



# Proceeds of Crime (Scotland) Act 1995

## 1995 CHAPTER 43

### PART V

#### MISCELLANEOUS AND GENERAL

#### Modifications etc. (not altering text)

- C1 [Pt. V](#) (ss.44-50) applied (with modifications) (S.) (1.5.1999) by [S.I. 1999/675](#), art. 4, [Sch. 3 paras. 13-17](#)

#### 44 Sequestration etc of person holding realisable or forfeitable property.

- (1) Schedule 2 to this Act shall have effect in relation to the sequestration, bankruptcy, winding up or receivership of persons or, as the case may be, companies holding realisable or forfeitable property.
- (2) In this section and in that Schedule “forfeitable property” means property which is or is liable to be the subject of a suspended forfeiture order.

#### 45 Disposal of family home under Part I or II.

- (1) This section applies where —
- (a) a confiscation order has been made in relation to any person and the prosecutor has not satisfied the court that—
- (i) in the case of an order made in connection with a drug trafficking offence, the person’s interest in his family home has been acquired by means of the proceeds of drug trafficking; or
- (ii) in any other case, the person’s interest in his family home has been acquired by means of the benefit derived from the commission of the offence concerned; or
- (b) a person’s family home has been forfeited to the Crown under section 24 of this Act.

*Status: Point in time view as at 01/04/1996.*

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- (2) Where this section applies, then, before the Crown disposes of any right or interest in the person's family home it shall—
- (a) obtain the relevant consent; or
  - (b) where it is unable to do so, apply to the court for authority to carry out the disposal.
- (3) On an application being made to it under subsection (2)(b) above, the court, after having regard to all the circumstances of the case including—
- (a) the needs and financial resources of the spouse or former spouse of the person concerned;
  - (b) the needs and financial resources of any child of the family;
  - (c) the length of the period during which the family home has been used as a residence by any of the persons referred to in paragraph (a) or (b) above,
- may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 12 months) as it may consider reasonable in the circumstances or may grant the application subject to such conditions as it may prescribe.
- (4) Subsection (3) above shall apply—
- (a) to an action for division and sale of the family home of the person concerned; or
  - (b) to an action for the purpose of obtaining vacant possession of that home,
- brought by the Crown as it applies to an application under subsection (2)(b) above and, for the purposes of this subsection, any reference in the said subsection (3) to the granting of the application shall be construed as a reference to the granting of decree in the action.
- (5) In this section—
- “family home”, in relation to any person (in this subsection referred to as “the relevant person”) means any property in which the relevant person has or had (whether alone or in common with any other person) a right or interest, being property which is occupied as a residence by the relevant person and his or her spouse or by the relevant person's spouse or former spouse (in any case with or without a child of the family) or by the relevant person with a child of the family;
- “child of the family” includes any child or grandchild of either the relevant person or his or her spouse or former spouse, and any person who has been treated by either the relevant person or his or her spouse or former spouse as if he or she were a child of the relevant person, spouse or former spouse, whatever the age of such a child, grandchild or person may be; and
- “relevant consent” means in relation to the disposal of any right or interest in a family home—
- (a) in a case where the family home is occupied by the spouse or former spouse of the relevant person, the consent of the spouse or, as the case may be, of the former spouse, whether or not the family home is also occupied by the relevant person;
  - (b) where paragraph (a) above does not apply, in a case where the family home is occupied by the relevant person with a child of the family, the consent of the relevant person.

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#### **46 Forfeiture of property where accused has died.**

- (1) This section applies where at any time after criminal proceedings have been instituted against an accused for an offence to which Part I of this Act applies and before the accused has been sentenced or otherwise dealt with in the proceedings he dies.
- (2) The Court of Session, if it is satisfied beyond reasonable doubt on an application being made to it by the Lord Advocate—
  - (a) that the accused committed the offence; and
  - (b) that there is property—
    - (i) which the accused had obtained, directly or indirectly, in connection with the commission of the offence or, as the case may be, in connection with drug trafficking; or
    - (ii) which is a gift caught by Part I of this Act or, as the case may be, an implicative gift,may, subject to subsection (5) below, make an order which shall have the effect of forfeiting that property.
- (3) The Court of Session may, without prejudice to any other power available to it, at any time before the determination of the case, allow an amendment of the application under subsection (2) above if the amendment is of a type which could competently have been made in an indictment or complaint under section 96 or 159 of the 1995 Act in the criminal proceedings.
- (4) An application under subsection (2) above shall be made as soon as is reasonably practicable after the relevant information becomes available to the Lord Advocate, but, in any event, within 6 years commencing with the date of death of the accused.
- (5) An application under subsection (2) above in relation to property such as is mentioned in paragraph (b)(ii) of that subsection shall be served on the recipient of the gift and, if he satisfies the Court on the balance of probabilities—
  - (a) that he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence or, if more than one, in contemplation of any of the offences or after the commission of the earlier or the earliest of the offences to which the proceedings for the time being relate; and
  - (b) that he was not associated with the giver in the commission of the offence; and
  - (c) that he would suffer hardship if the application were granted,the Court may refuse to make an order as mentioned in that subsection; and in the application of this subsection to an implicative gift, any reference to the commission of the offence shall be construed as a reference to the drug trafficking and the reference in paragraph (b) above to the earlier or earliest of more than one offence shall be construed as a reference to the beginning of the drug trafficking.
- (6) Where property has been forfeited under this section, then, if the Court of Session, on an application being made to it is satisfied by the applicant on the balance of probabilities that he was the owner of, or otherwise had an interest in, the property immediately before such forfeiture, it shall make an order under subsection (7) below.
- (7) An order under this subsection shall direct the Crown, if the applicant—
  - (a) was the owner of the property, to return it to him if it is reasonably practicable to do so or, if not, to pay compensation to him of an amount determined under subsection (8) below; or

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- (b) otherwise had an interest in the property, to pay compensation to him of an amount corresponding to the value of such interest.
- (8) For the purposes of subsection (7) above, the amount determined under this subsection shall be an amount equal to the amount of any consideration received for the property or the value of any such consideration at the time of the disposal, or, if no consideration was received, an amount equal to the value of the property at the time of the disposal.
- (9) Property which has been forfeited under this section shall be dealt with by the Crown in such manner as seems to it to be appropriate.
- (10) Where a restraint order is not in force in respect of a person when he dies in the circumstances mentioned in subsection (1) above, the Court of Session may, on the application of the Lord Advocate, in so far as the property concerned is—
- (a) heritable property in Scotland, make an order inhibiting any person; and
  - (b) moveable property, grant warrant for arrestment if the property would be arrestable if the person entitled to it were a debtor.
- (11) Paragraphs (a) and (b) of subsection (1) and subsections (2) to (5) of section 32 of this Act shall, subject to any necessary modifications, apply for the purposes of subsection (10)(a) above as they apply for the purposes of that section.
- (12) Subsections (2) to (4) of section 33 of this Act shall, subject to any necessary modifications, apply for the purposes of subsection (10)(b) above as they apply for the purposes of that section.
- (13) Proceedings under this section are civil proceedings for the purposes of section 10 of the <sup>M1</sup>Law Reform (Miscellaneous Provisions) (Scotland) Act 1968.

#### Marginal Citations

M1 1968 c.70.

#### 47 Construction of certain enactments.

- (1) Section 28 of the <sup>M2</sup>Bankruptcy Act 1914 (effect of order of discharge) shall have effect as if amounts payable under confiscation orders were debts excepted under subsection (1)(a) of that section.
- (2) In section 1(2)(a) of the <sup>M3</sup>Rehabilitation of Offenders Act 1974 (failure to pay fines etc. not to prevent person becoming rehabilitated) the reference to a fine or other sum adjudged to be paid by or on a conviction does not include a reference to an amount payable under a confiscation order.
- (3) Section 55(2) of the <sup>M4</sup>Bankruptcy (Scotland) Act 1985 (discharge of debtor not to release him from liabilities in respect of fines, etc.) shall have effect as if the reference to a fine included a reference to a confiscation order.
- (4) Section 281(4) of the <sup>M5</sup>Insolvency Act 1986 (discharge of bankrupt not to release him from liabilities in respect of fines, etc.) shall have effect as if the reference to a fine included a reference to a confiscation order.

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#### Marginal Citations

- M2 4 & 5 Geo.5 c.59
- M3 1974 c.53.
- M4 1985 c.66.
- M5 1986 c.45.

#### 48 Service and notice.

Subject to the provisions of this Act, provision may be made by rules of court as to the giving of notice required for the purposes of this Act in so far as it is connected with drug trafficking or the effecting of service so required; and different provision may be so made for different cases or classes of case and for different circumstances or classes of circumstance.

#### 49 Interpretation.

- (1) In this Act, unless the context otherwise requires—
- “the 1988 Act” means the <sup>M6</sup>Criminal Justice Act 1988;
  - “the 1989 Act” means the <sup>M7</sup>Prevention of Terrorism (Temporary Provisions) Act 1989;
  - “the 1994 Act” means the <sup>M8</sup>Drug Trafficking Act 1994;
  - “the 1995 Act” means the <sup>M9</sup>Criminal Procedure (Scotland) Act 1995;
  - “accused” includes a person against whom criminal proceedings have been instituted in relation to the commission of an offence and a person convicted of an offence;
  - “clerk of court” includes the sheriff clerk;
  - “confiscation order” means an order made under section 1(1), 11(4), 12(3) or 13 of this Act;
  - “interest”, in relation to property, includes right;
  - “property” has the meaning assigned by section 2 of this Act;
  - “realisable property” has the meaning assigned by section 4 of this Act;
  - “restraint order” means an order made under section 28 of this Act;
  - “suspended forfeiture order” means an order made under section 21(2) of this Act.
- (2) In this Act, “drug trafficking” means, subject to subsections (3) and (4) below, doing or being concerned in any of the following, whether in Scotland or elsewhere—
- (a) producing or supplying a controlled drug where the production or supply contravenes section 4(1) of the <sup>M10</sup>Misuse of Drugs Act 1971;
  - (b) transporting or storing such a drug where possession of it contravenes section 5(1) of that Act;
  - (c) importing or exporting such a drug where the importation or exportation is prohibited by section 3(1) of that Act;
  - (d) producing, supplying, transporting, storing, importing or exporting such a drug in contravention of a corresponding law (“corresponding law” having the meaning assigned by section 36(1) of that Act);

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- (e) manufacturing or supplying a scheduled substance within the meaning of section 12 of the Criminal Justice (International Co-operation) Act 1990 where the manufacture or supply is an offence under that section;
  - (f) acquiring, having possession of or using property in contravention of section 37 of the <sup>M11</sup>Criminal Law (Consolidation) (Scotland) Act 1995;
  - (g) concealing or transferring the proceeds of drug trafficking in contravention of section 14 of the said Act of 1990;
  - (h) using any ship for illicit traffic in controlled drugs in contravention of section 19 of the said Act of 1990.
- (3) Drug trafficking also includes, whether in Scotland or elsewhere, entering into or being otherwise concerned in any arrangement whereby—
- (a) the retention or control by or on behalf of another person of the other person's proceeds of drug trafficking is facilitated, or
  - (b) the proceeds of drug trafficking by another person are used to secure that funds are placed at the other person's disposal or are used for the other person's benefit to acquire property by way of investment.
- (4) In paragraphs (e) to (g) of subsection (2) above, references to conduct in contravention of the enactments mentioned in those paragraphs include conduct which would contravene the enactments if it took place in Scotland.
- (5) In this Act a “drug trafficking offence” means any of the following—
- (a) an offence under—
    - (i) section 4(2) (production, or being concerned in production, of controlled drug);
    - (ii) section 4(3) (supply of, or offer to supply, or being concerned in supply of, controlled drug);
    - (iii) section 5(3) (possession of controlled drug with intent to supply); or
    - (iv) section 20 (assisting in, or inducing commission of, certain drug related offences punishable under foreign law),
 of the <sup>M12</sup>Misuse of Drugs Act 1971;
  - (b) in connection with a prohibition or restriction on importation and exportation having effect by virtue of section 3 of the said Act of 1971, an offence under section 50(2) or (3) (improper importation), 68(2) (improper exportation) or 170 (fraudulent evasion of duty etc.) of the <sup>M13</sup>Customs and Excise Management Act 1979;
  - (c) an offence under section 37 of the Criminal Law (Consolidation) (Scotland) Act 1995;
  - (d) an offence under section 38 of the said Act of 1995;
  - (e) an offence under section 12, 14 or 19 of the <sup>M14</sup>Criminal Justice (International Co-operation) Act 1990;
  - (f) an offence of conspiring, inciting or attempting to commit an offence mentioned in paragraph (a), (b), (c) or (e) above.
- (6) For the purposes of this Act proceedings for an offence are instituted against a person—
- (a) on his arrest without warrant;
  - (b) when he is charged with the offence without being arrested;
  - (c) when a warrant to arrest him is granted;
  - (d) when a warrant to cite him is granted;

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- (e) in summary proceedings, on the first calling of the case; or
- (f) when a petition is intimated to him or an indictment or a complaint is served on him,

and, where the application of this subsection would result in there being more than one time for the institution of proceedings, they shall be taken to be instituted at the earliest of those times.

- (7) Any reference in this Act to a conviction of an offence includes a reference to a finding that the offence has been committed.

#### **Marginal Citations**

<b>M6</b>	1988 c.33.
<b>M7</b>	1989 c.4.
<b>M8</b>	1994 c.37.
<b>M9</b>	1995 c.46.
<b>M10</b>	1971 c.38.
<b>M11</b>	1995 c.39.
<b>M12</b>	1971 c.38.
<b>M13</b>	1979 c.2.
<b>M14</b>	1990 c.5.

#### **50 Short title, commencement and extent.**

- (1) This Act may be cited as the Proceeds of Crime (Scotland) Act 1995.
- (2) This Act shall come into force on 1 April 1996.
- (3) Subject to subsections (4) and (5) below, this Act extends only to Scotland.
- (4) Section 44 of and Schedule 2 to this Act and this section extend to England and Wales as well as to Scotland.
- (5) Section 42 of this Act extends only to England and Wales.

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