



# Proceeds of Crime Act 2002

## 2002 CHAPTER 29

### PART 3

#### CONFISCATION: SCOTLAND

##### *Confiscation orders*

#### **92 Making of order**

- (1) The court must act under this section where the following three conditions are satisfied.
- (2) The first condition is that an accused falls within either of the following paragraphs—
  - (a) he is convicted of an offence or offences, whether in solemn or summary proceedings, or
  - (b) in the case of summary proceedings in respect of an offence (without proceeding to conviction) an order is made discharging him absolutely.
- (3) The second condition is that the prosecutor asks the court to act under this section.
- (4) The third condition is that the court decides to order some disposal in respect of the accused; and an absolute discharge is a disposal for the purpose of this subsection.
- (5) If the court acts under this section it must proceed as follows—
  - (a) it must decide whether the accused has a criminal lifestyle;
  - (b) if it decides that he has a criminal lifestyle it must decide whether he has benefited from his general criminal conduct;
  - (c) if it decides that he does not have a criminal lifestyle it must decide whether he has benefited from his particular criminal conduct.
- (6) If the court decides under subsection (5)(b) or (c) that the accused has benefited from the conduct referred to—
  - (a) it must decide the recoverable amount, and
  - (b) it must make an order (a confiscation order) requiring him to pay that amount.

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- (7) But the court must treat the duty in subsection (6) as a power if it believes that any victim of the conduct has at any time started or intends to start proceedings against the accused in respect of loss, injury or damage sustained in connection with the conduct.
- (8) Before making an order under this section the court must take into account any representations made to it by any person whom the court thinks is likely to be affected by the order.
- (9) The standard of proof required to decide any question arising under subsection (5) or (6) is the balance of probabilities.
- (10) The first condition is not satisfied if the accused is unlawfully at large (but section 111 may apply).
- (11) For the purposes of any appeal or review, an order under this section is a sentence.
- (12) References in this Part to the offence (or offences) concerned are to the offence (or offences) mentioned in subsection (2).
- (13) In this section and sections 93 to 118 “the court” means the High Court of Justiciary or the sheriff.

### **93 Recoverable amount**

- (1) The recoverable amount for the purposes of section 92 is an amount equal to the accused’s benefit from the conduct concerned.
- (2) But if the accused shows that the available amount is less than that benefit the recoverable amount is—
  - (a) the available amount, or
  - (b) a nominal amount, if the available amount is nil.
- (3) But if section 92(7) applies the recoverable amount is such amount as—
  - (a) the court believes is just, but
  - (b) does not exceed the amount found under subsection (1) or (2) (as the case may be).
- (4) In calculating the accused’s benefit from the conduct concerned for the purposes of subsection (1), any property in respect of which—
  - (a) a recovery order is in force under section 266, or
  - (b) a forfeiture order is in force under section 298(2),must be ignored.
- (5) If the court decides the available amount, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding that amount.

### **94 Accused’s benefit**

- (1) If the court is acting under section 92 this section applies for the purpose of—
  - (a) deciding whether the accused has benefited from conduct, and
  - (b) deciding his benefit from the conduct.
- (2) The court must take account of—
  - (a) conduct occurring up to the time it makes its decision;

- (b) property obtained up to that time.
- (3) Subsection (4) applies if—
  - (a) the conduct concerned is general criminal conduct,
  - (b) a confiscation order mentioned in subsection (5) has at an earlier time been made against the accused, and
  - (c) his benefit for the purposes of that order was benefit from his general criminal conduct.
- (4) His benefit found at the time the last confiscation order mentioned in subsection (3)(c) was made against him must be taken for the purposes of this section to be his benefit from his general criminal conduct at that time.
- (5) If the conduct concerned is general criminal conduct the court must deduct the aggregate of the following amounts—
  - (a) the amount ordered to be paid under each confiscation order previously made against the accused;
  - (b) the amount ordered to be paid under each confiscation order previously made against him under—
    - (i) the Drug Trafficking Offences Act 1986 (c. 32);
    - (ii) Part 1 of the Criminal Justice (Scotland) Act 1987 (c. 41);
    - (iii) Part 6 of the Criminal Justice Act 1988 (c. 33);
    - (iv) the Criminal Justice (Confiscation) (Northern Ireland) Order 1990 (S.I. 1990/2588 (N.I.17));
    - (v) Part 1 of the Drug Trafficking Act 1994 (c. 37);
    - (vi) Part 1 of the Proceeds of Crime (Scotland) Act 1995 (c. 43);
    - (vii) the Proceeds of Crime (Northern Ireland) Order 1996 (S.I. 1996/1299 (N.I.9)); or
    - (viii) Part 2 or 4 of this Act.
- (6) But subsection (5) does not apply to an amount which has been taken into account for the purposes of a deduction under that subsection on any earlier occasion.
- (7) The reference to general criminal conduct in the case of a confiscation order made under any of the provisions listed in subsection (5)(b) is a reference to conduct in respect of which a court is required or entitled to make one or more assumptions for the purpose of assessing a person's benefit from the conduct.

## **95 Available amount**

- (1) For the purposes of deciding the recoverable amount, the available amount is the aggregate of—
  - (a) the total of the values (at the time the confiscation order is made) of all the free property then held by the accused minus the total amount payable in pursuance of obligations which then have priority, and
  - (b) the total of the values (at that time) of all tainted gifts.
- (2) An obligation has priority if—
  - (a) it is an obligation of the accused to pay an amount due in respect of a fine or other order of a court which was imposed or made on conviction for an offence and at any time before the confiscation order is made, or
  - (b) it is an obligation of the accused to pay a sum which would be—

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(i) a preferred debt if the accused's estate were sequestrated on the date of the confiscation order, or

(ii) a preferential debt if his winding up were ordered on that date.

(3) In subsection (2)—

“preferred debt” has the meaning given by section 51(2) of the Bankruptcy (Scotland) Act 1985 (c. 66);

“preferential debt” has the meaning given by section 386 of the Insolvency Act 1986 (c. 45).

## **96 Assumptions to be made in case of criminal lifestyle**

(1) Where the court decides under section 92 that the accused has a criminal lifestyle it must make the following four assumptions for the purpose of—

- (a) deciding whether he has benefited from his general criminal conduct, and
- (b) deciding his benefit from the conduct.

(2) The first assumption is that any property transferred to the accused at any time after the relevant day was obtained by him—

- (a) as a result of his general criminal conduct, and
- (b) at the earliest time he appears to have held it.

(3) The second assumption is that any property held by the accused at any time after the date of conviction was obtained by him—

- (a) as a result of his general criminal conduct, and
- (b) at the earliest time he appears to have held it.

(4) The third assumption is that any expenditure incurred by the accused at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct.

(5) The fourth assumption is that, for the purpose of valuing any property obtained (or assumed to have been obtained) by the accused, he obtained it free of any other interests in it.

(6) But the court must not make any of those assumptions in relation to particular property or expenditure if—

- (a) the assumption is shown to be incorrect, or
- (b) there would be a serious risk of injustice if the assumption were made.

(7) If the court does not make one or more of those assumptions it must state its reasons.

(8) The relevant day is the first day of the period of six years ending with—

- (a) the day when proceedings for the offence concerned were instituted against the accused, or
- (b) if there are two or more offences and proceedings for them were instituted on different days, the earliest of those days.

(9) But if a confiscation order mentioned in section 94(3)(c) has been made against the accused at any time during the period mentioned in subsection (8)—

- (a) the relevant day is the day when the accused's benefit was calculated for the purposes of the last such confiscation order;

- (b) the second assumption does not apply to any property which was held by him on or before the relevant day.
- (10) The date of conviction is—
- (a) the date on which the accused was convicted of the offence concerned, or
  - (b) if there are two or more offences and the convictions are on different dates, the date of the latest.

## **97 Effect of order on court's other powers**

- (1) If the court decides to make a confiscation order it must act as mentioned in subsections (2) and (4) in respect of the offence or offences concerned.
- (2) The court must take account of the confiscation order before—
- (a) it imposes a fine on the accused, or
  - (b) it makes an order falling within subsection (3).
- (3) These orders fall within this subsection—
- (a) an order involving payment by the accused, other than a compensation order under section 249 of the Procedure Act (compensation orders);
  - (b) an order under section 27 of the Misuse of Drugs Act 1971 (c. 38) (forfeiture orders);
  - (c) an order under Part 2 of the Proceeds of Crime (Scotland) Act 1995 (c. 43) (forfeiture orders);
  - (d) an order under section 23 of the Terrorism Act 2000 (c. 11) (forfeiture orders).
- (4) Subject to subsection (2), the court must leave the confiscation order out of account in deciding the appropriate sentence for the accused.
- (5) Subsection (6) applies if—
- (a) a court makes both a confiscation order and a compensation order under section 249 of the Procedure Act against the same person in the same proceedings, and
  - (b) the court believes he will not have sufficient means to satisfy both the orders in full.
- (6) In such a case the court must direct that so much of the compensation as it specifies is to be paid out of any sums recovered under the confiscation order; and the amount it specifies must be the amount it believes will not be recoverable because of the insufficiency of the person's means.

## **98 Disposal of family home**

- (1) This section applies where a confiscation order has been made in relation to any person and the prosecutor has not satisfied the court that the person's interest in his family home has been acquired as a benefit from his criminal conduct.
- (2) Where this section applies, then, before the administrator disposes of any right or interest in the person's family home he shall—
- (a) obtain the relevant consent; or
  - (b) where he is unable to do so, apply to the court for authority to carry out the disposal.

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(3) On an application being made to it under subsection (2)(b), 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),

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) 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 administrator as it applies to an application under subsection (2)(b) and, for the purposes of this subsection, any reference in 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) 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.