



# Proceeds of Crime Act 2002

## 2002 CHAPTER 29

### PART 3

#### CONFISCATION: SCOTLAND

##### *Reconsideration*

#### **104 No order made: reconsideration of case**

- (1) This section applies if—
  - (a) the first condition in section 92 is satisfied but no court has proceeded under that section,
  - (b) the prosecutor has evidence which was not available to him on the relevant date,
  - (c) before the end of the period of six years starting with the date of conviction the prosecutor applies to the court to consider the evidence, and
  - (d) after considering the evidence the court thinks it is appropriate for it to proceed under section 92.
- (2) The court must proceed under section 92, and when it does so subsections (3) to (8) below apply.
- (3) If the court has already sentenced the accused for the offence (or any of the offences) concerned section 92(4) does not apply.
- (4) Section 94(2) does not apply, and the rules applying instead are that the court must take account of—
  - (a) conduct occurring before the relevant date;
  - (b) property obtained before that date;
  - (c) property obtained on or after that date if it was obtained as a result of or in connection with conduct occurring before that date.
- (5) In relation to the assumptions that the court must make under section 96—

*Status: Point in time view as at 31/01/2018.*

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- (a) the first and second assumptions do not apply with regard to property first held by the accused on or after the relevant date;
  - (b) the third assumption does not apply with regard to expenditure incurred by him on or after that date;
  - (c) the fourth assumption does not apply with regard to property obtained (or assumed to have been obtained) by him on or after that date.
- (6) The recoverable amount for the purposes of section 92 is such amount as—
- (a) the court believes is just, but
  - (b) does not exceed the amount found under section 93.
- (7) In arriving at the just amount the court must have regard in particular to—
- (a) the amount found under section 93;
  - (b) any fine imposed on the accused in respect of the offence (or any of the offences) concerned;
  - (c) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (d) any compensation order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (8) If an order for payment of compensation under section 249 of the Procedure Act has been made against the accused in respect of the offence or offences concerned, section 97(5) and (6) do not apply.
- (9) The relevant date is—
- (a) if the court made a decision not to proceed under section 92, the date of the decision;
  - (b) if the court did not make such a decision, the date of the conviction.
- (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 were on different dates, the date of the latest.
- (11) In this section references to the court are to the court which had jurisdiction in respect of the offence or offences concerned to make a confiscation order.

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

**C1** Pt. 3 applied by Terrorism Act 2000 (c. 11), Sch. 8 paras. 17(4A), 34(3A) (as substituted (24.3.2003) by [Proceeds of Crime Act 2002 \(c. 29\)](#), s. 458(1), [Sch. 11 para. 39\(4\)\(5\)](#); S.S.I. 2003/210, [art. 2\(1\)\(b\)\(2\)](#), [sch.](#) (with [art. 7](#)); S.I. 2003/333, [art. 2](#), [Sch.](#)

**Commencement Information**

**II** S. 104 in force at 24.3.2003 by [S.S.I. 2003/210](#), [art. 2\(1\)\(a\)](#)

**105 No order made: reconsideration of benefit**

- (1) This section applies if the following two conditions are satisfied.

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- (2) The first condition is that in proceeding under section 92 the court has decided that—
  - (a) the accused has a criminal lifestyle but has not benefited from his general criminal conduct, or
  - (b) the accused does not have a criminal lifestyle and has not benefited from his particular criminal conduct.
- (3) The second condition is that—
  - (a) the prosecutor has evidence which was not available to him when the court decided that the accused had not benefited from his general or particular criminal conduct,
  - (b) before the end of the period of six years starting with the date of conviction the prosecutor applies to the court to consider the evidence, and
  - (c) after considering the evidence the court concludes that it would have decided that the accused had benefited from his general or particular criminal conduct (as the case may be) if the evidence had been available to it.
- (4) If this section applies the court—
  - (a) must make a fresh decision under section 92(5)(b) or (c) as to whether the accused has benefited from his general or particular criminal conduct (as the case may be);
  - (b) may make a confiscation order under that section.
- (5) Subsections (6) to (11) below apply if the court proceeds under section 92 in pursuance of this section.
- (6) If the court has already sentenced the accused for the offence (or any of the offences) concerned section 92(4) does not apply.
- (7) Section 94(2) does not apply, and the rules applying instead are that the court must take account of—
  - (a) conduct occurring before the date of the original decision that the accused had not benefited from his general or particular criminal conduct;
  - (b) property obtained before that date;
  - (c) property obtained on or after that date if it was obtained as a result of or in connection with conduct occurring before that date.
- (8) In relation to the assumptions that the court must make under section 96—
  - (a) the first and second assumptions do not apply with regard to property first held by the accused on or after the date of the original decision that the accused had not benefited from his general or particular criminal conduct;
  - (b) the third assumption does not apply with regard to expenditure incurred by him on or after that date;
  - (c) the fourth assumption does not apply with regard to property obtained (or assumed to have been obtained) by him on or after that date.
- (9) The recoverable amount for the purposes of section 92 is such amount as—
  - (a) the court believes is just, but
  - (b) does not exceed the amount found under section 93.
- (10) In arriving at the just amount the court must have regard in particular to—
  - (a) the amount found under section 93;

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- (b) any fine imposed on the accused in respect of the offence (or any of the offences) concerned;
  - (c) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (d) any compensation order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (11) If an order for the payment of compensation under section 249 of the Procedure Act has been made against the accused in respect of the offence or offences concerned, section 97(5) and (6) do not apply.
- (12) The date of conviction is the date found by applying section 104(10).
- (13) In this section references to the court are to the court which had jurisdiction in respect of the offence or offences concerned to make a confiscation order.

#### Commencement Information

**I2** S. 105 in force at 24.3.2003 by [S.S.I. 2003/210](#), [art. 2\(1\)\(a\)](#)

### 106 Order made: reconsideration of benefit

- (1) This section applies if—
- (a) a court has made a confiscation order,
  - (b) there is evidence which was not available to the prosecutor at the relevant time,
  - (c) the prosecutor believes that if the court were to find the amount of the accused's benefit in pursuance of this section it would exceed the relevant amount,
  - (d) before the end of the period of six years starting with the date of conviction the prosecutor applies to the court to consider the evidence, and
  - (e) after considering the evidence the court thinks it is appropriate for it to proceed under this section.
- (2) The court must make a new calculation of the accused's benefit from the conduct concerned, and when it does so subsections (3) to (5) below apply.
- (3) Section 94(2) does not apply, and the rules applying instead are that the court must take account of—
- (a) conduct occurring up to the time it decided the accused's benefit for the purposes of the confiscation order;
  - (b) property obtained up to that time;
  - (c) property obtained after that time if it was obtained as a result of or in connection with conduct occurring before that time.
- (4) In applying section 94(3) the confiscation order must be ignored.
- (5) In relation to the assumptions that the court must make under section 96—

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- (a) the first and second assumptions do not apply with regard to property first held by the accused after the time the court decided his benefit for the purposes of the confiscation order;
  - (b) the third assumption does not apply with regard to expenditure incurred by him after that time;
  - (c) the fourth assumption does not apply with regard to property obtained (or assumed to have been obtained) by him after that time.
- (6) If the amount found under the new calculation of the accused's benefit exceeds the relevant amount the court—
- (a) must make a new calculation of the recoverable amount for the purposes of section 92, and
  - (b) if it exceeds the amount required to be paid under the confiscation order, may vary the order by substituting for the amount required to be paid such amount as it believes just.
- (7) In applying subsection (6)(a) the court must—
- (a) take the new calculation of the accused's benefit;
  - (b) apply section 95 as if references to the time the confiscation order is made were to the time of the new calculation of the recoverable amount and as if references to the date of the confiscation order were to the date of that new calculation.
- (8) In applying subsection (6)(b) the court must have regard in particular to—
- (a) any fine imposed on the accused for the offence (or any of the offences) concerned;
  - (b) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (c) any order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (9) But in applying subsection (6)(b) the court must not have regard to an order falling within subsection (8)(c) if a court has made a direction under section 97(6).
- (10) In deciding under this section whether one amount exceeds another the court must take account of any change in the value of money.
- (11) The relevant time is—
- (a) when the court calculated the accused's benefit for the purposes of the confiscation order, if this section has not applied previously;
  - (b) when the court last calculated the accused's benefit in pursuance of this section, if this section has applied previously.
- (12) The relevant amount is—
- (a) the amount found as the accused's benefit for the purposes of the confiscation order, if this section has not applied previously;
  - (b) the amount last found as the accused's benefit in pursuance of this section, if this section has applied previously.
- (13) The date of conviction is the date found by applying section 104(10).

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#### Commencement Information

**I3** S. 106 in force at 24.3.2003 by [S.S.I. 2003/210](#), [art. 2\(1\)\(a\)](#)

### 107 Order made: reconsideration of available amount

- (1) This section applies if—
  - (a) a court has made a confiscation order,
  - (b) the amount required to be paid was the amount found under section 93(2), and
  - (c) the prosecutor applies to the court to make a new calculation of the available amount.
- (2) In a case where this section applies the court must make the new calculation, and in doing so it must apply section 95 as if references to the time the confiscation order is made were to the time of the new calculation and as if references to the date of the confiscation order were to the date of the new calculation.
- (3) If the amount found under the new calculation exceeds the relevant amount the court may vary the order by substituting for the amount required to be paid such amount as—
  - (a) it thinks is just, but
  - (b) does not exceed the amount found as the accused’s benefit from the conduct concerned.
- (4) In arriving at the just amount the court must have regard in particular to—
  - (a) any fine imposed on the accused for the offence (or any of the offences) concerned;
  - (b) any order which falls within section 97(3) and has been made against him in respect of the offence (or any of the offences) concerned and has not already been taken into account by a court in deciding what is the free property held by the accused for the purposes of section 95;
  - (c) any order which has been made against him in respect of the offence (or any of the offences) concerned under section 249 of the Procedure Act.
- (5) But in deciding what is just the court must not have regard to an order falling within subsection (4)(c) if a court has made a direction under section 97(6).
- (6) In deciding under this section whether one amount exceeds another the court must take account of any change in the value of money.
- (7) The relevant amount is—
  - (a) the amount found as the available amount for the purposes of the confiscation order, if this section has not applied previously;
  - (b) the amount last found as the available amount in pursuance of this section, if this section has applied previously.
- (8) The amount found as the accused’s benefit from the conduct concerned is—
  - (a) the amount so found when the confiscation order was made, or
  - (b) if one or more new calculations of the accused’s benefit have been made under section 106 the amount found on the occasion of the last such calculation.

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#### Commencement Information

**I4** S. 107 in force at 24.3.2003 by [S.S.I. 2003/210](#), [art. 2\(1\)\(a\)](#)

### 108 Inadequacy of available amount: variation of order

- (1) This section applies if—
  - (a) a court has made a confiscation order, and
  - (b) the accused or the prosecutor applies to the court to vary the order under this section.
- (2) In such a case the court must calculate the available amount and in doing so it must apply section 95 as if references to the time the confiscation order is made were to the time of the calculation and as if references to the date of the confiscation order were to the date of the calculation.
- (3) If the court finds that the available amount (as so calculated) is inadequate to meet the amount remaining to be paid it may vary the order by substituting for the amount required to be paid such smaller amount as the court believes is just.
- (4) If a person's estate has been sequestrated or he has been [<sup>F1</sup>made] bankrupt, or if an order for the winding up of a company has been made, the court must take into account the extent to which realisable property held by him or by the company may be distributed among creditors.
- (5) The court may disregard any inadequacy which it thinks is attributable (wholly or partly) to anything done by the accused for the purpose of preserving property held by the recipient of a tainted gift from any risk of realisation under this Part.
- (6) In subsection (4) “company” means any company which may be wound up under the Insolvency Act 1986 (c. 45) or the Insolvency (Northern Ireland) Order 1989 (S.I. 1989/2405 (N.I. 19)).

#### Textual Amendments

**F1** Word in s. 108(4) substituted (6.4.2016) by [The Enterprise and Regulatory Reform Act 2013 \(Consequential Amendments\) \(Bankruptcy\) and the Small Business, Enterprise and Employment Act 2015 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/481\)](#), reg. 1, [Sch. 1 para. 18](#)

#### Commencement Information

**I5** S. 108 in force at 24.3.2003 by [S.S.I. 2003/210](#), [art. 2\(1\)\(a\)](#)

### 109 Inadequacy of available amount: discharge of order

- (1) This section applies if—
  - (a) a court has made a confiscation order,
  - (b) the prosecutor applies to the court to discharge the order under this section, and
  - (c) the amount remaining to be paid under the order is less than £1,000.
- (2) In such a case the court must calculate the available amount, and in doing so it must apply section 95 as if references to the time the confiscation order is made were to the

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time of the calculation and as if references to the date of the confiscation order were to the date of the calculation.

- (3) If the court—
- (a) finds that the available amount (as so calculated) is inadequate to meet the amount remaining to be paid, and
  - (b) is satisfied that the inadequacy is due wholly to a specified reason or a combination of specified reasons,
- it may discharge the confiscation order.
- (4) The specified reasons are—
- (a) in a case where any of the realisable property consists of money in a currency other than sterling, that fluctuations in currency exchange rates have occurred;
  - (b) any reason specified by the Scottish Ministers.
- (5) The Scottish Ministers may by order vary the amount for the time being specified in subsection (1)(c).
- [<sup>F2</sup>(6) The discharge of a confiscation order under this section does not prevent the making of an application in respect of the order under section 106(1)(d) or 107(1)(c).
- (7) Where on such an application the court determines that the order should be varied under section 106(6) or (as the case may be) 107(3), the court may provide that its discharge under this section is revoked.]

#### Textual Amendments

- F2** S. 109(6)(7) inserted (S.) (27.4.2017 for specified purposes, 31.1.2018 in so far as not already in force) by [Criminal Finances Act 2017 \(c. 22\)](#), **ss. 32(4)**, 58(2)(6) (with s. 32(7)); [S.S.I. 2017/456](#), reg. 2(c); [S.I. 2018/78](#), reg. 3(o)

#### Commencement Information

- I6** S. 109 in force at 24.3.2003 by [S.S.I. 2003/210](#), **art. 2(1)(a)**

## 110 Information

- (1) This section applies if—
- (a) the court proceeds under section 92 in pursuance of section 104 or 105, or
  - (b) the prosecutor applies under section 106.
- (2) In such a case—
- (a) the prosecutor must give the court a statement of information within such period as the court may specify;
  - (b) section 101 applies accordingly (with appropriate modifications where the prosecutor applies under section 106);
  - (c) sections 102 and 103 apply accordingly.

#### Commencement Information

- I7** S. 110 in force at 24.3.2003 by [S.S.I. 2003/210](#), **art. 2(1)(a)**



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