THE INCREASING USE OF CIVIL RECOVERY RATHER THAN PROSECUTION

- **Has there been an increase?**
- **Should there be an increase?**
- **What was Parliament's intention?**

Part V of the Proceeds of Crime Act 2002

1. Civl Recovery is that part of the Act that provides for the recovery cash in summary proceedings and property obtained through unlawful conduct (s242). Unlawful conduct is conduct occurring in any part of the UK if it unlawful in that part or unlawful in a country outside UK and unlawful in UK (s.241).

2. There has been an increase in the use of civil recovery but is there any evidence that this has been used in cases rather than criminal proceedings? Indeed was this the intention for introducing this legislation?

3. **"<u>Recovering the Proceeds of Crime</u>"** a report from Performance and Innovation Unit issued in June 2000 discussed the legislative purpose of the proposed legislation which would become the Proceeds of Crime Act 2002 (POCA).

4. The rationale for civil forfeiture is set out as follows:

    a. The proposed civil forfeiture regime is intended to provide

    - reparative measure – taking away from individuals that which was never legitimately owned by them; and

    - a preventative measure – taking assets which are intended for use in committing crime.

5. But the Report also explicitly stated that the civil forfeiture route is **not** to be adopted as a soft option in place of criminal proceedings.

6. Section 2 of POCA sets out the general objectives with reference to which a relevant authority must exercise its functions. The principal object being

the reduction of crime by means of criminal investigation and criminal proceedings

> "….must exercise his functions in the way which he considers is best calculated to the reduction of crime having regard to any guidance given to him by the Secretary of State…
>
> ….The guidance must indicate that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings …"

Attorney General guidance to Prosecuting Bodies

7. Further guidance on asset recovery powers under POCA was issued by the Home Secretary and the Attorney General on Guy Fawkes Day 2009.

8. This states:

1. "The reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. However, the non-conviction based asset recovery powers available under the Act can also make an important contribution to the reduction of crime where (i) it is not feasible to secure and conviction, (ii) a conviction is obtained but a confiscation order is not made, or (iii) a relevant authority is of the view that the public interest will be better served by using those powers rather than by seeking a criminal disposal.

2. In any case where proceeds of crime have been identified but it is not feasible to secure a conviction, or a conviction has been secured but no confiscation order made, the relevant authorities SHOULD consider using the non-conviction-based powers available under the Act.

3. In any case where it appears that a conviction might be secured, relevant authorities will consider whether or not it is in the public interest to conduct a criminal investigation and (….) a prosecution. In these circumstances relevant authorities may also consider whether or not the public interest might be better served by using the non-conviction based

powers under the Act, applying the principle that a criminal disposal will generally make the best contribution to the reduction of crime.

4. Any assessment of where the public interest lies should include consideration of all relevant factors. The Code for Crown Prosecutors (…) lists some of the factors that might be relevant in deciding whether or not a prosecution is in the public interest. ….. A vital underlying consideration is the need to retain public confidence in the criminal justice system as a whole, and in the fair and proper use of the non-conviction based powers. In particular, care must be taken not to allow an individual or body corporate to avoid a criminal investigation and prosecution by consenting to the making of a civil recover order, in circumstances where a criminal disposal would be justified under the overriding principle that the reduction of crime is generally best served by that route and in accordance with the public interest factors in the relevant prosecutors' Code.

…….

9. This guidance does not prohibit a criminal investigation by a law enforcement authority being carried out at the same time as a civil recove4ry and/or tax investigation ….Nor does it prevent civil recovery … being instituted where a criminal investigation by a law enforcement authority is being carried out at the same time into unrelated criminality, subject to the duty on relevant authorities to seek to minimize prejudice to criminal investigations and proceedings……

10. In no circumstances may criminal and civil … proceedings be carried on at the same time in relation to the same criminality. Where criminal proceedings have been stayed by a court, or cannot progress for example because the defendant has absconded, they are not being carried on for the purposes of this prohibition….."

The Code for Crown Prosecutors

"A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal. The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest…"

9. Clearly then, as these guidelines make clear, where there is sufficient evidence for a criminal prosecution that is the course most likely to be followed rather than civil recovery.

What the Courts have said

Purpose of the Proceeds of Crime Act 2002

10. *Director of ARA v He & Chen [2004] EWHC 3021 (Admin)*

> "…the approach of the Director must be to let criminal proceedings take precedence, as it were, and only act if such proceedings are either not being taken or for any reason may have failed if, notwithstanding their failure or the inability for whatever reason to take them, she takes the view that she can establish within the requirements of the Act that the property in question was unlawfully obtained….
>
> It is important that the scheme is understood, … the purpose behind this part of the Act is, as I have indicated, to enable property which has been obtained by means of criminal conduct to be recovered from the person … involved in that criminal conduct, whether or not a prosecution has ensured or been successful."

11. In *Regina [The Serious Fraud Office] v Innospec Limited March 2010* Thomas LJ sitting at the Crown Court Southwark, disapproved of the proposed use of Civil recovery powers where a fine might result from a conviction of a corporate.

The Procedure

12. Hamblen J in *SOCA v Pelekanos [2009] EWHC 2307 (QB)* criticised the procedure specified in the Practice Direction for Civil Recovery proceedings which provide that a claim for a recovery order must be made using the CPR Part 8 (a very summary process). He said:

> "Any disputed recovery order is likely to involve substantial issues of fact which makes the Part 8 procedure inappropriate …. the consequence has been that there has been no disclosure by SOCA, but merely the exhibiting of documents upon which they rely to their witness statements. In a case involving disputed allegations of fraud and other criminal conduct this is unsatisfactory. Had further disclosure been required the consequence almost certainly would have been an adjournment and much wasted costs. If that had occurred, it would to a significant extent have been the consequence of the rigid procedural requirements laid down by the Practice Direction"

The Burden and Standard of Proof

13. In *re D [2008] 1WLR 1499* Lord Carswell said that the proper state of the law had been summarised by Richards LJ in *R(N) –v- Mental Health Review Tribunal (Northern Region) [2006] QB 468*:

> "62. Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities.
>
> Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but

in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities".

The one qualification which Lord Carswell added was:

> "28. … The standard itself is, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal scene in Regent's Park), the seriousness of the allegation to be proved…The seriousness of consequences …. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard of proof or a specially cogent standard of evidence, merely appropriately careful consideration by the tribunal before it is satisfied with the matter which has to be established".

14. In *SOCA v Pelekanos [2009] EWHC 2307 (QB)* Hamblen J stated:

> "The burden of proof is on the claimant and the standard of proof is the balance of probabilities. However, the serious nature of the allegations being made and the serious consequences of such allegations being proved mean that careful and critical consideration has to be given to the evidence for the Court to be satisfied that the allegations have been established."

Unlawful conduct

15. It is now well established that although it is not necessary to prove the commission of a specific criminal offence, it is necessary to identify the kind(s) of unlawful conduct being alleged and to prove that the property was obtained by or in return for criminal conduct of an identifiable kind.

16. In *R (Director of Assets Recovery Agency) v Green [2005] EWHC 3168 (Admin)* Sullivan J was asked to decide as a preliminary issue: "Whether a

claim for civil recovery can be determined on the basis of conduct in relation to property without the identification of any particular unlawful conduct …" He also stated that :

> "In civil proceedings for recovery under Part 5 of the Act the Director need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property was obtained.
>
> … sections 240 and 241 are framed so as to make it clear that the Director need not allege the commission of a specific criminal offence or offences. I further accept that Part 5 proceedings are not limited, as were the earlier forfeiture proceedings, to any particular kind or kinds of criminal offence, for example, drug trafficking, money laundering, et cetera, but it does not follow that the Director is not under any obligation to describe the conduct which is alleged to have occurred in such terms as will enable the court to reach a conclusion as to whether that conduct so described is properly described as unlawful conduct. For the purposes of sections 240 and 241(1) and (2) a description of the conduct in relatively general terms should suffice, "importing and supplying controlled drugs", "trafficking women for the purpose of prostitution", "brothel keeping", "money laundering" are all examples of conduct which, if it occurs in the United Kingdom is unlawful under the criminal law.
>
> … the Director need neither allege nor prove the commission of any specific criminal offence…. but she must prove that, on the balance of probabilities, the property was obtained by or in return for a particular kind or one of a number of kinds of unlawful conduct."

17. This was endorsed by the Court of Appeal in *The Director of Assets Recovery Agency v. Szepietowski & Ors [2006] EWHC (Admin) 3228* [per Moore-Bick LJ]: -

> "107… It is sufficient in my view for the director to prove that a criminal offence was committed, even if it is impossible to identify precisely when or by whom or in what circumstances and that the property was obtained by or in return for it. In my view Sullivan J was right therefore to hold that in order to succeed the Director need not prove the commission of any specific criminal offence in the sense of proving that a particular person committed a particular offence on a particular occasion. Nonetheless, I think it is necessary for her to prove that specific property was obtained by

> or in return for a criminal offence of an identifiable kind (robbery, theft, fraud or whatever) or, if she relies on Section 242 (2), by or in return for one or other of a number of offences of an identifiable kind. ….".

The relevance of the Respondent having no identifiable income to warrant his lifestyle and purchases

18. In *R (Director of Assets Recovery Agency) v Green [2005] EWHC 3168 (Admin)* Sullivan J was also asked to decide "whether the claimant can sustain a case for civil recovery in circumstances where a respondent has no identifiable lawful income to warrant the lifestyle and purchases of that respondent." He said:

> "A claim for civil recovery cannot be sustained solely on the basis that a respondent has no identifiable lawful income to warrant his lifestyle."

19. This has been elaborated upon in subsequent judgments, and particular emphasis has been placed on the limitations of the qualification made by the word "solely".

20. In *Olupitan v ARA [2008] EWCA* Langley J commented :

> "23….there is a danger in seeking to identify absolutes where questions of proof are in issue. The question in this case is whether Mr Olupitan obtained the property in issue through the unlawful conduct alleged. The test is whether it is more probable than not that such is the case. The evidence has, as one would expect, covered a number of matters, some more compelling than others, and including oral and documentary evidence from both Respondents. It is the whole picture which has to be balanced. For example, it is one thing to point to an unexplained lifestyle, it may be another if an explanation is offered but rejected as untruthful; and taken with other evidence either might be more or less persuasive."

21. The importance of looking at the whole evidential picture has been emphasised in other cases:-

a. In *ARA v Jackson and others [2007] EWHC 2553* King J endorsed Langley J's approach in Olupitan. He said:

> "115. I also echo what Langley J. said on the emphasis to be put on the qualifying adverb "solely" in the context of proof of obtaining property through unlawful conduct, by reference to a comparison between lifestyle and identifiable sources of income. Such a comparison will not in itself be sufficient but as in Olupitan so in the present case the Claimant is entitled to ask the court to look at the totality of the evidence and the whole picture which emerges.
>
> 116. I equally reject the submission made on behalf of the Respondent that I am not entitled to take a global approach to the issue of proof that the property in issue is recoverable within the meaning of the Act. The question is whether the Respondent obtained the property through the unlawful conduct alleged or whether the property in the Respondent's hands is representative of property so obtained. The test is whether it is more probable than not that such is the case. It is as was said in Olupitan the whole picture painted by the totality of the evidence which has to be balanced. …I do not consider it essential that the court considers each property transaction on an item by item basis in the sense that the Claimant has an obligation to show some particular unlawful actions by the Respondent at some particular time which enabled the particular transaction."

b. In *SOCA v Gale [2009] EWHC 1015 (QB)* Griffith Williams J commented on what Sullivan J had said in *Green* as follows:

> "14. With respect to Sullivan J, I consider his second answer is too restrictive. While a claim for civil recovery may not be sustained solely upon the basis that a respondent has no identifiable lawful income to warrant his lifestyle, the absence of any evidence to explain that lifestyle may provide the answer because the inference may be drawn from the failure to provide an explanation or from an explanation which was untruthful (and deliberately so) that the source was unlawful".

Determining what is Recoverable Property

22. It has been held in a number of cases that where a mortgage is obtained through a false statement being made dishonestly on the mortgage application form the property purchased with the assistance of that mortgage can be said to have be obtained therefore and to be recoverable property under POCA.

23. Where all the funds provided for the purchase were found to be tainted funds the entire interest in the property was held to be recoverable. However, if part of the purchase monies comes from untainted sources the analysis is more complex.

24. The Court of Appeal in *Olupitan & Anr v ARA [2008] EWCA Civ 104* Lord Justice Carnworth said of property which had been purchased using both funds from an unlawful source and untainted funds:

> In such a case it could no doubt still be said that the £100,000 house would not have been acquired "but for" the theft, and possibly, in ordinary language, that it was "obtained" by theft. However, the Act seems to me to require a more precise analysis. The original recoverable property is the stolen £75,000, which is then "mixed" with the lawful £25,000. Under s 306, the recovery order can only bite on the "portion" of the mixed property which is attributable to the unlawful £75,000."

25. And on this point Toulson LJ (agreeing with Carnworth LJ) stated:

> "52. … I agree that if a property is acquired in part with untainted money and in part with the proceeds of a mortgage fraud, it was not Parliament's intention that the purchaser should be deprived of the portion of the value of the property derived from untainted money. The object of s 306 (mixing property) is the opposite."

26. This approach was confirmed by the Court of Appeal in *R v Roach [2008] EWCA 2649* a case dealing with confiscation proceedings in relation to property which had been purchased as to half with tainted funds and as to half with untainted funds. Significantly the Court confirmed that the approach should be the same as in a case of confiscation proceedings and that the purchaser should not be deprived of the portion of the value of the property attributable to untainted funds. As stated in the judgment of Toulson LJ :

> "20. There is no authority which is directly binding on us on this point, but there is some statutory provision and authority of this court in relation to another part of the Act which provide a helpful pointer.
>
> 21 The overall purpose of the Act is to separate criminals from property and other benefits obtained as a result of their crime. This may be done through criminal confiscation proceedings, with which we are presently concerned, or through civil action brought by the director of the Asset Recovery Agency.
>
> 22. In relation to the latter, section 306 of the Act deals specifically with the position where property has been obtained through the use of mixed funds …
>
> 23. So if in the present case proceedings had been initiated by the director of the agency there is no doubt how this question would have been resolved. The appellant pooled tainted money (the half of the acquisition price which came from her own criminal proceeds) with untainted money to acquire an asset, namely 43 Lusitania Road, and the

> portion of that which would have been attributable to her criminality would have been one half."

27. On 21st December 2009 the Court In *SOCA v Pelekanos [2009] EWHC 3575 (QB)* gave its judgment on consequential matters having ruled in the earlier judgment that 4 properties had been purchased partly with "tainted" monies obtained through mortgage fraud and partly with "untainted" monies. To ascertain the appropriate quantum of the recoverable amount, it was necessary to determine how much untainted money had been spent by Pelekanos in purchasing the impugned properties. The object was to deprive him of the portion of the value of the properties which was attributable to his criminality. Any subsequent increase in the value of that half portion could be said to be attributable to his criminality, but no more.

Hamblen J also ruled:

> " 28 … I accept the Respondents' case on this issue. SOCA's recoverable proportion derives from a loan, the mortgage advance, and there is therefore some logic in making the repayment of that loan come in the first instance from that recoverable proportion. If this is not done the consequences would be startling, …"

OTHER RECENT CASES

An example of where civil recovery was proposed to be used alongside criminal proceedings for different criminal conduct.

28. *R v Innospec Limited listed before Thomas LJ at Southwark - March 2010.* The US authorities were investigating Innospec Inc when the SFO began their investigation which the company's involvement in the UN Oil for Food Programme for Iraq. The investigation showed that the company had sold fuel additives to Cuba in violation of the US Trading with the Enemy Act and Cuba Embargo Regulations.

29. The investigation that revealed the criminal conduct was carried out by the prosecuting authorities with the full co-operation of the independent directors of Innospec who took the view that they should admit the criminal offences. The US prosecuting authorities and the SFO entered into discussions as to a possible Global settlement. The company put forward an offer to pay US$25.8 over a period of about 4 years a further US$14.4m contingent upon the performance of contracts to sell Tetraethyl lead to Iraq over a 3 year period beginning 1 January 2010. This sum was put forward in full and final settlement of all outstanding issues with the US authorities and the SFO. The offer was accepted subject to the approval of the courts in the US and the UK.

30. In anticipation that an acceptable settlement would be reached it was agreed between the US and the SFO that the SFO would have primacy in respect of the Indonesian corruption and the DOJ in respect of the Iraq

corruption. The SFO had taken the view that, although part of the Iraq corruption could have been prosecuted in the UK, it was more logical to split the criminal liability of Innospec Inc and Innospec Ltd in this way.

31. It was further agreed between the authorities that the sum to be paid by the company would be divided as approximately 2/3 to the US authorities and 1/3 to the SFO.

32. It was then agreed between counsel for the company and the SFO that of the US$12.7m share to be paid in the UK $6.7m would be allocated to a fine or confiscation to be imposed in the Crown Court with the balance being the subject of a civil settlement.

33. Thomas LJ giving judgment in the Crown Court at Southwark said the following about the agreements:

> "…the Director of the SFO has shown a determination as a prosecutor to see that corruption of foreign government officials is brought to court in a manner in which a plea of guilty was inevitable. He has ensured that the facts are laid before the court in such a way that a sentence could be passed by the court which has in all the circumstances tried to reflect the serious criminality of such conduct. However, I have concluded that the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again…."

Where civil recovery has been used without any prior criminal proceedings?

34. In April 2008 the SFO acquired powers to obtain civil recoveries under the Serious Crime Act 2007.

35. Just 6 months later in October 2008 the SFO announced that it had reached a £2.25 settlement with major construction firm Balfour Beatty plc for alleged unlawful accounting in connection with payment irregularities which the company had self-reported. The SFO had been investigating for evidence of foreign bribery.

36. This was the first time a company has reached this type of civil settlement in the UK as part of a foreign bribery investigation. More normally the SFO would have pursued a long and costly criminal prosecution.

37. The Director of the SFO, Richard Alderman, described the Balfour Beatty settlement as being

> "…a highly significant development in our efforts to reform British corporate behaviour. We now have a range of enforcement tools at our disposal and a major factor in determining which of those tools is deployed will be the responsibility demonstrated by the company concerned".

Defendant absconded during criminal proceedings

38. *In SOCA v Qureshi & Anr [2009] All ER (D) 11 (Dec); 25 February 2009,* the defendant was the subject of a criminal investigation for

fraud, and a restraint order was made against his assets on 19 July 2004. He was subsequently prosecuted for fraud, but absconded to Pakistan shortly before his trial was due to begin. His assets comprised the remaining proceeds of sale of a property that he owned and money standing to the credit of various accounts. SOCA made an application for a recovery order in respect of the property that had passed through the hands of, or had been under the control of, the defendant.

39. The Court ruled that while the authorities made it that simply having assets which cannot readily be explained by reference to known income is not enough if there is other evidence to show that the person through whose hands the assets have passed was in fact engaged in criminal conduct, and acquisitive criminal conduct, then it is not necessary to identify a specific offence that has been committed, and relate that to the assets sought to be recovered. The Court made the Order stating:

> " …In the absence of any response from Mr Qureshi, and on the evidence of the very large sum of money that he had obtained fraudulently in the relevant period, and in the absence of any evidence of significant legitimate means, I am prepared to draw the inference that the monies passing through these bank accounts, and therefore frozen in them at the time of the restraint order in July 2004, were assets that were the fruits of crimes that had been committed by Mr Qureshi, and accordingly therefore are recoverable."

Civil Recovery Order following a criminal investigation and decision not to prosecute

40. *SOCA v Pelekanos [2009] EWHC 2307 (QB).* A criminal investigation commenced in 2004 by Hertfordshire Police into the activities of Mr Pelekanos, as part of that investigation searches were conducted at various properties and at one, a compact disc cases bearing traces of cocaine and a plastic bag containing seven ecstasy tablets were uncovered. Ultimately a decision was taken not to prosecute Mr Pelekanos and the matter was referred to ARA (now SOCA).

41. SOCA made an application for a civil recovery order under Part 5 of the Proceeds of Crime Act 2002 (the 2002 Act) alleging that Mr Pelekanos had been involved in offences of drug trafficking and money laundering. The application for a civil recovery order was in respect of a number of properties owned by Mr Pelekanos. SOCA also contended that the mortgage applications exhibited false information about his income and the sources of his income.

42. The Court found that SOCA's case for Mr Pelekanos having been involved in drug trafficking and money laundering was not proved but that the case was made out on mortgage fraud. and Hamblen J concluded:

> "170. This began as a case about drug trafficking. It has ended up as a case about mortgage fraud. As such, it illustrates the breadth of application of the civil recovery legislation. As the law stands, any person, however otherwise law abiding, may be the subject of a civil recovery order if he makes a deliberately false statement in a mortgage application form. It is important that this be more widely known, and it is desirable that mortgage providers spell out this possible consequence of a misstatement in their application forms."

An Order for Possession

43. Again in SOCA v Olden [2009] EWHC 822 (QB), March 31, 2009, the Court had made a recovery order in relation to various items of real and personal property pursuant to section 266(2) of POCA. The recovery order vested the recoverable property in the trustee for civil recovery, but the claimant also sought an order for possession of the recoverable property. The draft order provided in effect that all persons in possession of the recoverable property must forthwith give possession of it to the trustee subject to qualifications in relation to the house currently occupied by the respondent as his home.

44. It was submitted on behalf of the respondent that the court had no jurisdiction to make an order for possession because the Act provides only for the making of a recovery order. It does not turn the respondent into an immediate trespasser, and it does not entitle the claimant to seek an order

for possession. The trustee for civil recovery would be entitled to apply for an order for possession but not the claimant.

45. Ruling that the Court does have jurisdiction to make an order for possession Holroyde J set out eight relevant factors. He stated:

> "14. My conclusion is that it was the intention of Parliament that the Act should enable the enforcement authority to obtain not only the ownership of recoverable property but also the possession of it by the single mechanism of a successful application for a recovery order, without the need for other proceedings to give practical effect to the vesting of the property in the trustee."

46. As to whether or not that power should be exercised, the Court has a discretion and in this case took into account that there was a "real danger of an actual attempt by the respondent to frustrate the recovery order", taking into account the way in which the respondent had behaved throughout the proceedings. The Court made the order for possession.

SOCA v Lundon [2010] EWHC 353 (QB) 2nd March 2010

Disclosure Order

47. In *SOCA v Perry Ors [2009] All ER (D) 337 30th July 2009,* the respondents applied to set aside a disclosure order which had been

obtained without notice by SOCA for the purposes of a civil recovery investigation on the basis that the court had no jurisdiction to make it because they were not present, resident or domiciled in England and Wales.

48. The Court held that SOCA had reasonable grounds for believing that F had brought into the jurisdiction, property obtained as the result of unlawful conduct. Accordingly, the persons in whose name the property had been lodged were open to a civil recovery investigation even if they had no other connection with the English jurisdiction. Moreover, a closer connection could be established on the basis of F's past residence, and past and present business interests. Therefore, there was jurisdiction to make the Order against them. It followed that F were legitimate targets for the Order and, in consequence, for information notices. The fact that F were and could have been outside England and Wales at the time the Order was made, and not otherwise domiciled there, was immaterial.

49. Having given judgment Foskett J expressed some reservations about the practice of applying to a judge for a disclosure order purely on the papers. Although the general practice had been agreed some years ago and reflected what was perceived to be a

convenient way of dealing with such applications, the judge to whom the application is made being able to raise any queries about the proposed order with SOCA which would be responded to either orally or in writing. It may well be that the practice is entirely acceptable in many cases. However, a difficult case such as the present case does raise the issue of whether it is a practice that is always appropriate.

> "82. A disclosure order is itself an intrusive order and is a precursor to an even more intrusive obligation, namely, that of being required to furnish information under an information notice. In Director of the Assets Recovery Agency v Creaven [2006] 1 WLR 622 , Stanley Burnton J, as he then was, concluded that a claim for a disclosure order was sui generis and a statutory creation of a special kind that was neither a traditional in personam claim nor a traditional in rem (or proprietary) claim. That of itself makes it unusual. Miss Montgomery drew my attention to what the Parliamentary Under-Secretary of State for the Home Department (Mr Bob Ainsworth MP) said during the Committee stage of the Proceeds of Crime Bill on 29 January 2002 . It was in these terms:
>
> > *"The Government have decided to limit the use of disclosure orders in England, Wales and Northern Ireland to the director of the agency. The director is a specific post set up and operated exclusively under the Bill. ... Although disclosure orders will not be the director's first port of call, we envisage that there will be circumstances in which they will provide information that is absolutely vital to the building of a case for bringing civil recovery proceedings. ... The order is, of course, a potentially intrusive power ... and the Bill therefore contains a number of conditions to ensure that it will be used when appropriate and proportionate to the investigation. ...One of the requirements for making an order is that there are reasonable grounds for believing that the resulting information is likely to be of substantial value to the investigation. We do not anticipate that disclosure orders will be sought unless other powers such as production orders have already been sought or would demonstrably not be appropriate or sufficient to obtain the required information. That would be one of the*

> *points that the judge would be expected to consider, in respect of proportionality, before approving a disclosure order."*
>
> …I merely raise for consideration whether the present practice should govern every application made for a disclosure order or whether, following consultation, there may be some cases where an oral (albeit ex parte) application to a High Court Judge, with SOCA's legal representative and the maker of the witness statement attending, is thought to be the better course."

Power to set aside part of order for legal expenses

50. In SOCA v Szepietowski & Ors (No 2) 26th August 2009 TLR [1st July 2009] Henderson J said that there could be no presumption that an exclusion, once made, would be immune from future challenge. The power to vary or set aside an interim receiving order must include power to vary or set aside an exclusion from the property subject to the order.

51. In the Director of the *Assets Recovery Agency v Creaven* (The Times November 16, 2005; [2006] 1 WLR 622) it was held that a respondent would be permitted to make payments towards his legal costs out of a fund subject to a proprietary claim only if he could show that no other funds were available for that purpose.

a. The purpose of paragraphs 7A.4 and 7B.1 of Practice Direction - Civil Recovery Proceedings (Civil Procedure volume 2 section 3K) was to state the principles by reference to which the court would normally exercise the powers given to it by the legislation to make, vary or set aside exclusions, in cases where a defendant had free assets, and to make provision in a recovery order for the payment of reasonable legal expenses.

b. There was no conflict between paragraphs 7A.4 and 7B.1 of the Practice Direction and the associated legislative framework contained in the 2002 Act, as amended, and the Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations (SI 2005 No 3382).

Civil recovery sought after a defendant in criminal proceedings had died

52. SOCA v The Estate of Edward Lundon (deceased) & Ors [2010] EWHC *353 (QB)* [2nd March 2010]. Edward Lundon had been convicted of two counts of money laundering and was sentenced to 3 years' imprisonment. Criminal confiscation proceedings were outstanding at the time that he committed suicide.

53. SOCA then applied for a civil recovery order on the basis that the assets were obtained through, or represented the proceeds of unlawful conduct being money laundering, drug trafficking, acting as an unlicensed bookmaker and dealing in counterfeit goods. Mr Justice Blake stated:

> "70 … although propositions of fact can be demonstrated by inference from primary facts there must be a body of primary facts from which the inferences can legitimately be drawn. As the case law shows mere absence of evidence of legitimate earnings is not sufficient to draw the conclusion that assets were illegitimately acquired through offending of a particular class…"

54. The held on the evidence that it was more probable than not that Edward Lundon was engaged in money laundering and other serious criminal activity for periods after 1995. However, he found that there was virtually no information as to activities in 1993 when Lundon had first started acquiring shares. He made an order concluding that 15% of the particular assets was not recoverable property.

Civil recovery sought after defendant acquitted in the criminal proceedings

55. In *SOCA v Bosworth & Anr [2010] EWHC 645 (QB)* [26th March 2010], SOCA made an application for a recovery order in respect of 4 properties, monies held in 2 bank accounts and funds held by the police. Mr Bosworth had been acquitted of all charges of handling stolen goods. He had also been charged with offences of fraudulently evading tobacco duty but the prosecution offered no evidence.

56. In this case the Court found that SOCA had failed to prove on a balance of probabilities that the property was obtained by unlawful conduct and refused the application.

57. Of interest were the following points :-

- The Court found that it was not just or fair for SOCA to serve a 24 page witness statement and 468 pages of exhibits and to say in effect “if you read all of that, you will be able to work out what is the case which you have to meet”.

- The court stated that there “was a vagueness about what the case of SOCA actually was”.

58. The Court was also critical of these claims being made under CPR Part 8 stating that: “The issue of the claim form in this action under CPR Part 8 was in accordance with the relevant Practice Direction. Had the claim form been issued under CPR Part 7, it would have been necessary for there to have been Particulars of Claim …. By CPR Part 16.4(1) it is provided, so far as presently material, that : “Particulars of claim must include – (a) a concise statement of the facts upon which the claimant relies.”