Civil Forfeiture – a jurisprudence eating monster

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Introduction

1. Civil forfeiture measures are, generally, popular with governments. Civil forfeiture regimes are in place mainly in common law countries not just the UK, for example USA, Canada, Australia, Eire, South Africa, New Zealand and most Caribbean jurisdictions. With one or two exceptions they are generally not found in European countries.

2. The key features of these systems are:-

   (1) Government (national or local) led proceedings resulting in forfeiture of property to the State.

   (2) No criminal conviction or attendant criminal safeguards.

   (3) The basis is that the property is connected to crime: either the proceeds of crime and/or used in (or intended to be used in) crime.

   (4) Civil practice and procedure (lower standard of proof, relaxed rules for admission of evidence, no privilege against self-incrimination etc).

History of forfeiture

3. The generally accepted modern origin of forfeiture laws, certainly in common law countries, is thought to be the English law of *deodand* (from deo dandum "to give to God"). These laws can be traced back to pre-Norman times.

4. Some commentators (eg *Finkelstein; (1973) 46 Temple Law Review 169*) suggest that asset forfeiture laws can be traced back further – to Biblical times. The Old Testament focussed on the culpability of the thing which caused offence and its destruction rather than the punishment of the man in *Exodus* ch 21 v 28:-

> "If an ox gore a man or a woman that they die, then the ox shall surely be stoned and his flesh not be eaten. But the owner of the ox shall be quit."

5. *Deodand* was heavily used in England and France throughout medieval times. It seems to have begun before the Norman conquests as *banes*, whereby articles causing damage or death were given to the victim. It then became *deodand* in about 1200 and was primarily the forfeiture to the state of things which caused death, the forfeited article being re-distributed in some way in the community.

6. The growth of the railways in the early 19th century brought about the abolition of *deodand* in the UK. Coroner's juries had power to award *deodand* and did so against railway companies who, on the whole and in a manner prescient of the same country nearly 200 years later built and operated their train lines without much regard to risk to life. *Deodand* was abolished in the UK in 1846 when Parliament introduced the Fatal Accidents Act which allowed compensation to be awarded by a court to a deceased family.

7. Meanwhile, the colonisation of the United States by the British meant that many of its laws were carried across the Atlantic. *Deodand* was abolished in the US early in its development in 1790 (by the first Congress). But in its place numerous forfeiture laws were enacted, mainly concerned with the protection of shipping from piracy and maintenance of Customs regulations. Many customs laws across the world have long had forfeiture provisions traceable to these notions.

8. The modern explosion of civil forfeiture laws as a method of crime control is certainly due to organised crime. Two countries in particular were the pioneers; US and Italy. The United States by its introduction of the Racketeering Influenced and Corrupt Organisations Act 1970 ("RICO") which contained civil forfeiture remedies. In Italy, as early as 1956, in law 1423/56, powers were enacted to forfeit without conviction the property of persons connected to the *mafiosa*.

9. But it is well known that since the early 1980s the US has pressed ahead expanding asset forfeiture "programmes" both at state and federal level. There are over 100 statutes in the US authorising forfeiture, many without conviction. There are over 30,000 forfeitures in the US every year, mostly administrative. About 2,000 are civil claims decided by the Courts and most of them are based on drug trafficking and are made under 21 USC 881. The remainder of the civil cases are under 18 USC 981 which empowers the District Court to order forfeiture in relation to certain other crimes, mostly white collar type criminality and money laundering. To this since 2001 under the Patriot Act can be added property connected to terrorism.

10. 18 USC and 21 USC follow the same structure. The action is a civil *in rem* action and brought against the asset to be forfeited on the fiction it is guilty (*US v $1,240; US v 1243 3rd Avenue* etc). Until 2000 all the government had to show was "probable cause" that the property was the proceeds of or used in the

relevant crime, probable cause meaning something between reasonable grounds to suspect and reasonable grounds to believe. Then a person with an interest in the property could defeat forfeiture by showing that the property did not have that connection. Generally, there was no defence of innocent owner.

11. Given the strong following wind afforded the government it is not hard to understand the popularity of civil forfeiture to US authorities. Add in the fact that forfeited property results to the government - "incentivisation" as it is clumsily called – and the opportunity and temptation for abuse is apparent. Forfeiture actions exploded in the 1980s and 1990s and police forces and state attorneys were regularly attacked for prioritising fund raising by forfeiture rather than the adoption of conventional crime prevention tactics. In an extra-judicial speech in 1989, Judge David Sentelle of the D.C. Court of Appeals Circuit famously described RICO as:-

> "the monster that ate jurisprudence"

12. International initiatives do nothing to curb the monster's appetite. There is no Convention or multi-national treaty requiring or forbidding civil forfeiture. The 1990 Strasbourg Convention (modified in 2005) requires States to implement confiscation regimes but is limited to confiscation following conviction. The United Nations have developed a "model" civil forfeiture law. The Financial Action Task Force, generally regarded as internationally authoritative, is neutral providing by recommendation 3 of its 40 recommendations:-

> "Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction…."

13. Encouraged perhaps by the US experience, by the 1990s and early into the 21st Century, many other countries introduced civil forfeiture laws.. New South Wales (leading for Australia) in 1990 (Criminal Assets Recovery Act 1990),

Eire introduced civil forfeiture laws in 1996 (the Proceeds of Crime Act 1996), South Africa in 1998 (Prevention of Organised Crime Act 1998), Ontario (leading the way for Canada) in 2001 (the Remedies for Organised Crime and other Unlawful Activities Act 2001), the UK and federal government of Australia in 2002 (both called the Proceeds of Crime Act 2002) and more recently New Zealand, whose law came into force in December 2009 (the Criminal Proceeds (Recovery) Act 2009).

14. As said in paragraph 2 above, all these laws make provision for forfeiture of assets as connected to crime without any requirement for a conviction. All of them apply the civil law and require the government to prove its case to the civil rather than the criminal standard. Some only apply to proceeds of crime; others apply both to proceeds of crime and instrumentalities, that is things used in the commission of crime.

15. It might be thought that the US civil forfeiture system is out of line in that the burden to initiate a forfeiture case is very low (probable cause) with the burden then shifting to the claimant or owner to show the property is not connected to crime. This was the position until 2000, when the US implemented the Civil Asset Forfeiture Reform Act 2000. This Act brought about 2 principal changes to the civil forfeiture regime. First, it raised the burden on the government requiring it to prove its case on the standard civil burden, the balance of probabilities. Second, it established an "innocent owner" defence. If an owner established that he had no knowledge that the property had been used in a crime, or in a proceeds case that he had acquired the property in good faith at full value without notice of its criminal origin. Interestingly the catalyst for change was not adverse court decision but political and public pressure.

16. Thus, the current position is that most civil forfeiture regimes in the world are in rough alignment.

17. That is not to say that the categories of case which attract civil forfeiture are closed. Recently both New York State and Ontario in Canada have sought to discourage drink driving by providing for forfeiture of the car driven by the drunk. Canada's statute leaves little room for pontification of the subject matter: "The Safer Roads for a Safer Ontario Act 2007". Parochial civil forfeiture dumbs down in an effort to appeal to the community.

18. There are many potential constitutional challenges to civil forfeiture regimes. 2 are considered in this paper:-

(1) *The proceedings are really criminal and/or amount to a penalty*.

Depending on the country, such a finding has different results. It may make the law unconstitutional *per se* in that the legislative body may not have power to create a criminal law of this type. It may engage excessive fine provisions or raise issues of double penalty if there already have been (or might be) criminal proceedings. It may mean the procedural safeguards are inadequate or that the standard of proof is unconstitutionally low.

(2) *A forfeiture order would interfere with property rights*

Most constitutions guard against interference by the state with the right to ownership of property. This is not an absolute right. Questions arise as to whether the interference is justified.

The proceedings are really criminal

19. Civil forfeiture is attractive to governments as it is easier to prove than criminal offences. It is easier to prove not just because the standard of proof is lower. It is also easier because none of the civil forfeiture laws enacted (so far) require

proof of a particular crime.[1] Further, as with most civil procedures, the government and the person resisting forfeiture are subject to the same rules. Normally both parties have to set out their case in advance and usually each has to disclose documents which are adverse to his case.

20. But plainly civil forfeiture actions of this type have as their core an allegation of criminality. And the consequences may be harsh. For example, if the national law allows civil forfeiture of property used in the commission of crime (and many do), a house might be forfeited on the basis that a tenant used the greenhouse to grow marijuana. This might be regarded as a penalty for transgression of the criminal law and so a criminal proceeding.

21. In the US, the importance of categorisation between criminal and civil has principally arisen in the context of the double jeopardy prohibition in the 5th amendment. The leading case is *US v Ursery* (1996) 135 L Ed 2D549. The defendants had already been prosecuted, yet faced civil forfeiture proceedings. The 5th amendment double jeopardy clause prohibits a 2nd prosecution for the same offence. The issue was therefore whether a civil forfeiture action amounted to a 2nd prosecution. The Supreme Court held it did not. In national law *in rem* civil forfeitures did not amount to punishment. All members of the Court were clear that forfeiture of proceeds could not amount to punishment for a criminal wrong. It was merely the removal of property to which the owner had no right. In respect of things used in the commission of crime – instrumentalities – the majority held that this too did not amount to punishment. The statute is directed to owners who are culpable for the misuse of their property whether or not they have committed a criminal act. There is a powerful dissenting speech by Justice Stevens however to the effect that

[1] For example in the UK the Court of Appeal held in *Olupitan* [2008] EWCA Civ 104 held that no particular crime need by alleged as long as the government set out the nature of the crimes alleged in the most general way (eg fraud, money laundering, drug trafficking etc). The Irish Supreme Court similarly concluded that no particular crime needed to be identified in *McK v F and ors* [2005] IESC 6

forfeiture of property legally obtained but which is used in the commission of an offence can be a penalty and so engages the double jeopardy protection.

22. In respect of proceeds civil forfeiture no jurisdiction has found that the proceedings are in reality criminal. In the UK see *Charrington* [2005] EWCA Civ 335 where the Court of Appeal explained that there was no charge, arrest, conviction, penalty or criminal record. Absent such hallmarks, the proceedings were civil. These issues were recently revisited in the UK Supreme Court which heard argument in late May on whether the proceedings enjoyed the criminal protections in art 6(2) of the European Convention on Human Rights in *Gale v SOCA* UKSC 2010/190. Judgment is awaited.

23. In Ireland in *Gilligan v CAB* [2001] IESC, the Supreme Court explained that the civil forfeiture law:-

> "concerns the right of the State to take, or the right of a citizen to resist the State in taking, property which is proved on the balance of probabilities to represent the proceeds of crime. In general such a forfeiture is not a punishment and its operation does not require criminal procedures. Application of such legislation must be sensitive to the actual property and other rights of citizens but in principle and subject, no doubt, to special problems which may arise in particular cases, a person in possession of the proceeds of crime can have no constitutional grievance if deprived of their use."

24. Similarly in Canada, the Supreme Court of Canada recently tackled this issue in *Chatterjee v Ontatario* 2009 SCC 19 the issue arose in the context of whether Ontario had the power to make laws which interfered with sentences which were regulated as part of federal law. If the Ontarian civil forfeiture laws were in reality criminal and imposed a sentence they would be *ultra vires*. The Supreme Court made it clear that civil forfeiture laws were indeed civil and imposed no penalty.

25. The jurisprudence of the European Court of Human Rights results in the same conclusion but for slightly different reasons. The ECtHR approaches the issue applying a 3 fold test. First, the classification under domestic law (which is not decisive, indeed rarely relevant). Second, the nature of the offence. Third, the character of the penalty. Applying these criteria the Court has consistently held civil forfeitures to be civil. This is principally on the basis that such forfeitures do not involve penalties but are preventative measures which remove from circulation the proceeds of crime or property caught up in the commission of crime. The forfeiture of articles in this category is not a punishment. The ECtHR came to this conclusion in relation to proceeds civil forfeiture in *Butler v UK (app 41661/98)* 27th June 2002, *Raimondo v Italy* [1994] 18 EHRR 237 and *Walsh v UK* (*app 43384/05)* 21st November 20016. It came to a similar conclusion in relation to instrumentalities (albeit in the context of customs forfeitures) in *AGOSI v UK* [1986] 9 EHRR1 and *Air Canada v UK* [1995] 20 EHRR 150.

Protection of Property Rights

26. By definition, civil forfeiture laws interfere with property rights. Indeed such rights are usually destroyed. Countries with constitutions invariably protect property rights, but such protections are not absolute.

27. Article 1 of Protocol 1of the European Convention on Human Rights is a good example. It provides for a general protection prohibiting the state from interfering with property rights but then qualifies this right:-

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general

principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

28. The ECHR approach to all qualified rights, including article 1 of Protocol 1, is to apply a 3 fold test to constitutional compliance. Is the measure lawful (ie provided for by domestic law, ii) is it directed towards a legitimate aim and iii) is the measure proportionate to that aim?

29. Plainly civil forfeiture laws by statute, are provided for by law. The jurisprudence of the ECtHR is that forfeiture of proceeds or instrumentalities is legitimately directed towards the legitimate aim of crime prevention by controlling the use of property. The issue therefore is one of proportionality.

30. The Court has applied this test consistently holding asset forfeiture laws in general to be compliant with article 1 of protocol 1 (eg *Raimondo, Air Canada* (supra)). This does not mean that the Court in such cases has decided that the law cannot be non-compliant with article 1 of protocol 1, merely that on the facts before the Court forfeiture struck a fair balance between the interests of the community and the interests of the person suffering the forfeiture.

31. Proportionality is also the test under the domestic constitutions of many countries. It is far more likely to arise in instrumentalities cases. For example in South Africa in *Mohunram v NDPP* [2007] 2 ACC 4, the Constitutional Court quashed a forfeiture order in respect of a factory which housed 57 unlicensed gaming machines. The factory owners ran a legitimate business, but the gaming machines were not licensed contrary to the criminal law. The Supreme Court explained that the purposes of the forfeiture order were properly directed

towards removing incentives for the commission of crime, deterring persons from allowing their premises to be used for crime, and preventing the commission of crime. However, forfeiture of the factory was out of proportion to those aims. The criminal law had ample powers to deal with the criminality and forfeiture was not appropriate. The Court issued an important reminder to its own asset forfeiture agency, which others around the world might do well to absorb:-

> "[The Agency's] manifest function as defined by statute is to serve as a strongly-empowered law enforcement agency going after powerful crooks and their multitude of covert or overt subalterns. The danger exists that if the AFU spreads its net too widely so as to catch the small fry, it will make it easier for the big fish and their surrounding shoal of predators to elude the law. This would frustrate rather than further the objectives of POCA."

32. Interestingly, the South African Constitutional Court has made it clear that forfeiture of a car driven by a drunk driver is, absent "exceptional circumstances", disproportionate and unconstitutional (*NDPP v Vermaak* (1996) 386/06). Contrast the position in New York State and Canada where express provision has recently been made by statute for such forfeitures. It remains to be seen whether these laws survive examination against the constitutions of these jurisdictions.

33. Similarly in the UK, the courts have held that, properly applied, the civil forfeiture laws do not arbitrarily interfere with property rights (eg *He and Chen* [2004] EWHC 3021 Admin). The UK laws like most other laws contain numerous statutory exceptions to forfeiture, principally where the property is traceable to crime but the owner acquired the property in good faith, for full value without notice of the crime. Indeed the scope of the exceptions and the ability of the Court to protect innocent person's interests mean that in practice it is almost impossible for a forfeiture order to operate in a disproportionate

way. Even if such an order could do so, the UK specifically provides that an order cannot be made if it is incompatible with ECHR rights. Therefore, the proportionality test remains as a long stop protection.

34. Other jurisdictions have similar protections. Canada has "interests of justice" and legitimate owner defences. The US now (and since 2000) has legitimate owner defences (either the property has been used unlawfully without the knowledge of the owner or the owner is a good faith purchaser without notice of the crime). New Zealand and Australia have "undue hardship" defences. Ireland has a serious risk of injustice provision.

35. These sort of provisions, conferring discretions on the Courts are surely the proper way to ensure the correct balance is struck between the various interests.

The Future

36. Civil forfeiture laws are here to stay. It can only be expected that other countries will follow suit and enact them.

37. An interesting model is New Zealand. New Zealand's law allows the civil court not only to order forfeiture of property connected to crime, but permits the court to assess the value of a person's benefit from crime and order him to pay that amount. The order then becomes enforceable as a civil debt. Such an order, absent conviction is (the author believes) unique.

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