

Crime Doesn't Pay

BY PIERRE DE GARIS

Introduction

1. Not that anyone should need reminding, but the King's Bench Division of the High Court in the case of [DPP v Bijou \[2024\] EWHC 2997](#) has recently made clear that there is life yet in the age-old idiom of 'crime doesn't pay'.
2. This was a case in which the applicant, Mr Bijou, applied to vary a Property Freezing Order ("PFO") that had been made against him on the basis that the inclusion of assets which had already been used to re-assess his available amount in confiscation proceedings was wrong in law.
3. This application was based on two broad submissions, first that the making of a PFO was barred under an issue estoppel and secondly, in the alternative, that the granting of a PFO constituted an abuse of process.
4. In rejecting Mr Bijou's application, the Court held that neither was the case.
5. This decision should remind everyone of the severity of the powers contained within the [Proceeds of Crime Act, 2002](#) ("POCA") as well as the particularly wide ranging and serious financial consequences that face anyone who becomes subject to its purview. This article seeks to explore the facts and law as they applied in this case.

Facts

6. The history of Mr Bijou's involvement with the criminal justice system is concisely summarised across [4-12] of the judgment.
7. The most salient of which are as follows:
 - a. Mr Bijou is a convicted fraudster.
 - b. These convictions, each for multiple offences, date from 1997, 2000, 2010 and 2019.

- c. Following his 2010 conviction he was made subject to confiscation proceedings. As part of these proceedings, Mr Bijou was held to have led a criminal lifestyle.
 - d. In the 2010 case, Mr Bijou's benefit figure was assessed as being £1,950,000 with an original available amount of £466,502.73.
 - e. Following the discovery of additional assets, namely a house purchased for £1.1 million in 2016, and a car purchased for £65,653 in 2017 ("the disputed assets"), the Crown, in April 2022, successfully argued that the available amount pursuant to section 22 ought to be re-assessed to the full benefit figure.
 - f. Mr Bijou paid the remaining balance of £1,483,497.27 in two balancing payments in May and June 2022.
 - g. Mr Bijou paid this liability without needing to liquidate either of the disputed assets. Instead, he utilised further previously unknown assets.
 - h. On 13th October 2022, the DPP applied for a PFO alleging that Mr Bijou possessed assets which were obtained, or represent property obtained, through unlawful conduct. These assets were said to have an estimated value of between £3,470,000 and £3,870,000 and included the disputed assets.
 - i. These disputed assets were alleged to be the proceeds of further fraud offences dating back to activity between September and December 2015, September 2018 and March 2019, and a further attempted fraud in 2017.
 - j. Additionally, Mr Bijou had not filed a single self-assessment tax return between 2015 and 2022, nor were there associated PAYE or VAT records to provide any legitimate provenance to these assets.
 - k. The PFO was granted on 26 October 2022.
8. It is this PFO that Mr Bijou sought to vary.

The Law

9. The law on both criminal confiscation proceedings and civil recovery proceedings, and their application to this case, is set out in detail across [19-26] and [27-30] of the judgment respectively. In the interests of brevity, I will not replicate them in full in this article.
10. That notwithstanding, I believe the following extracts from [25], [27] and [40] go to the heart of the issues in this case.

“25. A confiscation order does not attach to any particular asset. It is an order made in personam that can properly be paid by the defendant from any assets whether taken into account in assessing the available amount or not. In this case, Mr Bijou paid his additional liability under the revised confiscation order from the MoneyCorp account without realising the disputed assets.”

“27. ... A civil recovery order may be made regardless of whether a prosecution has been brought in connection with the property.”

and

“40. The Act [POCA] expressly recognises and prevents the obvious abuse of an asset being both taken into account in determining the benefit amount in confiscation proceedings under Part 2 of the Act and being the subject of civil recovery proceeding under Part 5.

40.1 Where a civil recovery order has been made in respect of the asset, it must be ignored in calculating the defendant's benefit in confiscation proceedings: s.7(4)(a).

40.2 Alternatively, where the asset has already been taken into account in determining the benefit amount in the confiscation proceedings, it is not recoverable property and it is not therefore liable to civil recovery proceedings: s.308(9).”

Analysis

Issue Estoppel

11. At [33] Pepperall J applied the definition of issue estoppel as stated by Lord Sumption in the case of *Virgin Atlantic Airways Ltd v. Zodiac Seats Ltd* [2013] UKSC 46 at [22].
12. In the interests of brevity, I will not re-state that definition here. However, in short, Pepperall J was clear at [38] that issue estoppel did not arise in this case because the issues the Crown Court and High Court were considering fundamentally distinct from one another.
13. Confiscation proceedings, within Part 2 of POCA, are solely concerned with determining first, a person's benefit from their criminal lifestyle/actions and second, the assets they have available to pay towards any confiscation order.
14. Civil recovery proceedings, found within Part 5 of POCA, are instead concerned with determining, on the balance of probabilities, whether certain assets either, "were obtained, or represent property obtained, through unlawful conduct."
15. Therefore, the discovery in this case of the disputed assets which were used to re-assess Mr Bijou's available amount but not his benefit figure in the Crown Court, was distinct to the question in the High Court which was whether the disputed assets were either obtained, or represent property obtained, through unlawful conduct.
16. It is stated at [39] that the fundamental nature of the difference between the questions being answered by the High and Crown Court meant there will have been no "re-litigation of any issue decided in the Crown Court" and therefore issue estoppel was not held to be applicable.

Abuse of Process

17. The question of whether circumstances such as these are void for abuse of process is dealt with at [41] and [49].
18. The Court was clear in two respects.

19. First, at [41], that the will of Parliament was plain in intending POCA to allow for both criminal confiscation and civil recovery proceedings to be brought against the same individual. Though, as per s.7(4)(a) and s.308(9) referenced above, this should not extend to permitting double recovery.
20. Second, at [49], where the discovery of additional assets occurs beyond the limitation period within which the Crown can apply to reassess the benefit figure (under section 21 POCA), it does not constitute an abuse to seek to recover those assets through civil recovery proceedings under part 5 of POCA. It can, in my view, be seen as entirely the correct course of action for the prosecution to take.
21. Referring to [25], [27] and [40] quoted above. The reason for this is fundamentally because all confiscation orders are made *in personam*. This means the available amount does not attach, either as a charge over, or beneficial interest in, the particular asset/property that is used to determine the available amount from which a confiscation order is determined.
22. Therefore, it does not matter what asset was used to create an available amount. All that matters is that the liability is paid by the Defendant. This fact is what allowed Mr Bijou to settle his Confiscation Order using alternative assets in the first place.
23. It would only have been in circumstances where the Crown had successfully had Mr Bijou's benefit figure reassessed to account for these additional assets that it would then, likely, constitute an abuse to seek their parallel recovery in civil proceedings.
24. In any event such a situation was considered, and provided for, by Parliament by virtue of section 308(9) of POCA which outlines that "[p]roperty is not recoverable if it has been taken into account in deciding the amount of a person's benefit from criminal conduct for the purpose of making a confiscation order...".

Reflections

25. The decision made by Mr Bijou to settle his uplifted available amount liability with different assets to those which caused it to become uplifted had two consequences:
 - a. First, in making that decision, it permitted the DPP to seek those assets via civil recovery, and

- b. Second, that decision signalled, whether intentionally or not, that there were likely to be other available assets for the DPP to discover and seek to recover. This was identified as much at [26.3].



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Law is correct as at 17th December 2024

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