

To mark International Women's Day 2021, and this year's theme 'Choose to Challenge', members of Carmelite Chambers have contributed articles highlighting and challenging an aspect of the Justice System that impacts women's rights and welfare.

Partners and Confiscation

Richard Furlong and Alexandra Scott provide a brief guide to defending wives and partners in confiscation proceedings

Data from 2019 suggests that 26% of prosecutions are brought against women, of which only 10% are for indictable offences. The same data indicates that women account for just 5% of the prison population.

These statistics downplay the number of women actually affected by prosecutions which are successfully brought and shed no light at all on those whose lives are seriously adversely impacted by confiscation orders made against their partners. It is often the wives or partners of serving prisoners who watch their homes being sold to meet a confiscation order, who see their financial security vanish, and who have to start again.

The confiscation regime brought in by the Proceeds of Crime Act 2002 ('the Act') was designed to be draconian. The limited safeguards creating discretion which were built into the Act – under sections 6(5) and 10(6) – provide some protection for defendants. But none of these protections extend to third parties – either as interested parties or as the recipients of funds deemed to be tainted gifts – irrespective of whether they were in any way complicit or conniving in the offending, or whether they are wholly innocent of any misconduct.

Section 10A was introduced in 2015 and provides interested parties with the right to make representations, to the extent of their interest in any jointly held property, before the Judge makes a determination as to the proportion of the defendant's interest. The oft-cited example is that of the matrimonial home.

However, the scope for overlap between section 10A and the provisions relating to tainted gifts is substantial: a party asserting an interest has the hurdles of establishing the interest, and — if raised by the Crown — disproving the suggestion that that interest is tainted.

Identifying the interest

Practitioners defending the convicted male offender should be alive to third party interests, but there is an obligation on the face of section 10A and [Crim PR 33.13\(5\)\(f\)](#) on the prosecution in their section 16 statement in respect of confiscation to identify potential third party interests. Responsible prosecutors these days generally notify such third parties of the confiscation proceedings, but where they do not do so, it is incumbent on defence practitioners to bring such interests to their attention.

Solicitors should be alive to conflicts of interest, notably where there are multiple section 10A applicants (see [Ghulam](#) [2018] EWCA Crim 1691).

The CrimPR 33.13(3) specifies:

“Where it appears to the court that a person other than the defendant holds, or may hold, an interest in property held by the defendant which property is likely to be realised or otherwise used to satisfy a confiscation order—

the court must not determine the extent of the defendant’s interest in that property unless:

- (a) that other person has had a reasonable opportunity to make representations; and*
- (b) the court may order that other person to give such information, in such manner and within such a period, as the court directs.”*

Funding

The next difficulty is that legal aid is not available. Instructing solicitors and counsel may be expensive, although given there is an asset on which a charge could be levied, and also that

technically these proceedings are civil in nature, then there should be scope for creative funding arrangements. Difficulties may arise if the asset is restrained, and the partner has been served with the restraint order. [Section 41\(4\)](#) of the Act restricts applications to use restrained funds where it is said that the legal expenses are to be incurred by the recipient of a tainted gift.

Whether this provision and its consequences — that a partner may be effectively prevented by an inability to use restrained funds and the non-availability of legal aid from litigating the loss of her home — are consistent with [A1P1](#) of the European Convention on Human Rights is an issue yet to be litigated, although note the findings of the Court of Appeal Civil Division in relation to the underlying A1P1 issues in part 5 proceedings cited in [Azam v NCA](#) (also reported as *Sanam v NCA*) [2015] EWCA Civ 1234.

Advising the client

Before launching an application, the wife or partner needs to be advised in sensible terms as to the likelihood of success. In normal circumstances, the ordinary principles of property and trusts law apply ([Bevan](#) [2020] EWCA Crim 1345).

However, the tainted gift provisions are designed to override the wife's legal and equitable claims to property which she has not obtained independently.

In [Hayes](#) [2018] EWCA Crim 682, the Court of Appeal discounted the argument that the wife had contributed to the property in a non-financial way as a wife and mother, and such a contribution amounted to consideration to defeat the tainted gift provisions. The Court further discounted the proposition that since the property was purchased in joint names, there was no transfer from the defendant to his wife, transfer being from the vendor to husband and wife at the same time. The Court cited *Thompson* [2015] EWCA Crim 1820 for the proposition that “*the wife's legal and beneficial ownership was conveyed to her but was dependent upon an endowment made by virtue of the monies held in the account of the husband, which he effectively gifted to her by his consent to the conveyance drawn.*”

Hayes was followed in *Cracknell* [2020] EWCA Crim 132.

Two further cases bring home the Courts' stance: Morrison [2019] EWCA Crim 351 and Thakor [2020] EWCA Crim 541.

In Morrison, the defendant had given Ms Collinge, his former partner, some £38,200 to enable her to purchase the address she had lived in for the previous 17 years from the council, with a discount of £31,740 by virtue of her long tenancy. The alternative she faced was eviction in the light of her own financial difficulties. The situation was complicated by a repayment clause. If the property were sold within 5 years, a diminishing proportion of the £31,740 would fall to be repaid. At first instance it was accepted that the £38,200 transferred was a tainted gift. Section 10A considerations did not, therefore, arise. It was also accepted by the prosecution that Ms Collinge had no idea that the money was the proceeds of crime. The Recorder decided not to make any order in relation to the tainted gift, finding that as Morrison had no interest in the property and by extension no power to force the sale of it, he would have no means to pay the £39,485.93 *“and the order would be tantamount to sending him to prison ... [such an] order would be wholly disproportionate”*.

The Court of Appeal found that the Recorder erred in his application of the concept of proportionality under section 6(5)(b) of the Act. In paragraphs 62–68 of the judgment, the Court set out six principles from the earlier authorities, of which the following two seem most relevant to third parties:

“Fourthly, criminals must not be able to defeat confiscation proceedings by making gifts of assets that cannot be recovered, as this would undermine the efficacy of the scheme... The regime is deliberately severe.

Fifthly, the exception concerning proportionality in section 6(5)(b) is not to be equated with a general discretion in the court; nor even with a provision requiring or permitting the court to avoid the risk of serious injustice. It does not call for nor does it permit a general balancing exercise, in which various interests are weighed on each side of a balance, including the potential hardship or injustice which may be caused to third parties by the making of an order which includes a tainted gift...”

In *Thakor*, both husband and wife had been convicted of the summary offence of failing to notify a change of circumstances in respect of benefit. Mrs Justice Cheema–Grubb held that the fact that the wife had transferred the funds out of a joint account into her own account did not prevent the whole amount being available to meet the husband’s confiscation order as a tainted gift from him, she having no separate and independent right to any of the funds, and notwithstanding that he had done nothing more than assent to the transfer out of the joint account. She had benefited indirectly from the husband’s offending as well as her own.

Where the wife has an interest in the property backed by independent financial contributions or a loan, or some other genuine mechanism, she would be well advised to register a charge, even if a restraint order is in place (see [Ryder](#) [2020] EWCA Crim 1110).

Application

After section 10A was introduced, there was a form required to be lodged under the Criminal Procedure Rules. This made it easier for unrepresented partners to lodge their interests. This form has been withdrawn under the latest iteration of the CrimPR.

The application now will normally be in the form of an application and a witness statement unless the court otherwise directs under Crim PR 33.13(3)(b).

The procedure to be applied is civil procedure (see [Forte](#) [2020] EWCA Crim 1455). Citing [Hilton](#) [2020] UKSC 29, a Supreme Court case on the equivalent provisions in Northern Ireland, the Court of Appeal held that the purpose of section 10A was to combine confiscation and enforcement. Adverse inferences from the failure of a wife to give evidence were not formalised, but the judge was entitled to have regard to the fact that a party who could have contradicted the opposing case had not done so.

There will then be a hearing at which the application will be made, and the judge will rule, unless the prosecution can be persuaded to agree the third party interest.

Appeals

Whilst there is no right of appeal under the Criminal Appeal Act ([section 50\(1\)\(ca\)](#)) – although the husband’s resulting interest in the property can be appealed in the normal way – the position is salvaged to a limited extent by [section 31 of POCA](#) in circumstances where the wife was not given a reasonable opportunity to be heard, or there would be a serious risk of injustice were the section 10A determination to be given effect.

Ironically, there is no right of appeal where the judge simply makes no section 10A finding at all ([Ghulam, qv.](#)).

Conclusions

Confiscation law is a long way from respecting any proper procedural, legal or equitable rights of the wives and partners of convicted defendants. Substantial reforms are necessary to bring this area of the law into the modern era. There is no sign that the Law Commission’s ongoing [consultation](#) is looking at any of these areas. Women, as always, will have to campaign for these rights.

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