

LIMITED POWERS OF RECOVERY- UK SUPREME COURT LIMITS THE EXTRA-TERRITORIAL POWERS OF THE SERIOUS ORGANISED CRIME AGENCY

THE LONDON LITIGATION LETTER

INTRODUCTION

In a recent case, *Perry and others v the Serious Organised Crime Agency [2012] UKSC*, the UK Supreme Court has curtailed the efforts of the Serious Organised Crime Agency (SOCA) to freeze the foreign assets of a fraudster who had been convicted abroad. The Supreme Court ruled that the English courts did not have the jurisdiction to freeze property situated outside the UK.

BACKGROUND

In 2007, the appellant, Mr Perry, was convicted of fraud in Israel. He was sentenced to 12 years in prison, and fined approximately £3m. In May 2008 SOCA discovered that banks in London were holding about £14m in accounts in the name of Mr Perry and his family. SOCA, thereafter, sought to deprive Mr Perry, his family, and entities associated with them, of assets obtained in connection with his criminal activity, wherever in the world those assets were located. Although Mr Perry owned a house in London, neither he nor his family resided in the UK.

CIVIL RECOVERY ORDER

SOCA sought to rely upon Part 5 of the Proceeds of Crime Act 2002 (POCA) in its confiscation proceedings. Under Part 5, SOCA can apply to the Court for a Civil Recovery Order (CRO) in respect of property obtained through unlawful conduct. Such an order is made against particular property as opposed to a particular person and can be made against property held by others who are unaware of its criminal origins. The power of the civil court to make CROs is exercisable regardless of any criminal proceedings, and a prior criminal conviction is not a prerequisite for the order to be granted. SOCA submitted that the Court had the power to recover foreign assets pursuant to section 316(4) of Part 5 of POCA which defines property as “all property wherever situated”.

THE DISCLOSURE ORDER

SOCA obtained a disclosure Order from the UK High Court and thereafter served disclosure notices on Mrs Perry and her two daughters. The notices requested information as to the whereabouts of Mr Perry's assets. The notices, which were left at Mr Perry's London address, carried penal notices warning of criminal sanction for failure to comply with the Order.

THE FREEZING ORDER

SOCA also applied for and obtained a Worldwide Freezing Order (WFO) against Mr Perry and eight others, as a preliminary step in an attempt to ensure the effectiveness of its asset recovery proceedings. The WFO listed properties in London, New York, Tel Aviv, Jerusalem and Villefranche-sur-Mer. Mr Perry and two other appellants applied to vary the WFO so as to limit it to assets in the UK. They also challenged the validity of the disclosure notices.

The appeals to the High Court and the Court of Appeal failed. Both courts held that the language of Section 316(4) of POCA (“all property wherever situated”) was clear and applied to property outside the jurisdiction and that there was no reason not to give effect to the natural meaning of the language of the section. Mr Perry and the other appellants appealed to the Supreme Court.

THE APPEAL

The appellants argued that: it had never been Parliament's intention that CROs could be made against property situated abroad, as there were no provisions in Part 5 of POCA to that effect; a CRO could only be made in respect of property that was within the territorial jurisdiction of the court making such an order; and such an order would be in breach of international law.

THE DECISION

This important appeal was heard by the maximum nine judges, when Supreme Court appeals are usually heard by five or seven judges. Both the disclosure order and the WFO appeals were allowed.

The Supreme Court held that Part 5 of POCA did not provide the UK High Court the jurisdiction to make a CRO in relation to property situated outside the UK. In the lead judgment of the majority Lord Phillips stated that the courts below had placed undue weight upon the definition of “property” in section 316 of POCA. The words “wherever situated” did not describe the type of property to which Part 5 applied, but rather indicated the location of the property. The words “wherever situated” could not be applied to the word “property” every time it appeared in POCA, particularly as it appeared throughout. Most of the provisions of POCA plainly only applied to property located within the UK and the scope of the term depended on the context.

Lord Phillips held that the appellants had placed undue weight on the presumption that a UK statute does not have extra-territorial effect. However, European Union member states had departed from that principle in regard to the confiscation of the proceeds of crime; the Strasbourg Convention on Laundering Search, Seizure and Confiscation of the Proceeds of Crime 1990 was such an example. That Convention recognised that the courts of state A might seek to seize property in state B which represented proceeds of the criminal conduct of a defendant subject to the criminal jurisdiction of EU member state A. The Convention provided that such a seizure was to be effected by confiscation proceedings in state B at the request of state A. Parts 2, 3 and 4 of POCA were consistent with the Convention in that they imposed personal obligations in respect of the defendant's property worldwide. Those Parts also

provided a process by which a UK prosecuting authority could request other states to take measures in regard to any criminal property located within their jurisdiction. However, Part 5 does not contain any provisions relating to foreign enforcement.

The much wider jurisdiction that SOCA had argued for was unprecedented. Lord Phillips stated that the fact that POCA had separate provisions for the freezing of property in England and Wales, Scotland and Northern Ireland indicated that the provisions were designed to apply to one of the jurisdictions of the UK. Had Parliament intended Part 5 confiscation orders to have been extended to property outside the UK it surely would have included provisions to that effect. Indeed there was no compelling reason why Parliament should have wished to confer on SOCA a right to seek a CRO in respect of the proceeds of a crime that was not committed within the UK and where those proceeds were not within the UK. Lord Phillips, therefore, held that the WFO should be amended so as to only apply to property based in England and Wales.

SOCA had known that the persons, upon whom they had served the disclosure notices, had been outside the UK jurisdiction and that compliance with notices was subject to penal sanction. However, it was contrary to international law for one country to purport to criminalise conduct in another country committed by individuals who were not citizens of the first country. Therefore, Lord Phillips stated that the authority to issue a disclosure notice under POCA could only be exercised within the jurisdiction.

DISSENTING JUDGMENTS

Lord Judge and Lord Clarke dissented on the WFO appeal. They considered that POCA had been poorly drafted but its objective was clear – that those who engaged in criminal conduct, whether at home or abroad had to be deprived of the property representing its proceeds. Therefore, they believed that, subject to local law, CROs could include foreign property.

COMMENT

Although the outcome of the appeal was not unexpected, the ruling by the Supreme Court is significant, as it provides welcome guidance on the ambiguous language of POCA. By allowing the appeal, the Supreme Court has limited the power of the UK Court to make a CRO over property situated in the UK. That remains so even where property located abroad has been bought with the proceeds of crimes committed in the UK by a person resident in the jurisdiction.

It does not follow that the gains or proceeds of criminal conduct situated outside the jurisdiction are completely out of reach of SOCA. However, in order to seize such property SOCA will not be able to rely upon the UK Court, but will rather have to pass on the information about the property to the relevant authorities in the country where the assets are located and request that those authorities start confiscation proceedings.

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