
SCOTTISH STATUTORY INSTRUMENTS

2005 No. 581

The Criminal Justice (International Co
operation) Act 1990 (Enforcement of Overseas
Forfeiture Orders) (Scotland) Order 2005

PART 2

REQUESTS FOR RESTRAINT OF PROPERTY

Action on receipt of external request in connection with criminal investigations or proceedings

3.—(1) The Lord Advocate may make an application under article 6 on receipt of a request for the restraint of property made—

- (a) by or on behalf of an overseas authority in a designated country; and
- (b) for the purpose of facilitating the enforcement of any external forfeiture order which has yet to be made.

(2) The Lord Advocate may ask the overseas authority which made the request for such further information as may be necessary to determine whether the request is likely to satisfy the conditions in article 4.

Conditions for court to give effect to external request

4.—(1) The court may exercise the powers conferred by article 5 if the following conditions are satisfied.

(2) The conditions are that—

- (a) relevant property in Scotland is identified in the request;
- (b) a criminal investigation or proceedings for an offence have been instituted in the country from which the request was made; and
- (c) it appears to the court that there are reasonable grounds for believing that as a result of that investigation or those proceedings an external forfeiture order may be made against the person named in the request.

Restraint orders

5.—(1) If the conditions set out in article 4 are satisfied, the court may make an order (“a restraint order”) interdicting any specified person from dealing with relevant property which is identified in the request and specified in the order.

(2) A restraint order may be made subject to exceptions, and an exception may in particular—

- (a) make provision for reasonable living expenses and reasonable legal expenses in connection with the proceedings seeking a restraint order or the enforcement of the external forfeiture order;

- (b) make provision for the purpose of enabling any person to carry on any trade, business, profession or occupation;
- (c) be made subject to conditions.
- (3) But an exception to a restraint order must not make provision for any legal expenses which—
 - (a) relate to the offence mentioned in article 4(2); and
 - (b) are incurred by a person against whom proceedings for the offence have been instituted or by a recipient of a tainted gift.
- (4) The court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.
- (5) A restraint order does not affect property for the time being subject to a charge under—
 - (a) section 9 of the Drug Trafficking Offences Act 1986(1);
 - (b) section 78 of the Criminal Justice Act 1988(2);
 - (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990(3);
 - (d) section 27 of the Drug Trafficking Act 1994(4);
 - (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996(5).
- (6) Dealing with property includes removing the property from Scotland.

Application, recall and variation

- 6.—(1) A restraint order may be made on an ex parte application by the Lord Advocate, which may be heard in chambers.
- (2) The Lord Advocate must intimate an order to every person affected by it.
 - (3) Paragraph (2) does not affect the time when the order becomes effective.
 - (4) The Lord Advocate and any person affected by a restraint order may apply to the court to recall or vary the order and paragraphs (5) to (7) apply in such a case.
 - (5) The court may—
 - (a) recall the order;
 - (b) vary the order.
 - (6) If the conditions in article 4 were satisfied by virtue of the fact that proceedings were instituted, the court must recall the order if—
 - (a) at the conclusion of the proceedings, no external forfeiture order has been made, or
 - (b) within a reasonable time an external forfeiture order has not been registered under this Order.
 - (7) If the conditions in article 4 were satisfied by virtue of the fact that an investigation was instituted, the court must recall the order if within a reasonable time proceedings for the offence are not instituted.

Appeals

- 7.—(1) If on an application for a restraint order the court decides not to make one, the Lord Advocate may reclaim against the decision.

(1) 1986 c. 32.
 (2) 1988c.33.
 (3) S.I.1990/2588 (N.I. 17).
 (4) 1994 c. 37.
 (5) S.I. 1996/1299 (N.I. 9).

(2) The Lord Advocate and any person affected by the order may reclaim against the decision of the court on an application under article 6(4).

(3) On a reclaiming motion under paragraph (1) or (2) the court may—

- (a) confirm the decision, or
- (b) make such order as it thinks appropriate.

Inhibition of property affected by order

8.—(1) On the application of the Lord Advocate, the court may, in relation to the property mentioned in paragraph (2), grant warrant for inhibition against any person specified in a restraint order.

(2) That property is the heritable property to which the restraint order applies (whether generally or such of it as is specified in the application).

(3) The warrant for inhibition—

- (a) has effect as if granted on the dependence of an action for debt by the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly, and
- (b) has the effect of letters of inhibition and must forthwith be registered by the Lord Advocate in the Register of Inhibitions and Adjudications.

(4) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868(6) (effective date of inhibition) applies in relation to an inhibition for which warrant is granted under paragraph (1) as it applies to an inhibition by separate letters or contained in a summons.

(5) The execution of an inhibition under this article in respect of property does not prejudice the exercise of an administrator's powers under or for the purposes of this Part in respect of that property.

(6) An inhibition executed under this article ceases to have effect when, or in so far as, the restraint order ceases to apply in respect of the property in relation to which the warrant for inhibition was granted.

(7) If an inhibition ceases to have effect to any extent by virtue of paragraph (6) the Lord Advocate must—

- (a) apply for the recall or, as the case may be, the restriction of the inhibition, and
- (b) ensure that the recall or restriction is reflected in the Register of Inhibitions and Adjudications.

Arrestment of property affected by order

9.—(1) On the application of the Lord Advocate the court may, in relation to moveable realisable property to which a restraint order applies (whether generally or such of it as is specified in the application), grant warrant for arrestment.

(2) Such a warrant for arrestment may be granted only if the property would be arrestable if the person entitled to it were a debtor.

(3) A warrant under paragraph (1) has effect as if granted on the dependence of an action for debt at the instance of the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly.

(4) The execution of an arrestment under this article in respect of property does not prejudice the exercise of an administrator's powers under or for the purposes of this Part in respect of that property.

(5) An arrestment executed under this article ceases to have effect when, or in so far as, the restraint order ceases to apply in respect of the property in relation to which the warrant for arrestment was granted.

(6) If an arrestment ceases to have effect to any extent by virtue of paragraph (5) the Lord Advocate must apply to the court for an order recalling, or as the case may be, restricting the arrestment.

Management administrators

10.—(1) If the court makes a restraint order it may at any time, on the application of the Lord Advocate—

- (a) appoint an administrator to take possession of any realisable property to which the order applies and (in accordance with the court’s directions) to manage or otherwise deal with the property;
- (b) order a person who has possession of property in respect of which an administrator is appointed to give the administrator possession of it

(2) An appointment of an administrator may be made subject to conditions or exceptions.

(3) Where the court makes an order under paragraph (1)(b), the clerk of court must notify the accused and any person subject to the order of the making of the order.

(4) Any dealing of the accused or any such person in relation to property to which the order applies is of no effect in a question with the administrator unless the accused or, as the case may be, that person had no knowledge of the administrator’s appointment.

(5) The court—

- (a) may order a person holding an interest in realisable property to which the restraint order applies to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the accused or the recipient of a tainted gift;
- (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property.

(6) The court must not—

- (a) confer the power in paragraph (1) to manage or otherwise deal with the property, or
- (b) exercise the power conferred on it by paragraph (5),

unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.

(7) The court may order that a power conferred by an order under this article is subject to such conditions and exceptions as it specifies.

(8) Managing or otherwise dealing with property includes—

- (a) selling the property or any part of it or interest in it;
- (b) carrying on or arranging for another person to carry on any trade or business the assets of which are or are part of the property;
- (c) incurring capital expenditure in respect of the property.

(9) Paragraphs (1)(b) and (5) do not apply to property for the time being subject to a charge under—

- (a) section 9 of the Drug Trafficking Offences Act 1986(7);
- (b) section 78 of the Criminal Justice Act 1988(8);

(7) 1986 c. 32.

(8) 1988 c. 33.

- (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990⁽⁹⁾;
- (d) section 27 of the Drug Trafficking Act 1994⁽¹⁰⁾;
- (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996⁽¹¹⁾.

Seizure in pursuance of restraint order

11.—(1) If a restraint order is in force a constable or a relevant officer of Revenue and Customs may seize any realisable property to which it applies to prevent its removal from Scotland.

(2) Property seized under paragraph (1) must be dealt with in accordance with the directions of the court which made the order.

Restraint orders: restrictions on proceedings and remedies

12.—(1) While a restraint order has effect, the court may sist any action, execution or any legal process in respect of the property to which the order applies.

(2) If the court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either sist the proceedings or allow them to continue on any terms it thinks fit.

(3) Before exercising any power conferred by paragraph (2), the court must give an opportunity to be heard to—

- (a) the Lord Advocate; and
- (b) any administrator appointed in respect of the property under article 10.

⁽⁹⁾ S.I. 1990/2588 (N.I. 17).

⁽¹⁰⁾ 1994 c. 37.

⁽¹¹⁾ S.I. 1996/1299 (N.I. 9).