
STATUTORY INSTRUMENTS

2005 No. 3181

The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

PART 5

GIVING EFFECT IN THE UNITED KINGDOM TO EXTERNAL ORDERS BY MEANS OF CIVIL RECOVERY

CHAPTER 2

CIVIL RECOVERY IN THE HIGH COURT OR COURT OF SESSION

Vesting and realisation of recoverable property

Recovery orders

177.—(1) The court must decide to give effect to an external order which falls within the meaning of section 447(2) of the Act by registering it and making a recovery order if it determines that any property or sum of money which is specified in it is recoverable property.

(2) In making such a determination the court must have regard to—

- (a) the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of the Act, and
- (b) articles 202 to 207.

(3) The recovery order must vest the recoverable property in the trustee for civil recovery.

(4) But the court may not make in a recovery order—

- (a) any provision in respect of any recoverable property if each of the conditions in paragraph (5) or (as the case may be) (6) is met and it would not be just and equitable to do so, or
- (b) any provision which is incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998⁽¹⁾).

(5) In relation to a court in England and Wales or Northern Ireland, the conditions referred to in paragraph (4)(a) are that—

- (a) the respondent obtained the recoverable property in good faith,
- (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it,
- (c) when he took the steps, he had no notice that the property was recoverable,
- (d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him.

(1) 1998 c. 42.

- (6) In relation to a court in Scotland, the conditions referred to in paragraph (4)(a) are that—
- (a) the respondent obtained the recoverable property in good faith,
 - (b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it,
 - (c) when he took steps, he had no reasonable grounds for believing that the property was recoverable,
 - (d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him.
- (7) In deciding whether it would be just and equitable to make the provision in the recovery order where the conditions in paragraph (5) or (as the case may be) (6) are met, the court must have regard to—
- (a) the degree of detriment that would be suffered by the respondent if the provision were made,
 - (b) the enforcement authority's interest in receiving the realised proceeds of the recoverable property.
- (8) A recovery order may sever any property.
- (9) A recovery order may impose conditions as to the manner in which the trustee for civil recovery may deal with any property vested by the order for the purpose of realising it.
- (10) A recovery order made by a court in England and Wales or Northern Ireland may provide for payment under article 191 of reasonable legal expenses that a person has reasonably incurred, or may reasonably incur, in respect of—
- (a) the proceedings under this Part in which the order is made, or
 - (b) any related proceedings under this Part.
- (11) If regulations under article 199 apply to an item of expenditure, a sum in respect of the item is not payable under article 199 in pursuance of provision under paragraph (10) unless—
- (a) the enforcement authority agrees to its payment, or
 - (b) the court has assessed the amount allowed by the regulations in respect of that item and the sum is paid in respect of the assessed amount.
- (12) This article is subject to articles 181 to 189.

Functions of the trustee for civil recovery

178.—(1) The trustee for civil recovery is a person appointed by the court to give effect to a recovery order.

(2) The enforcement authority must nominate a suitably qualified person for appointment as the trustee.

(3) The functions of the trustee are—

- (a) to secure the detention, custody or preservation of any property vested in him by the recovery order,
- (b) in the case of property other than money, to realise the value of the property for the benefit of the enforcement authority, and
- (c) to perform any other functions conferred on him by virtue of this Chapter.

(4) In performing his functions, the trustee acts on behalf of the enforcement authority and must comply with any directions given by the authority.

(5) The trustee is to realise the value of property vested in him by the recovery order, so far as practicable, in the manner best calculated to maximise the amount payable to the enforcement authority.

(6) The trustee has the powers mentioned in Schedule 3.

(7) References in this article to a recovery order include an order under article E46 and references to property vested in the trustee by a recovery order include property vested in him in pursuance of an order under article 187.

Recording of recovery order (Scotland)

179.—(1) The clerk of the court must immediately after the making of a recovery order which relates to heritable property situated in Scotland send a certified copy of it to the keeper of the register of inhibitions and adjudications for recording in that register.

(2) Recording under paragraph (1) is to have the effect as from the date of the recovery order, of an inhibition at the instance of the trustee for civil recovery against the person in whom the heritable property was vest prior to that date.

Rights of pre-emption etc.

180.—(1) A recovery order is to have effect in relation to any property despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict the vesting of the property.

(2) A right of pre-emption, right of irritancy, right of return or other similar right does not operate or become exercisable as a result of the vesting of any property under a recovery order.

A right of return means any right under a provision for the return or reversion of property in specified circumstances.

(3) Where property is vested under a recovery order, any such right is to have effect as if the person in whom the property is vested were the same person in law as the person who held the property and as if no transfer of the property had taken place.

(4) References to rights in paragraphs (2) and (3) do not include any rights in respect of which the recovery order was made.

(5) This article applies in relation to the creation of interests, or the doing of anything else, by a recovery order as it applies in relation to the vesting of property.

Associated and joint property

181.—(1) Articles 182 and 183 apply if the court makes a recovery order in respect of any recoverable property in a case within paragraph (2) or (3).

(2) A case is within this paragraph if—

(a) the property to which the proceedings relate includes property which is associated with the recoverable property and is specified or described in the claim form or (in Scotland) application, and

(b) if the associated property is not the respondent's property, the claim form or application has been served on the person whose property it is or the court has dispensed with service.

(3) A case is within this paragraph if—

(a) the recoverable property belongs to joint tenants, and

(b) one of the tenants is an excepted joint owner.

(4) An excepted joint owner is a person who obtained the property in circumstances in which it would not be recoverable as against him; and references to the excepted joint owner's share of

the recoverable property are to so much of the recoverable property as would have been his if the joint tenancy had been severed.

(5) Paragraphs (3) and (4) do not extend to Scotland.

Agreements about associated and joint property

182.—(1) Where—

- (a) this article applies, and
- (b) the enforcement authority (on the one hand) and the person who holds the associated property or who is the excepted joint owner (on the other) agree,

the recovery order may, instead of vesting the recoverable property in the trustee for civil recovery, require the person who holds the associated property or who is the excepted joint owner to make a payment to the trustee.

(2) A recovery order which makes any requirement under paragraph (1) may, so far as required for giving effect to the agreement, include provision for vesting, creating, or extinguishing any interest in property.

(3) The amount of the payment is to be the amount which the enforcement authority and that person agree represents—

- (a) in a case within article 181(2), the value of the recoverable property,
- (b) in a case within article 181(3), the value of the recoverable property less the value of the excepted joint owner's share.

(4) But if—

- (a) a property freezing order, an interim receiving order, a prohibitory property order or an interim administration order applied at any time to the associated property or joint tenancy, and
- (b) the enforcement authority agrees that the person has suffered loss as a result of the order mentioned in sub-paragraph (a),

the amount of the payment may be reduced by any amount the enforcement authority and that person agree is reasonable, having regard to that loss and to any other relevant circumstances.

(5) If there is more than one such item of associated property or excepted joint owner, the total amount to be paid to the trustee, and the part of that amount which is to be provided by each person who holds any such associated property or who is an excepted joint owner, is to be agreed between both (or all) of them and the enforcement authority.

(6) A recovery order which makes any requirement under paragraph (1) must make provision for any recoverable property to cease to be recoverable.

Associated and joint property: default of agreement

183.—(1) Where this article applies, the court may make the following provision if—

- (a) there is no agreement under article 182, and
- (b) the court thinks it just and equitable to do so.

(2) The recovery order may provide—

- (a) for the associated property to vest in the trustee for civil recovery or (as the case may be) for the excepted joint owner's interest to be extinguished, or
- (b) in the case of an excepted joint owner, for the severance of his interest.

(3) A recovery order making any provision by virtue of paragraph (2)(a) may provide—

- (a) for the trustee to pay an amount to the person who holds the associated property or who is an excepted joint owner, or
- (b) for the creation of interests in favour of that person, or the imposition of liabilities or conditions, in relation to the property vested in the trustee,

or for both.

(4) In making any provision in a recovery order by virtue of paragraph (2) or (3), the court must have regard to—

- (a) the rights of any person who holds the associated property or who is an excepted joint owner and the value to him of that property or, as the case may be, of his share (including any value which cannot be assessed in terms of money),
- (b) the enforcement authority's interest in receiving the realised proceeds of the recoverable property.

(5) If—

- (a) a property freezing order, an interim receiving order, a prohibitory property order or an interim administration order applied at any time to the associated property or joint tenancy, and
- (b) the court is satisfied that the person who holds the associated property or who is an excepted joint owner has suffered loss as a result of the order mentioned in subparagraph (a),

a recovery order making any provision by virtue of paragraph (2) or (3) may require the enforcement authority to pay compensation to that person.

(6) The amount of compensation to be paid under paragraph (5) is the amount the court thinks reasonable, having regard to the person's loss and to any other relevant circumstances.

Payments in respect of rights under pension schemes

184.—(1) This article applies to recoverable property consisting of rights under a pension scheme.

(2) A recovery order in respect of the property must, instead of vesting the property in the trustee for civil recovery, require the trustees or managers of the pension scheme—

- (a) to pay to the trustee for civil recovery within the period determined in accordance with paragraph 5 of Schedule 4 (“the prescribed period”) the amount determined by the trustees or managers to be equal to the value of the rights, and
- (b) to give effect to any other provision made by virtue of this article and the two following articles in respect of the scheme.

This paragraph is subject to articles 187 to 189.

(3) A recovery order made by virtue of paragraph (2) overrides the provisions of the pension scheme to the extent that they conflict with the provisions of the order.

(4) A recovery order made by virtue of paragraph (2) may provide for the recovery by the trustees or managers of the scheme (whether by deduction from any amount which they are required to pay to the trustee for civil recovery or otherwise) of costs incurred by them in—

- (a) complying with the recovery order, or
- (b) providing information, before the order was made, to the enforcement authority, interim receiver or interim administrator.

(5) None of the following provisions applies to a court making a recovery order by virtue of paragraph (2)—

- (a) any provision of section 159 of the Pension Schemes Act 1993⁽²⁾, section 155 of the Pension Schemes (Northern Ireland) Act 1993⁽³⁾, section 91 of the Pensions Act 1995⁽⁴⁾ or Article 89 of the Pensions (Northern Ireland) Order 1995⁽⁵⁾ (which prevent assignment and the making of orders that restrain a person from receiving anything which he is prevented from assigning),
- (b) any provision of any enactment (whenever passed or made) corresponding to any of the provisions mentioned in sub-paragraph (a),
- (c) any provision of the pension scheme in question corresponding to any to those provisions.

Consequential adjustment of liabilities under pension schemes

185.—(1) A recovery order made by virtue of article 184(2) must require the trustees or managers of the pension scheme to make such reduction in the liabilities of the scheme as they think necessary in consequence of the payment made in pursuance of that paragraph.

(2) Accordingly, the order must require the trustees or managers to provide for the liabilities of the pension scheme in respect of the respondent's recoverable property to which article 184 applies to cease.

(3) So far as the trustees or managers are required by the recovery order to provide for the liabilities of the pension scheme in respect of the respondent's recoverable property to which article 184 applies to cease, their powers include (in particular) power to reduce the amount of—

- (a) any benefit or future benefit to which the respondent may be entitled under the scheme,
- (b) any future benefit to which any other person may be entitled under the scheme in respect of that property.

Pension schemes: supplementary

186.—(1) Schedule 4 has effect for the purposes of the exercise by trustees or managers of their powers under articles 184 and 185, including provision about the calculation and verification of the value at any time of rights and liabilities.

(2) A pension scheme means an occupational pension scheme or a personal pension scheme; and those expressions have the same meaning as in the Pension Schemes Act 1993 or, in relation to Northern Ireland, the Pension Schemes (Northern Ireland) Act 1993.

(3) In relation to an occupational pension scheme or a personal pension scheme, the trustees or managers means—

- (a) in the case of a scheme established under a trust, the trustees,
- (b) in any other case, the managers.

(4) References to a pension scheme include—

- (a) a retirement annuity contract (within the meaning of Part 3 of the Welfare Reform and Pensions Act 1999⁽⁶⁾ or, in relation to Northern Ireland, Part 4 of the Welfare Reform and Pensions (Northern Ireland) Order 1999⁽⁷⁾),
- (b) an annuity or insurance policy purchased, or transferred, for the purpose of giving effect to rights under an occupational pension scheme or a personal scheme,

(2) 1993 c. 48
(3) 1993 c. 49.
(4) 1995 c. 26
(5) S.I. 1995/3213 (N.I. 22).
(6) 1999 c. 30.
(7) S.I. 1999/3147 (N.I. 11).

- (c) an annuity purchased, or entered into, for the purpose of discharging any liability in respect of a pension credit under section 29(1)(b) of the Welfare Reform and Pensions Act 1999 or, in relation to Northern Ireland, Article 26(1)(b) of the Welfare Reform and Pensions (Northern Ireland) Order 1999.
- (5) References to the trustees or managers—
 - (a) in relation to a retirement annuity contract or other annuity, are to the provider of the annuity,
 - (b) in relation to an insurance policy, are to the insurer.
- (6) Paragraphs (2) to (5) have effect for the purposes of this group of articles (that is, articles 184, 185 and this article).

Consent orders

187.—(1) The court may make an order staying (in Scotland, sisting) any proceedings for a recovery order on terms agreed by the parties for the disposal of the proceedings if each person to whose property the proceedings, or the agreement, relates is a party both to the proceedings and the agreement.

- (2) An order under paragraph (1) may, as well as staying (or sisting) the proceedings on terms—
 - (a) make provision for any property which may be recoverable property to cease to be recoverable,
 - (b) make any further provision which the court thinks appropriate.

(3) Article 191 applies to property vested in the trustee for civil recovery, or money paid to him, in pursuance of the agreement as it applies to property vested in him by a recovery order or money paid under article 182.

Consent orders: pensions

188.—(1) This article applies where recoverable property to which proceedings under this Chapter relate includes rights under a pension scheme.

- (2) An order made under article 187—
 - (a) may not stay (in Scotland, sist) the proceedings on terms that the rights are vested in any other person, but
 - (b) may include provision imposing the following requirement, if the trustees or managers of the scheme are parties to the agreement by virtue of which the order is made.
- (3) The requirement is that the trustees or managers of the pension scheme—
 - (a) make a payment in accordance with the agreement, and
 - (b) give effect to any other provision made by virtue of this article in respect of the scheme.

(4) The trustees or managers of the pension scheme have power to enter into an agreement in respect of the proceedings on any terms on which an order made under article 187 may stay (in Scotland, sist) the proceedings.

(5) The following provisions apply in respect of an order under article 187, so far as it includes the requirement mentioned in paragraph (3).

(6) The order overrides the provisions of the pension scheme to the extent that they conflict with the requirement.

(7) The order may provide for the recovery by the trustees or managers of the scheme (whether by deduction from any amount which they are required to pay in pursuance of the agreement or otherwise) of costs incurred by them in—

- (a) complying with the order, or
 - (b) providing information, before the order was made, to the enforcement authority, interim receiver or interim administrator.
- (8) Articles 184(5) and 185 (read with article 186) apply as if the requirement were included in an order made by virtue of article 184(2).
- (9) Paragraphs (4) to (7) of article 186 have effect for the purposes of this article.

Limit on recovery

- 189.**—(1) This article applies if the enforcement authority seeks a recovery order—
- (a) in respect of both property which is or represents property which satisfies the tests in article 202(1) or (2) and related property, or
 - (b) in respect of property which is or represents property which satisfies those tests where such an order, or an order under article 187, has previously been made in respect of related property.
- (2) For the purposes of this article—
- (a) the original property means the property specified in the external order or a sum of money so specified,
 - (b) the original property, and any items of property which represent the original property, are to be treated as related to each other.
- (3) The court is not to make a recovery order if it thinks that the enforcement authority’s right to recover the original property has been satisfied by a previous recovery order or order under article 187.
- (4) Subject to paragraph (3), the court may act under paragraph (5) if it thinks that—
- (a) a recovery order may be made in respect of two or more related items of recoverable property, but
 - (b) the making of a recovery order in respect of both or all of them is not required in order to satisfy the enforcement authority’s right to recover the original property.
- (5) The court may in order to satisfy that right to the extent required make a recovery order in respect of—
- (a) only some of the related items of property, or
 - (b) only a part of any of the related items of property,
- or both.
- (6) Where the court may make a recovery order in respect of any property, this article does not prevent the recovery of any profits which have accrued in respect of the property.
- (7) If—
- (a) an order is made under section 298 of the Act for the forfeiture of recoverable property, and
 - (b) the enforcement authority subsequently seeks a recovery order in respect of related property,
- the order under section 298 is to be treated, for the purposes of this article as if it were a recovery order obtained by the enforcement authority in respect of the forfeited property.
- (8) If—
- (a) in pursuance of a judgment in civil proceedings (whether in the United Kingdom or elsewhere), the claimant has obtained property from the defendant (“the judgment property”),

- (b) the claim was based on the defendant's having obtained the judgment property or related property through unlawful conduct within the meaning of section 242 of the Act, and
- (c) the enforcement authority subsequently seeks a recovery order in respect of property which is related to the judgment property,

the judgment is to be treated for the purposes of this article as if it were a recovery order obtained by the enforcement authority in respect of the judgment property.

In relation to Scotland, "claimant" and "defendant" are to be read as "pursuer" and "defender".

(9) If—

- (a) property 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, and
- (b) the enforcement authority subsequently seeks a recovery order in respect of related property,

the confiscation order is to be treated for the purposes of this article as it were a recovery order obtained by the enforcement authority in respect of the property referred to in sub-paragraph (a).

(10) In paragraph (9), a confiscation order means—

- (a) an order under section 6, 92 or 156 of the Act or an external order registered under Parts 2, 3 or 4 of this Order,
- (b) an order under a corresponding provision of an enactment mentioned in section 8(7)(a) to (g) of the Act,

and, in relation to an order mentioned in sub-paragraph (b), the reference to the amount of a person's benefit from criminal conduct is to be read as a reference to the corresponding amount under the enactment in question.

Article 189: supplementary

190.—(1) Paragraphs (2) and (3) give examples of the satisfaction of the enforcement authority's right to recover the original property.

(2) If—

- (a) there is a disposal, other than a part disposal, of the original property, and
- (b) other property (the representative property) is obtained in its place,

the enforcement authority's right to recover the original property is satisfied by the making of a recovery order in respect of either the original property or the representative property.

(3) If—

- (a) there is a part disposal of the original property, and
- (b) other property (the representative property) is obtained in place of the property disposed of,

the enforcement authority's right to recover the original property is satisfied by the making of a recovery order in respect of the remainder of the original property together with either the representative property or the property disposed of.

(4) In this article—

- (a) a part disposal means a disposal to which article 211(1) applies,
- (b) the original property has the same meaning as in article 189.

Applying realised proceeds

191.—(1) This article applies to—

- (a) sums which represent the realised proceeds of property which was vested in the trustee for civil recovery by a recovery order or which he obtained in pursuance of a recovery order,
- (b) sums vested in the trustee by a recovery order or obtained by him in pursuance of a recovery order.

(2) The trustee is to make out of the sums—

- (a) first, any payment required to be made by him by virtue of article 183,
- (b) next, any payment of legal expenses which, after giving effect to article 177(11), are payable under this paragraph in pursuance of provision under article 177(10) contained in the recovery order,
- (c) next, any payment of expenses incurred by a person acting as an insolvency practitioner which are payable under this paragraph by virtue of article 3(10),

and any sum which remains is to be paid to the enforcement authority.

(3) The Director may apply a sum received by him under paragraph (2) in making payment of the remuneration and expenses of—

- (a) the trustee, or
- (b) any interim receiver appointed in, or in anticipation of, the proceedings for the recovery order.

(4) Paragraph (3)(a) does not apply in relation to the remuneration of the trustee if the trustee is a member of the staff of the Agency.