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SCOTTISH STATUTORY INSTRUMENTS

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**2005 No. 581**

**CRIMINAL LAW**

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

<i>Made</i>	- - - -	<i>15th November 2005</i>
<i>Laid before the Scottish Parliament</i>	- - - -	<i>1st December 2005</i>
<i>Coming into force</i>	- -	<i>31st December 2005</i>

At the Court at Buckingham Palace, the 15th day of November 2005

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, in exercise of the powers conferred upon Her by section 9 of the Criminal Justice (International Co operation) Act 1990<sup>(1)</sup> is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:

**PART 1**

**GENERAL PROVISIONS**

**Citation, commencement and extent**

**1.**—(1) This Order may be cited as the Criminal Justice (International Co operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 2005 and shall come into force on 31st December 2005.

(2) This Order extends to Scotland only.

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<sup>(1)</sup> 1990 c. 5; section 9 was amended by section 21 of the Criminal Justice Act 1993 (c. 36), by section 14 of the Proceeds of Crime Act 1995 (c. 11), by paragraph 190 of Schedule 6 to the Criminal Justice (Scotland) Act 1995 (c. 20) and by section 9 of the Serious Organised Crime and Police Act 2005 (c. 15).

## **Revocation and savings**

2.—(1) The Criminal Justice (International Co-operation) Act 1990 (Enforcement of Overseas Forfeiture Orders) (Scotland) Order 1999(2) (“the 1999 Order”) is hereby revoked, except article 10 and any other provisions in so far as they apply to article 10.

(2) Paragraph (1) does not apply in relation to a restraint order made or any external forfeiture order registered under the 1999 Order before the coming into force of this Order.

## **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<sup>(3)</sup>;
  - (b) section 78 of the Criminal Justice Act 1988<sup>(4)</sup>;
  - (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990<sup>(5)</sup>;
  - (d) section 27 of the Drug Trafficking Act 1994<sup>(6)</sup>;
  - (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996<sup>(7)</sup>.
- (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.
- (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).

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(3) 1986 c. 32.  
(4) 1988c.33.  
(5) S.I. 1990/2588 (N.I. 17).  
(6) 1994 c. 37.  
(7) S.I. 1996/1299 (N.I. 9).

- (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<sup>(8)</sup> (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.

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(8) 1868 c. 101.

(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<sup>(9)</sup>;
- (b) section 78 of the Criminal Justice Act 1988<sup>(10)</sup>;
- (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990<sup>(11)</sup>;

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<sup>(9)</sup> 1986 c. 32.

<sup>(10)</sup> 1988 c. 33.

<sup>(11)</sup> S.I. 1990/2588 (N.I. 17).

- (d) section 27 of the Drug Trafficking Act 1994<sup>(12)</sup>;
- (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996<sup>(13)</sup>.

#### **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.

## **PART 3**

### **EXTERNAL FORFEITURE ORDERS**

#### **Applications to give effect to external forfeiture orders**

**13.**—(1) On receipt of an external forfeiture order concerning relevant property in Scotland, the Lord Advocate may make an ex parte application to the court to give effect to the order.

(2) No application to give effect to such an order may be made otherwise than under paragraph (1).

(3) An application under paragraph (1) may be heard in chambers.

#### **Authentication by an overseas court**

**14.**—(1) Paragraph (2) applies where an overseas court has authenticated its involvement in—

- (a) any judgement;
- (b) any order;
- (c) any other document concerned with such a judgement or order or proceedings relating to it.

(2) Where this paragraph applies, any statement in the judgement, order or document is admissible in evidence in proceedings under this Part.

#### **Conditions for the court to give effect to external forfeiture orders**

**15.**—(1) The court must decide to give effect to an external forfeiture order where all of the following conditions are satisfied.

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<sup>(12)</sup> 1994 c. 37.

<sup>(13)</sup> S.I. 1996/1299 (N.I. 9).

(2) The first condition is that the external forfeiture order was made consequent on the conviction of the person named in the order and no appeal is outstanding in respect of that conviction.

(3) The second condition is that the external forfeiture order is in force and no appeal is outstanding in respect of it.

(4) The third condition is that giving effect to the external forfeiture order would not be incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998<sup>(14)</sup>) of any person affected by it.

(5) The fourth condition is that the specified property must not be subject to a charge under—

- (a) section 9 of the Drug Trafficking Offences Act 1986<sup>(15)</sup>;
- (b) section 78 of the Criminal Justice Act 1988<sup>(16)</sup>;
- (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990<sup>(17)</sup>;
- (d) section 27 of the Drug Trafficking Act 1994<sup>(18)</sup>;
- (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996<sup>(19)</sup>.

(6) In paragraph (3) “appeal” includes—

- (a) any proceedings by way of discharging or setting aside the order; and
- (b) an application for a new trial or suspension or delay in execution of any penalty or sentence.

### **Registration of external forfeiture orders**

**16.**—(1) Where the court decides to give effect to an external forfeiture order, it must—

- (a) register the order; and
- (b) provide for notice of the registration to be given to any person affected by it.

(2) Only an external forfeiture order registered by the court may be implemented under this Order.

(3) The court may cancel the registration of the external forfeiture order, or vary the property to which it applies, on an application by the Lord Advocate or any person affected by it if, or to the extent that, the court is of the opinion that any of the conditions in article 15 is not satisfied.

(4) Notice of an application under paragraph (3) must be given—

- (a) in the case of an application by the Lord Advocate, to any person affected by the registration of the external forfeiture order; and
- (b) in any other case, to the Lord Advocate and any other person affected by the registration of the external forfeiture order.

(5) The court shall not cancel the registration of the external forfeiture order or vary the property to which it applies under paragraph (3) unless it gives the Lord Advocate and any person affected by it the opportunity to make representations to it.

(6) The court must cancel the registration of the external forfeiture order or an application by the Lord Advocate or any person affected by it, if it appears to the court that the order has been satisfied—

- (a) by the surrender of the specified property, or
- (b) by any other means.

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<sup>(14)</sup> 1998 c. 42.

<sup>(15)</sup> 1986 c. 32.

<sup>(16)</sup> 1988 c. 33.

<sup>(17)</sup> S.I. 1990/2588 (N.I. 17).

<sup>(18)</sup> 1994 c. 37.

<sup>(19)</sup> S.I. 1996/1299 (N.I. 9).

(7) Where the registration of an external forfeiture order is cancelled or varied under paragraph (3) or (6), the court must provide for notice of this to be given to the Lord Advocate and any person affected by it.

#### **Appeal about external forfeiture orders**

**17.—**(1) If on an application for the court to give effect to an external forfeiture order by registering it, the court decides not to do so, the Lord Advocate may reclaim against the decision.

(2) If an application is made under article 16(3) or (6) in relation to the registration of an external forfeiture order, the following persons may reclaim against the court's decision on the application—

- (a) the Lord Advocate;
- (b) any person affected by the registration.

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

- (a) confirm or set aside the decision to register; or
- (b) direct the court to register the external forfeiture order (or so much of it as relates to property other than that to which article 15(5) applies).

#### **Appointment of enforcement administrators**

**18.—**(1) This article applies if—

- (a) an external forfeiture order is registered; and
- (b) it is not satisfied within a reasonable time.

(2) On the application of the Lord Advocate the court may appoint an administrator in respect of the specified property.

#### **Powers of enforcement administrators in respect of external forfeiture orders for the recovery of specified property**

**19.—**(1) If the court appoints an administrator under article 18, it may act under this article on the application of the Lord Advocate.

(2) The court may confer on the administrator the following powers in relation to the specified property—

- (a) power to take possession of the property;
- (b) power to manage or otherwise deal with the property;
- (c) power to realise the property in such manner as the court may specify.

(3) The court may order any person who has possession of the specified property to give possession of it to the administrator.

(4) The clerk of court must notify the offender and any person subject to an order under paragraph (3) of the making of that order.

(5) Any dealing of the offender or any such person in relation to which the order applies is of no effect in a question with the administrator unless the person had no knowledge of the administrator's appointment.

(6) The court—

- (a) may order a person holding an interest in the specified property to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the offender 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.
- (7) The court must not—
  - (a) confer the power mentioned in paragraph (2)(b) or (c) in respect of the property; or
  - (b) exercise the power conferred on it by paragraph (6) in respect of property,unless it gives persons holding interests in the property a reasonable opportunity to make representations about it.
- (8) The court may order that a power conferred by an order under this article is subject to such conditions and exceptions as it specifies.
- (9) 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.

#### **Satisfaction of external forfeiture order**

**20.** A registered external forfeiture order is satisfied when the specified property has been disposed of in accordance with that order.

## **PART 4**

### **ADMINISTRATORS AND PROCEDURE**

#### **Protection of administrator appointed under article 10 or 18**

- 21.**—(1) If an administrator appointed under article 10 or 18—
- (a) takes action in relation to property which is not the specified property;
  - (b) would be entitled to take the action if it were the specified property; and
  - (c) believes that there are reasonable grounds for taking the action,
- the administrator is not liable to any person in respect of any loss or damage resulting from the action, except so far as the loss or damage is caused by that administrator's negligence.
- (2) Any amount due in respect of the remuneration and expenses of an administrator so appointed must be paid by the Lord Advocate.

#### **Protection of persons affected**

- 22.**—(1) This paragraph applies where an administrator is appointed under article 10 or 18.
- (2) The following persons may apply to the court—
- (a) any person affected by action taken by the administrator;
  - (b) any person who may be affected by action the administrator proposes to take.
- (3) On an application under this article the court may make such order as it thinks appropriate.

### **Recall and variation of order**

**23.—**(1) The Lord Advocate, an administrator and any other person affected by an order made under article 10, 18 or 19 may apply to the court to vary or recall the order.

(2) On an application under this article the court—

- (a) may vary the order;
- (b) may recall the order.

(3) But in the case of an order under article 10—

- (a) if the conditions in article 4 were satisfied by virtue of the fact that proceedings were instituted, the court must recall the order if at the conclusion of the proceedings no external forfeiture order has been made or if within a reasonable time an external forfeiture order has not been registered under Part 3 of this Order;
- (b) if the conditions were satisfied by virtue of the fact that an investigation was instituted the court must recall the order if within a reasonable period proceedings for the offence are not instituted.

### **Management administrators: discharge**

**24.—**(1) This article applies if—

- (a) an administrator stands appointed under article 10 in respect of property which is identified in the restraint order (the management administrator); and
- (b) the court appoints an administrator under article 18.

(2) The court must order the management administrator to transfer to the other administrator all property held by the management administrator by virtue of the powers conferred by article 10.

(3) If the management administrator complies with an order under paragraph (2) that administrator is discharged—

- (a) from appointment under article 10;
- (b) from any obligation under this Order arising from that appointment.

### **Appeals**

**25.—**(1) If on an application for an order under article 10, 18 or 19 the court decides not to make one, the Lord Advocate may reclaim in respect of the decision.

(2) If the court makes an order under article 10, 18 or 19 the following persons may reclaim in respect of the court's decision—

- (a) the Lord Advocate;
- (b) any person affected by the Order.

(3) If on an application for an order under article 23 the court decides not to make one, the person who applied for the order may reclaim in respect of the decision.

(4) If the court makes an order under article 23, the following persons may reclaim in respect of the court's decision—

- (a) the person who applied for the order in respect of which the application was made;
- (b) any person affected by the court's decision;
- (c) the administrator.

(5) The following persons may reclaim in respect of a decision of the court on an application under article 24—

- (a) the person who applied for the order in respect of which the application was made;
  - (b) any person affected by the court's decision;
  - (c) the administrator.
- (6) On a reclaiming motion under this article the court may—
- (a) confirm the decision;
  - (b) make such order as it thinks appropriate.

#### **Administrators: further provision**

26. Schedule 1 which makes further provision about administrators appointed under articles 10 and 18 has effect.

#### **Administrators: restrictions on proceedings and remedies**

27.—(1) Where an administrator is appointed under article 18, the court may sist any action, execution or other legal process in respect of the property to which the order appointing the administrator relates.

(2) If a court (whether the Court of Session or any other court) in which proceedings are pending, in respect of the property is satisfied that an application has been made for the appointment of an administrator or that an administrator has been appointed in relation to that 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;
- (b) if appointed, the administrator.

## **PART 5**

### **INTERPRETATION**

#### **General interpretation**

28. In this Order—

“court” means the Court of Session;

“designated country” means a country or territory designated under Schedule 2 to this Order;

“overseas authority” means an authority which has responsibility in a country or territory outside the United Kingdom for making a request to an authority in another country or territory (including United Kingdom) to prohibit dealing with relevant property;

“overseas court” means a court of a country or territory outside the United Kingdom;

“a relevant officer of Revenue and Customs” means such an officer exercising functions by virtue of section 6 of the Commissioners for Revenue and Customs Act 2005(20).

#### **External forfeiture orders**

29.—(1) An order made—

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(20) 2005 c. 11.

- (a) by a court in a designated country,
- (b) for the forfeiture and destruction, or the forfeiture and other disposal, of anything in respect of which a relevant offence has been committed or which was used or intended for use in connection with the commission of such an offence,

is referred to in this Order as an “external forfeiture order”.

(2) In paragraph (1)–

- (a) a “relevant offence” means any offence that corresponds to or is similar to an offence under the law of Scotland;
- (b) the reference to an order includes any order, decree, direction or judgement, or any part thereof, however described.

### **Designated countries**

**30.** The countries or territories set out in Schedule 2 to this Order are hereby designated for the purposes of section 9 of the Criminal Justice (International Co operation) Act 1990.

### **Property**

**31.**—(1) In this Order–

- (a) a reference to property is a reference to all property wherever situated and includes–
  - (i) money;
  - (ii) all forms of property, whether heritable or moveable and whether corporeal or incorporeal;
- (b) property is held by a person if that person holds an interest in it;
- (c) property is obtained by a person if that person obtains an interest in it;
- (d) property is transferred by one person to another if the first one transfers or grants an interest in it to the second;
- (e) references to property held by a person include references to property vested in that person’s permanent or interim trustee (within the meaning of the Bankruptcy (Scotland) Act 1985(21)), trustee in bankruptcy or liquidator);
- (f) references to an interest held by a person beneficially in property include references to an interest which would be held by him beneficially if the property were not so vested;
- (g) references to an interest, in relation to land in Scotland, are to any estate, interest, servitude or other heritable right in or over land, including a heritable security;
- (h) references to an interest, in relation to property other than land, include references to a right (including a right to possession).

(2) Property is “relevant property” if there are reasonable grounds to believe that it may be needed to satisfy an external forfeiture order which has been made or which may be made.

(3) “Specified property” in relation to an external forfeiture order means the property, the recovery of which is specified in the external forfeiture order.

### **Tainted gifts and their recipients**

**32.**—(1) In this Order, a gift is tainted if it was made by the accused or offender, as the case may be, at any time after–

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(21) 1985 c. 66.

- (a) the date on which the offence to which the external forfeiture order or request relates was committed, or
  - (b) if the accused or offender's criminal conduct consists of two or more such offences and they were committed on different dates, the date of the earliest.
- (2) For the purposes of paragraph (1), an offence which is a continuing offence is committed on the first occasion when it is committed.
- (3) A gift may be a tainted gift whether it was made before or after the coming into force of this Order.
- (4) In this Order, an accused or offender, as the case may be, is to be treated as making a gift if that accused or offender transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer.
- (5) If paragraph (4) applies, the property given is to be treated as such share in the property transferred as is represented by the fraction—
- (a) whose numerator is the difference between the two values mentioned in paragraph (4), and
  - (b) whose denominator is the value of the property at the time of the transfer.
- (6) In this Order, references to a recipient of a tainted gift are to a person to whom the accused or offender, as the case may be, has (whether directly or indirectly) made the gift.

#### **Value: the basic rule**

- 33.**—(1) Subject to article 34, this article applies where it is necessary under this Order to decide the value at any time of property then held by that person.
- (2) Its value is the market value of the property at that time.
- (3) But if at that time another person holds an interest in the property its value, in relation to the person mentioned in paragraph (1) is the market value of that person's interest at that time ignoring any charging order under a provision listed in paragraph (4).
- (4) Those provisions are—
- (a) section 9 of the Drug Trafficking Offences Act 1986<sup>(22)</sup>;
  - (b) section 78 of the Criminal Justice Act 1988<sup>(23)</sup>;
  - (c) article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990<sup>(24)</sup>;
  - (d) section 27 of the Drug Trafficking Act 1994<sup>(25)</sup>;
  - (e) article 32 of the Proceeds of Crime (Northern Ireland) Order 1996<sup>(26)</sup>.

#### **Value of tainted gifts**

- 34.**—(1) The value at any time (the material time) of a tainted gift is the greater of the following—
- (a) the value (at the time of the gift) of the property given, adjusted to take account of later changes in the value of money;
  - (b) the value (at the material time) of the property found under paragraph (2).
- (2) The property found under this paragraph is as follows—
- (a) if the recipient holds the property given, that property;

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<sup>(22)</sup> 1986 c. 32.

<sup>(23)</sup> 1988 c. 33.

<sup>(24)</sup> S.I. 1990/2588 (N.I. 17).

<sup>(25)</sup> 1994 c. 37.

<sup>(26)</sup> S.I. 1996/1299 (N.I. 9).

- (b) if the recipient holds no part of the property given, any property which directly or indirectly represents it in the recipient's hands;
  - (c) if the recipient holds part of the property given, that part and any property which directly or indirectly represents the other part in the recipient's hands.
- (3) The references in paragraph (1)(a) and (b) to the value are to the value found in accordance with article 33.

**Meaning of “accused” and “offender”**

**35. In this Order—**

“accused”, in relation to a restraint order means—

- (a) in a case in which the conditions in article 4 are satisfied by virtue of the fact that a criminal investigation has been instituted, the alleged offender;
- (b) in a case in which the conditions in article 4 are satisfied by virtue of the fact that proceedings for an offence have been instituted, the person against whom those proceedings have been instituted (whether or not that person has been convicted);

“offender”, in relation to an external forfeiture order means the person convicted of criminal conduct.

*A. K. Galloway*  
Clerk of the Privy Council

## SCHEDULE 1

Article 26

### ADMINISTRATORS: FURTHER PROVISION

#### *General*

1. In this Schedule, unless otherwise expressly provided—
  - (a) references to an administrator are to an administrator appointed under article 10 or 18;
  - (b) references to specified property are to the specified property in respect of which the administrator is appointed.

#### *Appointment etc.*

- 2.—(1) If the office of administrator is vacant, for whatever reason, the court must appoint a new administrator.
  - (2) Any property vested in the previous administrator vests in the new administrator.
  - (3) Any order under article 10 or 19(3) in relation to the previous administrator applies in relation to the new administrator when the new administrator gives written notice of appointment to the person subject to the order.
  - (4) The administration of property by an administrator must be treated as continuous despite any temporary vacancy in that office.
  - (5) The appointment of an administrator is subject to such conditions as to caution as the accountant of court may impose.
  - (6) The premium of any bond of caution or other security required by such conditions must be treated as part of the administrator's expenses in the exercise of the administrator's functions.

#### *Functions*

- 3.—(1) An administrator—
  - (a) may, if appointed under article 10; and
  - (b) must, if appointed under article 18(2), as soon as practicable take possession of the property, as the case may be, and of the documents mentioned in sub paragraph (2).
- (2) Those documents are any documents which—
  - (a) is in the possession or control of the person ("A") in whom the property is vested (or would be vested but for an order made under paragraph 5(4)); and
  - (b) relates to the property or to A's assets, business or financial affairs.
- (3) An administrator is entitled to have access to, and to copy, any document relating to the property or to A's assets, business or financial affairs and not falling within sub paragraph (2)(a).
- (4) An administrator may bring, defend or continue any legal proceedings relating to the property.
- (5) An administrator may borrow money so far as it is necessary to do so to safeguard the property and may for the purposes of such borrowing create a security over any part of the property.
- (6) An administrator may, if of the view that it would be beneficial for the management or realisation of the property—
  - (a) carry on any business of A;
  - (b) exercise any right of A as holder of securities in a company;
  - (c) grant a lease of the property to take on lease any other property;

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- (d) enter into any contract, or execute any deed, as regards the property or as regards A's business.
- (7) An administrator may, where any right, option or other power forms part of A's estate, make payments or incur liabilities with a view to—
  - (a) obtaining property which is the subject of; or
  - (b) maintaining,
 the right, option or power.
- (8) An administrator may effect or maintain insurance policies as regards the property on A's business.
- (9) An administrator may, if appointed under article 18(2), complete any uncompleted title which A has to any heritable estate; but completion of title in A's name does not validate by accretion any unperfected right in favour of any person other than the administrator.
- (10) An administrator may sell, purchase or exchange property or discharge any security for an obligation due to A; but it is incompetent for the administrator or an associate of the administrator (within the meaning of section 74 of the Bankruptcy (Scotland) Act 1985<sup>(27)</sup>) to purchase any of A's property in pursuance of this sub paragraph.
- (11) An administrator may claim, vote and draw dividends in the sequestration of the estate (for bankruptcy or liquidation) of a debtor of A and may accede to a voluntary trust deed for creditors of such a debtor.
- (12) An administrator may discharge any functions through agents or employees, but is personally liable to meet the fees and expenses of any such agent or employee out of which remuneration as is payable to the administrator on a determination by the account of court.
- (13) An administrator may take such professional advice as that administrator considers necessary in connection with the exercise of that administrator's functions.
- (14) An administrator may at any time apply to the court for directions as regards the exercise of that administrator's functions.
- (15) An administrator may exercise any power specifically conferred on that administrator by the court, whether conferred on appointment or subsequently.
- (16) An administrator may—
  - (a) enter any premises;
  - (b) search for or inspect anything authorised by the court;
  - (c) make or obtain a copy, photograph or other record of anything so authorised;
  - (d) remove anything which the administrator is required or administered to take possession of in pursuance of an order of the court.
- (17) An administrator may do anything incidental to the powers and duties listed in the previous provisions of this paragraph.

#### *Consent of accountant of court*

4. An administrator proposing to exercise any power conferred by paragraph 3(4) to (7) must first obtain consent of the accountant of court.

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(27) 1985 c. 66.



### *Dealings in good faith with administrator*

**5.—**(1) A person dealing with an administrator in good faith and for value is not concerned to enquire whether the administrator is acting within the powers mentioned in paragraph 3.

(2) Sub paragraph (1) does not apply where the administrator or an associated purchases property in contravention of paragraph 3(10).

(3) The validity of any title is not challengeable by reason only of the administrator having acted outwith the powers mentioned in paragraph 3.

(4) The exercise of a power mentioned in paragraphs 3(4) to (11) must be in A's name except where and in so far as an order made by the court under this sub paragraph vests the property in the administrator (or in a previous administrator).

(5) The court may make an order under sub paragraph (4) on the application of the administrator or on its own motion.

### *Money received by administrator*

**6.—**(1) All money received by an administrator in the exercise of that administrator's functions must be deposited by that administrator, in the name (unless vested in the administrator by virtue of paragraph 5(4)) of the holder of the property realised, in an appropriate bank or institution.

(2) But the administrator may at any time retain a sum not exceeding £200.

(3) In sub paragraph (1), "appropriate bank or institution" means a bank or institution mentioned in section 3(1) of the Banking Act 1987<sup>(28)</sup> or for the time being specified in Schedule 2 to that Act.

### *Effect of appointment of administrator on diligence*

**7.—**(1) An arrestment or poinding of specified property, executed on or after the appointment of an administrator does not create a preference for the arrester or poinder.

(2) Any specified property so arrested or poinded, or (if the property has been sold) the proceeds of sale, must be handed over to the administrator.

(3) A poinding of the ground in respect of specified property on or after such appointment is ineffectual in a question with the administrator except for the interest mentioned in sub paragraph (4).

(4) That interest is—

- (a) interest on the debt of a secured creditor for the current half-yearly term; and
- (b) arrears of interest on that debt for one year immediately before the commencement of that term.

(5) On and after such appointment no other person may raise or insist in an adjudication against specified property or be confirmed as executor – creditor on that property.

(6) An inhibition on specified property which takes effect on or after such appointment does not create a preference for the inhibitor in a question with the administrator.

(7) This paragraph is without prejudice to articles 8 and 9.

(8) In this paragraph, the reference to an administrator is to an administrator appointed under article 18(2).

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(28) 1987 c. 22.

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### *Supervision*

**8.—**(1) If the accountant of court reports to the court that an administrator has failed to perform any duty imposed on that administrator, the court may, after giving the administrator an opportunity to be heard as regards the matter—

- (a) remove the administrator from office;
- (b) censure the administrator; or
- (c) make such order as it thinks fit.

(2) Section 6 of the Judicial Factors (Scotland) Act 1889<sup>(29)</sup> does not apply in relation to an administrator.

### *Accounts and remuneration*

**9.—**(1) Not later than two weeks after the issuing of any determination by the accountant of court as to the remuneration and expenses payable to the administrator, the administrator or the Lord Advocate may appeal against it to the court.

(2) The amount of remuneration payable to the administrator must be determined on the basis of the value of the work reasonably undertaken by that administrator, regard being had to the extent of the responsibilities involved.

(3) The accountant of court may authorise the administrator to pay without taxation an account in respect of legal services incurred by the administrator.

### *Discharge of Administrator*

**10.—**(1) After an administrator has lodged final accounts under paragraph 9(1), that administrator may apply to the accountant of court to be discharged from office.

(2) A discharge, if granted, frees the administrator from all liability (other than liability arising from fraud) in respect of any act or omission of that administrator in exercising functions as administrator.

## SCHEDULE 2

Article 28

### Designated Countries

Afghanistan  
 Albania  
 Algeria  
 Andorra  
 Angola  
 Antigua and Barbuda  
 Argentina  
 Armenia  
 Australia  
 Austria  
 Azerbaijan

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(29) 1889 c. 39.

Bahamas  
Bahrain  
Bangladesh  
Barbados  
Belarus  
Belgium  
Belize  
Benin  
Bhutan  
Bolivia  
Bosnia and Herzegovina  
Botswana  
Brazil  
Brunei Darussalem  
Bulgaria  
Burkina Faso  
Burundi  
Cambodia  
Cameroon  
Canada  
Cape Verde  
Central African Republic  
Chad  
Chile  
China  
Colombia  
Comoros  
Congo  
Cook Islands  
Costa Rica  
Côte D'Ivoire  
Croatia  
Cuba  
Cyprus  
Czech Republic  
Denmark  
Djibouti  
Dominica  
Dominican Republic  
Ecuador

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Egypt  
El Salvador  
Eritrea  
Equatorial Guinea  
Estonia  
Ethiopia  
Fiji  
Finland  
France  
Gabon  
Gambia  
Georgia  
Germany  
Ghana  
Greece  
Grenada  
Guatemala  
Guinea  
Guinea Bissau  
Guyana  
Haiti  
Honduras  
Hungary  
Iceland  
India  
Indonesia  
Iran (Islamic Republic of)  
Iraq  
Ireland  
Israel  
Italy  
Jamaica  
Japan  
Jordan  
Kazakhstan  
Kenya  
Kuwait  
Kyrgyzstan  
Lao's People's Democratic Republic  
Latvia

Lebanon  
Lesotho  
Liberia  
Libyan Arab Jamahiriya  
Liechtenstein  
Lithuania  
Luxemburg  
Madagascar  
Malawi  
Malaysia  
Maldives  
Mali  
Malta  
Mauritania  
Mauritius  
Mexico  
Micronesia (Federal States of)  
Moldova  
Monaco  
Mongolia  
Morocco  
Mozambique  
Myanmar  
Namibia  
Nauru  
Nepal  
Netherlands  
New Zealand  
Nicaragua  
Niger  
Nigeria  
Norway  
Oman  
Pakistan  
Panama  
Paraguay  
Peru  
Philippines  
Poland  
Portugal

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Qatar  
Republic of Korea  
Romania  
Russian Federation  
Rwanda  
Saint Kitts & Nevis  
Saint Lucia  
Saint Vincent and the Grenadines  
San Marino  
San Tome & Principe  
Saudi Arabia  
Senegal  
Serbia and Montenegro  
Seychelles  
Sierra Leone  
Singapore  
Slovakia  
Slovenia  
South Africa  
Spain  
Sri Lanka  
Sudan  
Suriname  
Swaziland  
Sweden  
Switzerland  
Syrian Arab Republic  
Tajikistan  
Thailand  
The former Yugoslav Republic of Macedonia  
Togo  
Tonga  
Trinidad and Tobago  
Tunisia  
Turkey  
Turkmenistan  
Uganda  
Ukraine  
United Arab Emirates  
United Republic of Tanzania

United States of America

Uruguay

Uzbekistan

Venezuela

Vietnam

Yemen

Zambia

Zimbabwe

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## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order makes provision in respect of the enforcement in Scotland of orders made in designated countries for the forfeiture of anything in respect of which an offence has been committed or which was used in connection with the commission of an offence. The designated countries are listed in Schedule 2.

Part 2 makes provisions for prohibitions (“restraint orders”) on dealing with property, situated in Scotland, which is specified in a request by an overseas authority. In order to exercise the powers to make a restraint order, the Court of Session must be satisfied that the conditions set out in article 4 are satisfied. The conditions include a requirement that a criminal investigation or proceedings have been started in the country from which the external request was made with regard to an offence. The Lord Advocate is responsible for applying to the Court of Session for a restraint order (article 3). Articles 5 to 7 make supplementary provision about the making of restraint orders, including provisions for appeals relating to them. Articles 8 and 9 allow the Court to grant warrant for inhibition in respect of heritable property to which a restraint order applies or for arrestment in relation to moveable property to which it applies. Article 10 provides for the appointment and powers of administrators in respect of property subject to restraint orders. Article 11 provides for the seizure of property subject to a restraint order and article 12 provides for the sisting of proceedings relating to property to which a restraint order applies while the order has effect.

Part 3 makes provision for the registration of external forfeiture orders, which arise from a criminal conviction in the country from which the order was sent and concern relevant property in Scotland. An application for registration is to be made by the Lord Advocate (article 13). The conditions set out in article 15 must be satisfied if the Court of Session is to give effect to the order by registering it. Where the conditions are satisfied the court must register the external order (article 16(1)). Article 17 provides for appeals. Articles 18 and 19 provide for the appointment and powers of enforcement administrators in respect of property specified in the external order. Article 20 sets out the circumstances in which an external forfeiture order has been satisfied.

Part 4 makes further provision about administrators. This includes provision about protecting administrators in respect of things done by them (article 21) and the protection of persons affected by action taken by the administrator (article 22). Provision is made and the recall and variation of orders affecting administrators (article 23) as well as the discharge of administrators in certain

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circumstances (article 24). Article 25 provides for appeals about orders made by the court with regard to administrators. Schedule 1 makes further provision about administrators.

Part 5 provides for interpretation of the Order.