



Proceeds of Crime (Scotland) Act 1995

1995 CHAPTER 43

PART III

RESTRAINT ORDERS

28 Restraint orders

- (1) The court may, on the application of the prosecutor, make an order (in this Part of this Act referred to as a “restraint order”) in the circumstances mentioned in—
 - (a) section 29(2) or (3) of this Act interdicting—
 - (i) any person named in the order from dealing with his realisable property; or
 - (ii) that person and any person named in the order as appearing to the court to have received from him a gift caught by Part I of this Act or, as the case may be, an implicative gift from dealing with their own, or the other's, realisable property,
(whenever that property was acquired and whether it is described in the order or not); and
 - (b) section 30(1) of this Act interdicting any person named in the order from dealing with any property which is, or is liable to be, the subject of a suspended forfeiture order.
- (2) A restraint order made under subsection (1)(a) above may contain conditions and exceptions to which the interdict shall be subject and in particular—
 - (a) may provide for the release to the person named in the order of such reasonable living expenses as the court thinks fit; and
 - (b) shall provide for the release of property in so far as it is required to meet reasonable legal expenses payable or likely to be payable in relation to proceedings—
 - (i) as regards the offence by virtue of which the restraint order has been made; or
 - (ii) as regards a confiscation order made on conviction of the offence.

- (3) A restraint order shall—
- (a) be made on an *ex parte* application which shall be heard in chambers; and
 - (b) without prejudice to the time when it becomes effective, be intimated to each person affected by it.
- (4) For the purposes of this Part of this Act, dealing with property includes (without prejudice to the generality of the expression)—
- (a) making a payment to any person in reduction of the amount of a debt;
 - (b) removing the property from the jurisdiction of the court; and
 - (c) transferring or disposing of the property.
- (5) Where the court has made a restraint order (including a restraint order made under and within the meaning of the 1994 Act), a constable or a person commissioned by the Commissioners of Customs and Excise may, for the purpose of preventing any property subject to the order being removed—
- (a) in the case of a restraint order made in connection with a drug trafficking offence (including a drug trafficking offence within the meaning of the 1994 Act) from Great Britain;
 - (b) in any other case, the jurisdiction of the court, seize that property.
- (6) Property seized under subsection (5) above shall be dealt with in accordance with the directions of the court which made the order.
- (7) In this Part of this Act, “the court” means where, as regards the criminal proceedings in question, a trial diet or a diet fixed for the purposes of section 76 of the 1995 Act is intended to be held, is being or has been held—
- (a) in the High Court of Justiciary, the Court of Session;
 - (b) in the sheriff court, a sheriff of that court exercising his civil jurisdiction.
- (8) The court may, where it has granted a restraint order, interdict a person not subject to that order from dealing with property affected by it while it is in force.
- (9) Subsections (2)(a) and (3)(a) above shall apply in relation to an interdict under subsection (8) above as they apply in relation to subsection (1) above; and subsections (1), (2), (4) and (5) of section 31 of this Act shall apply in relation to an interdict under subsection (8) above as they apply in relation to a restraint order.
- (10) Without prejudice to the time when it becomes effective, an interdict under subsection (8) above shall be intimated to each person affected by it.

29 Restraint orders in relation to realisable property

- (1) A restraint order under section 28(1)(a) of this Act may be made in the circumstances mentioned in either subsection (2) or (3) below.
- (2) For the purposes of this subsection, the circumstances are—
- (a) proceedings have been instituted against an accused in Scotland for an offence to which Part I of this Act applies;
 - (b) the proceedings have not been concluded; and

Status: This is the original version (as it was originally enacted).

- (c) either a confiscation order has been made or it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a confiscation order may be made in those proceedings.
- (3) For the purposes of this subsection, the circumstances are that the court is satisfied that—
- (a) it is proposed to institute proceedings within 28 days against a person suspected of such an offence and it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a confiscation order may be made in those proceedings; or
 - (b) the prosecutor has made, or proposes within 28 days to make, an application under section 11 or, as the case may be, section 13 of this Act in relation to that person in respect of the offence, and it appears to the court that there are reasonable grounds for thinking that the application may be granted.
- (4) Where the court has made a restraint order in the circumstances mentioned in subsection (3)(a) or (b) above and no proceedings have been instituted or application made within 28 days as mentioned in that subsection, the prosecutor shall forthwith apply to the court for the recall of the order and the court shall grant the application.
- (5) When proceedings for the offence or, as the case may be, proceedings on an application under section 11 or 13 of this Act are concluded, the prosecutor shall forthwith apply to the court for recall of the order and the court shall grant the application.
- (6) For the purposes of this section, proceedings are concluded as regards an offence where—
- (a) the trial diet is deserted *simpliciter*;
 - (b) the accused is acquitted or, under section 65 or 147 of the 1995 Act, discharged or liberated;
 - (c) the High Court of Justiciary or, as the case may be, the sheriff sentences or otherwise deals with him without making a confiscation order and without postponing a decision as regards making such an order;
 - (d) after such postponement as is mentioned in paragraph (c) above, the High Court of Justiciary or, as the case may be, the sheriff decides not to make a confiscation order;
 - (e) his conviction is quashed; or
 - (f) a confiscation order made in the proceedings is satisfied (whether by payment of the amount due under the order or by the accused serving imprisonment in default).
- (7) For the purposes of this section, proceedings on an application under section 11 or 13 of this Act are concluded—
- (a) when the application is refused; or
 - (b) where the application is granted, when a confiscation order made in the proceedings is satisfied (whether by payment of the amount due under the order or by the accused serving imprisonment in default).

30 Restraint orders in relation to forfeitable property

- (1) A restraint order may be made in respect of a person under section 28(1)(b) where—
- (a) proceedings have been instituted against him in Scotland for an offence;
 - (b) the proceedings have not been concluded; and

- (c) a suspended forfeiture order has been made in respect of the property concerned or it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a suspended forfeiture order may be made in those proceedings.
- (2) A restraint order may also be made where the court is satisfied that it is proposed to institute proceedings in respect of an offence within 28 days and it appears to the court that, in the event of his conviction of the offence, there are reasonable grounds for thinking that a suspended forfeiture order may be made in those proceedings.
- (3) Where the court has made a restraint order by virtue of subsection (2) above, and no proceedings have been instituted within 28 days as mentioned in that subsection, the prosecutor shall forthwith apply to the court for the recall of the order and the court shall grant the application.
- (4) When proceedings for the offence are concluded, the prosecutor shall forthwith apply to the court for recall of the order and the court shall grant the application.
- (5) For the purposes of this section, proceedings are concluded as regards an offence where—
 - (a) the trial is deserted *simpliciter*;
 - (b) the accused is acquitted or, under section 65 or 147 of the 1995 Act, discharged or liberated;
 - (c) the High Court of Justiciary or, as the case may be, the sheriff sentences or otherwise deals with him without making a suspended forfeiture order;
 - (d) his conviction is quashed;
 - (e) a suspended forfeiture order made in the proceedings is recalled or varied so as to exclude from forfeiture any property to which the restraint order relates; or
 - (f) the property, or part of the property, to which the restraint order relates is forfeited.

31 Variation and recall of restraint orders

- (1) Subject to subsections (2) and (3) below, the court may, at the instance of—
 - (a) the prosecutor, at any time vary or recall a restraint order in relation to any person or to any property;
 - (b) any person having an interest, at any time vary or recall a restraint order in relation to the person or to any property.
- (2) On an application made under subsection (1)(b) above by a person named in a restraint order as having received a gift caught by Part I of this Act or, as the case may be, an implicative gift, the court may recall the order in relation to that person if it is satisfied on the balance of probabilities—
 - (a) that he received the gift not knowing, not suspecting and not having reasonable grounds to suspect that the gift was made in contemplation of, or after, the commission of the offence or if more than one, in contemplation of any of the offences or after the commission of the earlier or the earliest of the offences to which the proceedings for the time being relate; and
 - (b) that he was not associated with the giver in the commission of the offence; and
 - (c) that he would suffer hardship if the order were not recalled.
- (3) Where an application has been made under subsection (1) above for the variation or recall of a restraint order, any property in relation to which the restraint order was made

shall not be realised during the period beginning with the making of the application and ending with the determination of the application by the court.

- (4) The court may, where it has recalled a restraint order as mentioned in subsection (1) (b) or (2) above, order that property of the person at whose instance it was recalled shall cease to be realisable or, as the case may be, liable to forfeiture.
- (5) The prosecutor or any person having an interest may reclaim or appeal to the Court of Session against an interlocutor refusing, varying or recalling or refusing to vary or recall a restraint order, within such period as may be prescribed by Act of Sederunt.
- (6) Where, in relation to a restraint order which is recalled, interdict has been granted under section 28(8) of this Act, the clerk of court shall, on the restraint order being recalled, forthwith so inform each person so interdicted.

32 Inhibition of property affected by restraint order or by interdict

- (1) On the application of the Lord Advocate, the Court of Session may in respect of heritable realisable property in Scotland affected by a restraint order (whether such property generally or particular such property) grant warrant for inhibition against any person interdicted by the order or, in relation to that property, under section 28(8) of this Act; and subject to the provisions of this Part of this Act, the warrant—
 - (a) shall have 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; and
 - (b) shall have the effect of letters of inhibition and shall forthwith be registered by the Lord Advocate in the Register of Inhibitions and Adjudications.
- (2) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868 (effective date of inhibition) shall apply in relation to an inhibition for which warrant has been granted under subsection (1) above as that section applies to an inhibition by separate letters or contained in a summons.
- (3) In the application of section 158 of that Act of 1868 (recall of inhibition) to such an inhibition as is mentioned in subsection (2) above, references in that section to a particular Lord Ordinary shall be construed as references to any Lord Ordinary.
- (4) The fact that an inhibition has been executed under subsection (1) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Part of this Act in respect of that property.
- (5) No inhibition executed under subsection (1) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for the inhibition has been granted has ceased to have effect in respect of that property; and the Lord Advocate shall—
 - (a) apply for the recall, or as the case may be restriction, of the inhibition; and
 - (b) ensure that the recall, or restriction, of an inhibition on such application is reflected in the Register of Inhibitions and Adjudications.

33 Arrestment of property affected by restraint order

- (1) On the application of the prosecutor, the court may, in respect of moveable property affected by a restraint order (whether such property generally or particular such

property), grant warrant for arrestment if the property would be arrestable if the person entitled to it were a debtor.

- (2) A warrant under subsection (1) above shall have effect as if granted on the dependence of an action for debt at the instance of the prosecutor against the person and may be executed, recalled, loosed or restricted accordingly.
- (3) The fact that an arrestment has been executed under subsection (2) above in respect of property shall not prejudice the exercise of an administrator's powers under or for the purposes of this Act in respect of that property.
- (4) No arrestment executed under subsection (2) above shall have effect once, or in so far as, the restraint order affecting the property in respect of which the warrant for such arrestment has been granted has ceased to have effect in respect of that property; and the prosecutor shall apply to the court for an order recalling, or as the case may be, restricting the arrestment accordingly.

34 Administrators

Schedule 1 to this Act shall have effect as regards the appointment of administrators under this Act.