

PROCEEDS OF CRIME ACT 2002

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Civil Recovery of the Proceeds etc. of Unlawful Conduct Chapter 4: General

Recoverable property

Section 304: Property obtained through unlawful conduct

420. *Sections 304 to 316* apply to both civil recovery and cash forfeiture. *Section 304* defines when property is recoverable, and how the original property may be followed when it is disposed of by the person who originally obtained it or a person who subsequently obtained it. Under *subsection (1)*, property that is obtained through unlawful conduct is recoverable property; as such, it may be recovered by the enforcement authority. But the enforcement authority will not always be able to recover the property from the person who obtained the property through unlawful conduct. The property may, for example, have been sold; or the person may be untraceable, or dead. *Subsections (2) and (3)* therefore provide that where the property has been disposed of or passed to someone else, it may be ‘followed’ by the enforcement authority and recovered from that person. If the person to whom the property has been passed then in turn passes it on, the enforcement authority will be able to follow the property along the chain of transactions.
421. The ability to ‘follow’ property is, however, limited in several ways. Recovery depends on the original property continuing to be identifiable as such. And if any of the transactions in question is of the sort set out at *section 308*, the chain will be broken and the enforcement authority will no longer be able to follow and recover the property.

Section 305: Tracing property, etc.

422. *Sections 305 and 306* allow the enforcement authority to recover property which has not itself been obtained through unlawful conduct but which ‘represents’ such property.
423. *Section 305* establishes the principle of tracing the original recoverable property if it is disposed of. Under *subsection (1)*, property which represents property which is or has been recoverable, is also recoverable.
424. Under *subsection (2)*, where a person disposes of either the original recoverable property or representative property, and receives property in return, the property he receives in return becomes representative property and will also be recoverable. For example, if a stolen car is sold, the proceeds of sale will ‘represent’ the original property and the enforcement authority will be able to ‘trace’ into those proceeds and recover them. And if the proceeds of drug dealing are spent on jewellery, the jewellery itself will represent the original proceeds, and the enforcement authority will be able to recover it.
425. Like ‘following’ under *section 304*, ‘tracing’ is capable of being pursued along a chain of transactions. Under *subsection (3)*, where representative property is disposed of, it

may be followed into the hands of the person who obtains it; it continues to represent the original property, and is therefore recoverable.

426. Tracing and following may multiply indefinitely the items of property that are rendered potentially recoverable. However, the enforcement authority will not be able to multiply its total recovery accordingly; limitations on total recovery are placed by [section 278](#).

Section 306: Mixing property

427. Property which was not itself obtained through unlawful conduct at any stage can come to 'represent' such property, and therefore be potentially recoverable, not only by being traceable by the enforcement authority under [section 305](#) but also by having become mixed with recoverable property. Because the ability to follow property under [section 304](#) is dependent on the property retaining its identity, it may become impossible to follow property when it is mixed into other property.
428. *Subsection (3)* gives some illustration of this problem. If cash which is the proceeds of drug dealing is paid into a bank account which is in credit through deposits of honest earnings, it becomes impossible to identify any individual withdrawals which may be made from that account as being the 'dirty' money rather than the clean. *Subsection (2)* therefore provides that in such circumstances so much of the 'mixed' property as is attributable to the recoverable property will be representative of the original property, and is therefore itself recoverable.

Section 307: Recoverable property: accruing profits

429. [Section 307](#) provides that the property that is recoverable under [sections 304](#) to [306](#) is to be taken to include accrued profits; the profits are to be treated as representative property. So, for example, if the enforcement authority can recover money paid into a bank account, the authority can recover it with any interest accrued.

Section 308: General exceptions

430. [Section 308](#) constitutes a limitation on the enforcement authority's ability to follow and trace property; the exceptions set out here also apply to the forfeiture provisions in Chapter 3. [Section 304](#) provides that where, for example, someone is given a yacht in return for a contract killing, and then sells the yacht, the authority may follow the yacht into the hands of the purchaser and recover it from him. Under *subsection (1)* of this section, if the purchaser paid full value for the yacht, and was unaware of its unlawful provenance, the authority is not entitled to recover it from him or from anyone else who may subsequently acquire it. The fact that the yacht has ceased to be recoverable property, however, does not prevent the proceeds of the sale of the yacht representing property obtained through unlawful conduct, and themselves being recoverable (*subsection (10)*).
431. *Subsection (2)* ensures that property ceases to be recoverable following successful civil recovery or cash forfeiture proceedings or following disposal in accordance with Part 5 powers. For example, if property is sold by an interim receiver or interim administrator in the exercise of his powers, although it may still be 'property obtained through unlawful conduct', or representative of such property, it will not be recoverable in the hands of the recipient and may be recycled in the market in the ordinary way.
432. *Subsections (3) to (7)* set out other circumstances in which property will cease to be recoverable: for example, where a payment is made following a compensation or restitution order under the Powers of Criminal Courts (Sentencing) Act 2000, and the sum or property received would otherwise be recoverable; where a claimant obtains property from a defendant in civil proceedings which are based on the defendant's unlawful conduct, and the property would otherwise be recoverable; where an amount is paid in accordance with a restitution order made by a court under the Financial Services and Markets Act 2000 and that amount would otherwise be recoverable; and where

restitution is required to be made by the Financial Services Authority under that Act paying an amount which would otherwise be recoverable.

433. *Subsections (8) and (9)* serve to exclude property from civil recovery if such property is already the subject of a restraint order, or has been taken into account in making a criminal confiscation order.

Section 309: Other exemptions

434. *Section 309* provides that certain property is not recoverable or associated property if it is prescribed by order or is disposed of in pursuance of a prescribed enactment. *Subsection (2)* provides that where property is disposed of in pursuance of a prescribed enactment, it is to be treated for the purposes of *section 278* (limit on recovery) as though it had been disposed of under a recovery order. *Subsection (4)* provides that an order is to be made by the Secretary of State, following consultation with the Scottish Ministers. The order is subject to the affirmative resolution procedure under *section 459(6)(a)*.

Section 310: Granting interests

435. This section makes some detailed provision about the granting of interests in property. Take, for example, the case of someone who obtains a freehold house through the proceeds of unlawful conduct, and then grants a tenancy of it. At the time the house was 'obtained', the tenancy had no existence. The tenancy, therefore, cannot be described as having been obtained through unlawful conduct, either by the landlord or by the tenant. But it is intended to be as recoverable as the property obtained by the same unlawful conduct.
436. Under *subsection (1)*, where a person grants an interest in recoverable property, the granting of the interest is to be regarded as a disposal of the property; and the question of whether the interest is recoverable is to be determined in line with the provisions regarding disposal of recoverable property. Under *subsection (2)*, if the interest is in the original property that was obtained through unlawful conduct, it is to be treated as though it had been obtained through the same conduct. And if the interest is in property which represents property obtained through unlawful conduct, it is to be treated as such.

Insolvency

Section 311: Insolvency

437. This section sets out the interrelationship between civil recovery and insolvency proceedings. Broadly, a civil recovery claim will be treated in the same way that any other civil proprietary claim is treated in insolvency proceedings. This means that in most circumstances the enforcement authority will have to apply for leave from the court dealing with the insolvency proceedings to bring or continue civil recovery proceedings. This is provided for in the Insolvency Act 1986 (and its Northern Ireland and Scottish equivalents, the Insolvency (Northern Ireland) Order 1989 and the Bankruptcy (Scotland) Act 1985). However, under the insolvency legislation, leave does not have to be obtained in relation to all types of insolvency proceedings. *Section 311* therefore covers the insolvency proceedings that are not covered by the 1985 or 1986 Acts or the 1989 Order, so that the enforcement authority will have to apply for leave from the insolvency court in all circumstances.
438. The section also covers the interrelationship between cash forfeiture and insolvency proceedings. Under *subsection (1)*, civil recovery proceedings may not be initiated or continued in respect of property which is subject to insolvency proceedings (as defined in *subsection (3)*) without the leave of the court which is dealing with the insolvency. Under *subsection (2)*, an application for the further detention of cash under the cash forfeiture provisions in Chapter 3, where the cash forms part of the insolvency proceedings listed in *subsection (3)*, may not be made without the leave of the insolvency court. An application to the insolvency court may be made without

notice, to prevent a potential civil recovery respondent finding out about the Director's intention to bring proceedings (*subsection (4)*); but notice must still be given where required to the insolvency practitioner or to the official receiver (*subsection (5)*).

Delegation of enforcement functions

Section 312: Performance of functions of Scottish Ministers by constables in Scotland

439. *Schedule 11* of the Act amends the Police (Scotland) Act 1967 to enable constables to undertake temporary service with the Scottish Ministers in connection with their functions under Part 5 (civil recovery) of the Act. On secondment, a constable will not bring with him his police powers. There are, however, certain of the functions bestowed by Part 5 on Scottish Ministers that it would not be appropriate for seconded constables to exercise. These are set out in *section 312* and include taking proceedings in the Court of Session and exercising the Scottish Ministers' order making powers.

Section 313: Restriction on performance of Director's functions by police

440. *Section 313* provides that police officers who are seconded to the Agency will not be able to undertake civil recovery work on behalf of the Director. Seconded officers will retain their police powers and it would not be appropriate for them to work on civil recovery cases.

Interpretation

Section 314: Obtaining and disposing of property

441. 'Disposing' of property is a key feature of the provisions at *section 304* and *305*, which deal with following and tracing property. Disposal of property may take place, for instance:

- where the property is dealt with to some extent only (including where an interest in the property is created – for example where a tenancy is granted out of freehold real property); a disposal might also consist of the grant of an interest in a part (*subsection (1)*);
- where a person makes a payment, in cash or any other kind of property, to another (*subsection (2)*);
- where property changes hands on death (*subsection (3)*).

442. *Subsection (4)* is relevant to the protection provided at *section 308(1)* for persons who obtain property 'for value'. It provides that a person obtains property 'for value' only when he has given executed consideration for it. That means that if someone obtains property in return for a promise to pay for it or to perform some service in exchange, that will not count as having 'obtained for value' until the payment is actually made or the service performed.

Section 315: Northern Ireland: courts

443. The Act relies upon procedural mechanisms contained in the Civil Procedure Rules for England and Wales. These do not apply in Northern Ireland. Further, the relevant rules of court in Northern Ireland have recently been the subject of a review and a number of changes have been recommended but not yet implemented. It is not therefore possible at this stage to specify the exact terms for the procedural mechanisms that will apply to civil recovery. Against that background it is necessary to provide that the expressions relating to the initiation and conduct of proceedings used in this Part of the Act are to be read in accordance with rules of court made in Northern Ireland. Such rules of court would be made under section 55 of the Judicature (Northern Ireland) Act 1978.

*These notes refer to the Proceeds of Crime Act 2002
(c.29) which received Royal Assent on 24 July 2002*

Section 316: General interpretation

444. *Subsection (1)* defines certain terms used in this Part of the Act. *Subsection (3)* enables property to be identified and traced by reference to events occurring before commencement of this Part. *Subsections (4) to (7)* explain the use of the terms ‘property’ and ‘holding property.’