

CHAPTER 46

TRUSTEES INVOLVED WITH CRIMINAL AND TERRORIST PROPERTY

2. THE LEGISLATION

Principal legislation and regulations

46-03(1) INSERT AT THE END: and by the Serious Crime Act 2007 with effect from early 2008.

46-03(3) NOTE 11. INSERT AT THE END: amended by Money Laundering (Amendment) Regulations 2007 (SI 2007/3299).

4. PROCEEDS OF CRIME

Criminal conduct

Foreign element

46-13 NOTE 48. DELETE AND REPLACE BY: See Proceeds of Crime Act 2002 (Money Laundering: Exceptions to Overseas Conduct Defence) Order 2006 (SI 2006/1070) providing in art.2 that any conduct punishable by more than 12 months' imprisonment in any part of the United Kingdom if it had occurred there is (with minor exceptions) so prescribed.

Criminal property

The offender's state of mind

46-17 AFTER THE SECOND QUOTATION INSERT: There is no requirement that the suspicion must be reasonable; but a mere feeling of unease is not suspicion.^{65a}

Arrangements

46-18 IN THE FIRST SENTENCE, DELETE commit AND REPLACE WITH committing.

^{65a} *Shah v HSBC Private Bank (UK) Ltd* [2009] EWHC 79 (QB); [2009] 1 Lloyd's Rep. 328 at [45]–[48] (affd. [2010] EWCA Civ 31; [2010] All E.R. (D) 45 (Feb)).

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AFTER THE LAST SENTENCE, INSERT: But the property must have been criminal property as a result of some conduct occurring before the act which is alleged to constitute the offence under section 328; it is not enough that the property became criminal only as a result of carrying out the arrangement.^{69a}

Acquisition, use and possession

- 46-21** AT THE END OF THE TEXT ADD: Here too the property must have been criminal property as a result of some conduct occurring before the act which is alleged to constitute the offence under section 329; it is not enough that the property became criminal only as a result of acquiring, using or having possession of the property.^{77a}

Other defences

- 46-25** NOTE 86. AT THE END ADD: inserted by Serious Organised Crime and Police Act 2005, s.103(1), (4).

Concealing, disguising, converting and transferring

- 46-26** AT THE END OF THE TEXT ADD: Here again the property must have been criminal property as a result of some conduct occurring before the act which is alleged to constitute the offence under section 327; it is not enough that the property became criminal only as a result of concealing or disguising the property and so on.^{88a}

Defences

- 46-29** NOTE 94. AT THE END ADD: inserted by Serious Organised Crime and Police Act 2005, s.103(1), (2).

^{69a} *R. v Geary* [2010] EWCA Crim 1925; [2011] 2 All E.R. 198.

^{77a} *R. v Geary* [2010] EWCA Crim 1925; [2011] 2 All E.R. 198.

^{88a} *R. v Geary* [2010] EWCA Crim 1925; [2011] 2 All E.R. 198.

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5. PROPERTY CONNECTED WITH TERRORISM**“Terrorist property”***Proscribed organisations*

46–39 NOTE 23. THE REFERENCE TO THE HOME OFFICE’S WEBSITE SHOULD NOW BE TO:
http://security.homeoffice.gov.uk/terrorist-threat/proscribed-terrorist-orgs/proscribed-terrorist-groups/index.html.

Laundering terrorist property

46–47 DELETE THE HEADING TO THIS PARAGRAPH (*The defence*) AND REPLACE BY: *Mental element.*

AFTER § 46–47 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Prior consent and disclosure as a defence to sections 15 to 18

46–47A There are defences comparable to those under the 2002 Act against criminal liability for any breach of sections 15 to 18 of the Terrorism Act 2000 if there is suitable disclosure to an authorised member of the staff of SOCA and that person’s consent is forthcoming.^{49a}

6. DUTIES OF DISCLOSURE AND NON-DISCLOSURE**Duties of disclosure under the Proceeds of Crime Act 2002**

46–50(2) DELETE THE SECOND SENTENCE AND N.65 AND REPLACE BY: Included in the regulated sector by the 2002 Act are businesses to the extent that they consist of “the participation in financial or real property transactions concerning ... the creation, operation or management of trusts” by someone providing legal services by way of business; and the provision to others, by way of business, of services which extend to “acting, or arranging for another person to act, as ... a

^{49a} Terrorism Act 2000, ss.21ZA–21ZC, inserted by Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg. 2, Sch.1. For the comparable provisions in Proceeds of Crime Act 2002, see §§ 46–30 to 46–32.

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trustee of an express trust or similar legal arrangement”.⁶⁵ The business of a professional trustee is therefore included.

46–50(3) NOTE 67. DELETE AND REPLACE BY: Proceeds of Crime Act 2002, s.330(3A), inserted by Serious Organised Crime and Police Act 2005, s.104(1), (3).

46–50(4) NOTE 69. DELETE AND REPLACE BY: Proceeds of Crime Act 2002, s.330(4), inserted by Serious Organised Crime and Police Act 2005, s.104(1), (3) and amended by Serious Crime Act 2007, s.74(2)(f), Sch.8, Pt 6, paras.121, 126.

Defences

46–51(1) NOTE 75. DELETE AND REPLACE BY: Proceeds of Crime Act 2002, s.330(6)(a), inserted by Serious Organised Crime and Police Act 2005, s.104(1), (3). There does not seem to have been any decision on what is a reasonable excuse in this context.

46–51(2) NOTE 76. DELETE AND REPLACE BY: See the definition in Proceeds of Crime Act 2002, s.330(14), inserted by Proceeds of Crime Act 2002 and Money Laundering Regulations 2003 (Amendment) Order 2006 (SI 2006/308), art.2.

NOTE 78. AT THE END ADD: and Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.3, Sch.2.

46–51(3) DELETE 202 Act AND REPLACE BY: 2002 Act.

AFTER § 46–51(3) INSERT THE FOLLOWING NEW SUB-PARAGRAPH.

(3A) A knows or reasonably believes that the money laundering is occurring outside the United Kingdom, it is not unlawful under the local criminal law and it is not of a kind prescribed by an order of the Secretary of State,^{80a} or

⁶⁵ Proceeds of Crime Act 2002, s.330(12) and Sch.9, Pt 1, paras.1(1)(n)(v), (1)(o), (4)(d)(i), Sch.9 as substituted by Proceeds of Crime Act 2002 (Business in the Regulated Sector and Supervisory Authorities Order 2007 (SI 2007/3287), arts.2, 3. Cf. the definition of “the regulated sector” in Terrorism Act 2000, see § 46–53, and that of “relevant person” in Money Laundering Regulations 2007 (SI 2007/2157), see § 46–60.

^{80a} Proceeds of Crime Act 2002, s.330(7A), inserted by Serious Organised Crime and Police Act 2005, s 102(1), (5). No such order has been made.

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46–52 NOTE 82. DELETE Serious Organised Crime and Police Act 2002 AND REPLACE BY Serious Organised Crime and Police Act 2005.

Duties of disclosure under the Terrorism Act 2000

46–53 DELETE THIRD FOURTH AND FIFTH SENTENCES (The definition ... TO ... investment schemes) AND NN.83–87 AND REPLACE BY: The definition of that expression in this Act is the same as that in the 2002 Act, so that it extends to the business of professional trustees, asset managers and legal advisers.^{83–86}

46–53(1) AT THE END OF THE FIRST SENTENCE INSERT A NEW NOTE 87: As amended by Counter-Terrorism Act 2008, s 77(1), (2).

NOTE 88. DELETE AND REPLACE BY: Terrorism Act 2000, s.19(7B), inserted by Anti-terrorism, Crime and Security Act 2001, s.3, Sch 2, Pt 3, para 5(1), (4) and amended by Serious Organised Crime and Police Act 2005, s.59, Sch.4, paras.125, 126.

46–53(2) NOTE 91. INSERT AT THE END: and amended by Serious Organised Crime and Police Act 2005, s.59, Sch.4, paras.125, 128 and Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.2, Sch.1.

Duties of non-disclosure—tipping-off

46–55 DELETE THE SECOND SENTENCE AND REPLACE BY: The offences of that name created both by the 2002 Act and the Terrorism Act 2000 apply only to the regulated sector,^{97a} but both Acts also create offences, not further described here, of prejudicing investigations which apply outside the regulated sector.^{97b}

^{83–86} Terrorism Act 2000, s.19(7A) and Sch.3A, both originally inserted by Anti-terrorism, Crime and Security Act 2001, s.3 and Sch.2, Pt 3, para.5(4), (6) but the terms of Sch.3A now inserted by Terrorism Act 2000 (Business in the Regulated Sector and Supervisory Authorities) Order 2007 (SI 2007/3288), art.2.

^{97a} For which see §§ 46–50(2), 46–53.

^{97b} Proceeds of Crime Act 2002, s.342, as amended by Serious Crime Act 2007, s.77, Sch.10, paras.1, 2 and Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.3, Sch.2; Terrorism Act 2000, s.39, as amended by Anti-terrorism, Crime and Security Act 2001, s.117(1), (3) and Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.2, Sch.1.

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Proceeds of Crime Act 2002

46–56 DELETE THE ENTIRE PARAGRAPH AND N.98 AND REPLACE BY:

The tipping-off offences created by the 2002 Act are concerned with avoiding prejudice to investigations by the authorities. The investigation may or may not have been prompted by an authorised disclosure or a protected disclosure.⁹⁸

46–57 DELETE THE ENTIRE PARAGRAPH AND N.99 AND REPLACE BY:

Section 333A of the 2002 Act⁹⁹ provides, in part:

- “(1) A person commits an offence if—
- (a) the person discloses any matter within subsection (2);
 - (b) the disclosure is likely to prejudice any investigation that might be conducted following the disclosure referred to in that subsection; and
 - (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector.
- (2) The matters are that the person or another person has made a disclosure under this Part—
- (a) to a constable,
 - (b) to an officer of Revenue and Customs,
 - (c) to a nominated officer, or
 - (d) to a member of staff of [SOCA] authorised for the purposes of this Part by the Director General of that Agency,
- of information that came to that person in the course of a business in the regulated sector.
- (3) A person commits an offence if—
- (a) the person discloses that an investigation into allegations that an offence under this Part has been committed is being contemplated or is being carried out;
 - (b) the disclosure is likely to prejudice that investigation; and

⁹⁸ For which see §§ 46–31 to 46–33 and § 46–52 respectively.

⁹⁹ Inserted by Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.3, Sch.2.

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- (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector.”

Neither offence is committed if the person does not know or suspect that the disclosure is likely to prejudice an investigation.^{99a} There are exceptions for disclosures made within undertakings, disclosures between certain institutions and between advisers of the same kind (including professional legal advisers), and disclosures by certain advisers (again including professional legal advisers) to their clients, though only if made for the purpose of dissuading the client from committing an offence.^{99b}

Terrorism Act 2000

46–58 DELETE THE ENTIRE PARAGRAPH AND NN.1 TO 6 AND REPLACE BY:

Section 21D of the Terrorism Act 2000¹ is in almost identical terms. It provides, in part:

- “(1) A person commits an offence if—
- (a) the person discloses any matter within subsection (2);
 - (b) the disclosure is likely to prejudice any investigation that might be conducted following the disclosure referred to in that subsection; and
 - (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector.
- (2) The matters are that the person or another person has made a disclosure under a provision of this Part—
- (a) to a constable,
 - (b) in accordance with a procedure established by that person’s employer for the making of disclosures under that provision,
 - (c) to a nominated officer, or
 - (d) to a member of staff of [SOCA] authorised for the purposes of that provision by the Director General of that Agency,

^{99a} Proceeds of Crime Act 2002, s.333D(3), (4), inserted as above.

^{99b} Proceeds of Crime Act 2002, ss.333B–333E, inserted as above.

¹ Inserted by Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.2, Sch.1.

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of information that came to that person in the course of a business in the regulated sector.

- (3) A person commits an offence if—
- (a) the person discloses that an investigation into allegations that an offence under this Part has been committed is being contemplated or is being carried out;
 - (b) the disclosure is likely to prejudice that investigation; and
 - (c) the information on which the disclosure is based came to the person in the course of a business in the regulated sector.”

Again, neither offence is committed if the person does not know or suspect that the disclosure is likely to prejudice an investigation.² There are also exceptions comparable to those under the 2002 Act.³⁻⁶

7. CUSTOMER DUE DILIGENCE AND OTHER SYSTEMS

General

AFTER § 46–59 INSERT THE FOLLOWING NEW PARAGRAPH:

46–59A The Counter-Terrorism Act 2008 gives H.M. Treasury powers to impose requirements on business with countries outside the European Economic Area against the risk of money laundering activities or terrorist financing.^{8a} The requirements include customer due diligence and ongoing monitoring but also extend to limiting or ceasing business with a specified person altogether. Those powers are confined to credit or financial institutions, however, and are not further discussed here.

Customer due diligence—general scheme

46–61 NOTE 23. AT THE END ADD: In June 2011, H.M. Treasury proposed the de-criminalisation of “technical” money laundering offences.

² Terrorism Act 2000, s.21G, inserted by Terrorism Act 2000 and Proceeds of Crime Act 2002 (Amendment) Regulations 2007 (SI 2007/3398), reg.2, Sch.1.

³⁻⁶ Terrorism Act 2000, ss.21E–21H, inserted as above.

^{8a} Counter-Terrorism Act 2008, s.62 and Sch.7.

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Scope of customer due diligence measures*Identifying the customer*

- 46-64** NOTE 31. DELETE AND REPLACE BY: Official guidance from the Joint Money Laundering Steering Group (*Prevention of money laundering/combating the financing of terrorism: guidance for the UK financial sector, Part I* (Dec. 2007), para.5.3.2) states, “The firm *identifies* the customer by obtaining a range of information about him. The *verification* of the identity consists of the firm verifying some of this information against documents, data or information obtained from a reliable and independent source” (emphasis in original).

Obtaining information about the business relationship

- 46-66** IN THE SECOND SENTENCE, DELETE the BEFORE regulation.

Administration of the trust and third parties*Trusts having a beneficial owner*

- 46-91** IN THE THIRD SENTENCE DELETE will be concerned with the beneficiaries of the estate AND REPLACE BY: will not be concerned with the beneficiaries of the estate.

Other systems*Penalties*

- 46-115** AT THE END OF THE FIRST SENTENCE, INSERT A NEW NOTE 86a: In June 2011, H.M. Treasury has proposed the de-criminalisation of “technical” money laundering offences.

8. GUIDANCE FOR TRUSTEES**Guidance by industry and professional bodies**

- 46-117** IN THE FIRST SENTENCE INSERT (regulated sector) AFTER the 2002 Act.

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46–118(1) DELETE THE ENTIRE SUB-PARAGRAPH AND N.90 AND REPLACE BY: The Joint Money Laundering Steering Group of the British Bankers Association has issued guidance, which has been approved by H.M. Treasury.⁹⁰

46–118(2) DELETE THE FIRST SENTENCE AND REPLACE BY: The Law Society has issued successive *Practice Notes* on money laundering, the current version being that of February 22, 2008.

46–118(3) DELETE SECOND SENTENCE AND NN.92 TO 93 AND REPLACE BY: It published *The FSA's new role under the Money Laundering Regulations 2007. Our Approach*⁹² but it does not issue guidance on the 2007 Regulations.⁹³

When trustees discover that they are holding criminal property

46–126 IN THE LAST SENTENCE DELETE OF WHERE IT LAST OCCURS.

AT THE END OF THAT SENTENCE INSERT A NEW NOTE 23A: *Cf.* § 46–17.

AT THE END OF THE PARAGRAPH ADD A NEW SENTENCE: In comparable circumstances, trustees will incur no liability to their beneficiaries if they refuse to make a distribution without the appropriate consent.^{23b}

9. CIVIL RECOVERY OF PROCEEDS OF CRIME**Introduction**

46–130 NOTE 34. AT THE END ADD: Proceeds of Crime Act 2002 has been amended by Serious Organised Crime and Police Act 2005 and Serious Crime Act 2007.

DELETE THE SECOND SENTENCE AND N.35 AND REPLACE BY: It empowers SOCA, successor to the Assets Recovery Agency, to recover in civil High Court proceedings property that has been obtained through unlawful conduct and property representing it.³⁵

⁹⁰ See *Prevention of money laundering/combating the financing of terrorism. Guidance for the UK financial sector* (Dec. 2007). The guidance and proposed amendments may be read on the Group's website at www.jmlsg.org.uk.

⁹² The publication can be read on the F.S.A.'s website at www.fsa.gov.uk.

⁹³ The F.S.A.'s earlier *Money Laundering Sourcebook* has been withdrawn.

^{23b} *Cf. Shah v HSBC Private Bank (UK) Ltd* [2009] EWHC 79 (QB); [2009] 1 Lloyd's Rep. 328 (affd [2010] EWCA Civ 31; [2010] All E.R. (D) 45 (Feb)).

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“Recoverable property”

46–133 AT THE END OF THE TEXT ADD: An order for recovery can be made even though the property is abroad.^{48a}

General exceptions

46–138 IN THE LAST SENTENCE, DELETE (not yet exercised).

NOTE 63. AT THE END ADD: See Proceeds of Crime Act 2002 (Exemptions from Civil Recovery) Order 2003 (SI 2003/336), making exemptions not material for the purpose of this work.

Proceedings for recovery orders

46–139 IN THE FIRST SENTENCE DELETE that is, the Director of the Assets Recovery Agency AND SUBSTITUTE: ordinarily SOCA.

Application for an interim receiving order or a property freezing order

46–140 DELETE THE HEADING TO THIS PARAGRAPH AND REPLACE BY THE HEADING SET OUT ABOVE.

DELETE THE FIRST TWO SENTENCES AND N.69 AND REPLACE BY: Where the enforcement authority, ordinarily SOCA, may take proceedings for a recovery order in the High Court, the authority may (before or after starting the proceedings) apply to the court for an interim receiving order or a property freezing order.⁶⁹ An interim receiving order is an order for the detention, custody or preservation of property and the appointment of an interim receiver. A property freezing order is an order prohibiting any person to whose property it applies from dealing with the property in any way; it was introduced to obviate the need to appoint an

³⁵ Proceeds of Crime Act 2002, s.243(1), empowering the “enforcement agency” to take such proceedings; and by *ibid.*, s.316, as amended by Serious Crime Act 2007, s.74(2)(b), Sch.8, Pt 2, paras.85, 91(1), (2)(a), “enforcement agency” includes SOCA).

^{48a} *Perry v Serious Organised Crime Agency* [2011] EWCA Civ 578; *The Times*, June 10, 2011.

⁶⁹ Proceeds of Crime Act 2002, ss.245A, 245E, inserted by Serious Organised Crime and Police Act 2005, s.98(1); *ibid.*, s.246, as amended by Serious Crime Act 2007, s.74(2)(b), Sch.8, Pt 2, paras.85, 86. Those sections of the 2002 Act contain provisions summarised in the remainder of this paragraph.

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interim receiver in every case, though the court may in fact also appoint a receiver (limited to the management of property) when making the order or afterwards.

DELETE THE LAST SENTENCE AND REPLACE BY: The application for an interim receiving order must nominate a suitably qualified person (not a member of the staff of SOCA) for appointment as interim receiver; and if a receiver is to be appointed as part of a property receiving order the application must contain a similar nomination (but in that case the receiver may be a member of the staff of SOCA).

Receivers and interim receivers

46–141 DELETE THE HEADING TO THIS PARAGRAPH AND REPLACE BY THE FOREGOING.

AT THE END OF THE FIRST SENTENCE, INSERT A NEW NOTE 69a: Proceeds of Crime Act 2002, s.247.

DELETE THE LAST THREE SENTENCES AND NN.72 TO 74 AND REPLACE BY: A property freezing order under which a receiver has been appointed will confer powers on the receiver limited to management of the property. The order may authorise or require the receiver to take any steps which the court thinks appropriate in connection with the management of the property (but they include securing the detention, custody and preservation of the property so as to manage it).⁷² Both an interim receiving order and a property freezing order prohibit any dealing with the property on the part of the owner.⁷³ If the interim receiver or receiver deals with property which he reasonably believes to be covered by the order, he is protected from liability except so far as any loss or damage is caused by his negligence.⁷⁴ Both forms of order are registrable as pending land actions.^{74a}

Restrictions on dealing

46–142 DELETE THE ENTIRE PARAGRAPH AND NN.75 TO 79 AND REPLACE BY:

⁷² Proceeds of Crime Act 2002, s.245F, inserted by Serious Crime Act 2007, s.83(1).

⁷³ See § 46–142.

⁷⁴ Proceeds of Crime Act 2002, s.245F(7), inserted by Serious Crime Act 2007, s.83(1), s. 247(3).

^{74a} Proceeds of Crime Act 2002, s.248, as amended by Serious Organised Crime and Police Act 2005, s. 109, Sch.6, paras.4, 11.

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Both a property freezing order and an interim receiving order will prohibit any person to whom the order applies from dealing with the property.⁷⁵ Exclusions may, however, be made when an order of either kind is made or on an application to vary it. The excluded property may be described in general terms, a provision which apparently extends to permitting certain expenses to be paid without specifying the precise assets to be used.⁷⁶ An exclusion may, in particular, make provision for the purpose of enabling any person to meet his reasonable living expenses, or to carry on any trade, business, profession or occupation, and may be made subject to conditions. The reference to living expenses and the business of “any person” is important for trusts. It enables the court, for example, to allow trustees otherwise forbidden to deal with trust property to pay income to a beneficiary who needs it for living expenses. The power to make exclusions, however, has to be exercised with a view to ensuring, so far as practicable, that the satisfaction of any right of the enforcement agency to recover the property obtained through unlawful conduct is not unduly prejudiced. This, especially the word “unduly”, calls for some balancing of the ability of SOCA to recover the property and the ability of the holder of the property, or “any person”, to maintain a reasonable standard of living while the proceedings are decided. It is to be assumed that the expenses will be met primarily out of such of the person’s assets as are not asserted to be recoverable property.⁷⁷ No doubt living expenses will be allowed where that is truly necessary but they will ordinarily be restricted to what is need to maintain the normal standard of living of the person in question.

⁷⁵ Proceeds of Crime Act 2002, s.245A–245C, inserted by Serious Organised Crime and Police Act 2005, s.98(1), s.252. Those sections of the 2002 Act contain provisions summarised in the remainder of this paragraph.

⁷⁶ See *Hansard*, May 13, 2002, col. 114.

⁷⁷ *Director of the Assets Recovery Agency v Creaven* [2005] EWHC 2726 (Admin); [2006] 1 W.L.R. 622.

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Legal expenses

46–143 DELETE THE ENTIRE PARAGRAPH, HEADING AND N.80 AND REPLACE BY:

Legal expenses^{77a}

Trustees may be made defendants to civil recovery proceedings where SOCA considers that they hold recoverable property in that capacity. They may then have difficulty in funding the defence of the proceedings. In its original form, the 2002 Act contained an absolute prohibition on making any exclusion from an interim receiving order for the purpose of enabling any person to meet legal expenses in respect of proceedings under Part 5 of the 2002 Act itself, *i.e.* proceedings for the civil recovery of property obtained through unlawful conduct.⁷⁸ Parliament was apparently under the misapprehension that community funding would instead be available for a defendant.⁷⁹ In practice it was not and the prohibition was later modified to permit an exclusion for the purpose of meeting legal expenses.⁸⁰ A similar exclusion is permitted from a property freezing order.^{80a} The court is now bound to have regard to the desirability of legal representation and to disregard the possibility of community funding^{80b} but the exclusion must be limited to reasonable legal expenses, must specify the total amount that may be released and must be subject to conditions laid down in regulations.^{80c} It is provided—though only in a Practice Direction, the status of which is doubtful—that the court will not make an exclusion for the purpose of meeting legal costs if the person subject to the interim receiving order can meet the costs out of assets to which the order does not apply.^{80d} The legislation says nothing about persons who are sued in the capacity of trustee or in some other fiduciary capacity. It has been held that the omission is

^{77a} For provisions as to the assessment of costs payable by the trustee for civil recovery, see The Costs Practice Direction (supplementing CPR Pts 43 to 48), para.49A.1 *et seq.*

⁷⁸ Proceeds of Crime Act 2002, s.252(4).

⁷⁹ Cf. § 46–144 and *Director of the Assets Recovery Agency v Creaven*, above, at [9]; *Serious Organised Crime Agency v Szepietowski* [2009] EWHC 344 (Ch); [2009] 4 All E.R. 393 at [13].

⁸⁰ Proceeds of Crime Act 2002, s.252(4), (4A), substituted by Serious Organised Crime and Police Act 2005, s.109, Sch. 6, paras.4, 14(1), (3).

^{80a} Proceeds of Crime Act 2002, s.245C(5), (6), inserted by Serious Organised Crime and Police Act 2005, s.98(1).

^{80b} *ibid.*

^{80c} Proceeds of Crime Act 2002, ss.245C(5), (6), 252(4), (4A), 286A; Proceeds of Crime Act 2002 (Legal Expenses in Civil Recovery Proceedings) Regulations 2005 (SI 2005/3382); and see Practice Direction—Civil Recovery Proceedings.

^{80d} Practice Direction—Civil Recovery Proceedings, para.7A.4. Cf. § 27–05 on the status of the Practice Direction.

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not accidental and that the statutory regime is exhaustive; in other words, where an interim receiving order is directed at trust property, the existence of adequate personal assets in the hands of the trustee will disqualify him from seeking an exclusion for the purpose of meeting legal expenses out of the trust assets.^{80e} The trustee is nonetheless under no obligation to use his own assets for the purpose of defending the trust property^{80f} and the proceedings may therefore go undefended. If he does use his own assets, however, and he succeeds in establishing that the trust property is not recoverable property, he will have his ordinary right of indemnity out of the trust fund, by then free of the order;^{80g} if he fails, but has acted reasonably, the court still has a discretion to allow his costs to be paid out of the trust fund, either on the indemnity basis or the standard basis, and it is only if he has acted unreasonably that the court will be likely to refuse an order in his favour.^{80h} Alternatively, the trustee may be able to arrange for one or more of the beneficiaries to fund the defence.

10. CONFISCATION AND SIMILAR ORDERS

Restraint orders under section 41 of the Proceeds of Crime Act 2002

46–144 DELETE realizable THROUGHOUT AND REPLACE BY: realisable.

NOTE 82. DELETE AND REPLACE BY: See Proceeds of Crime Act 2002, s.82 (as amended by Serious Organised Crime and Police Act 2005, s.109, Sch.9, paras.4, 5 and prospectively amended by Counter-Terrorism Act 2008, s.39, Sch.3, para.7). Free property includes an interest under a trust, see *R. v Walker* [2011] EWCA Crim 103.

AT THE END OF THE TEXT ADD: But assets belonging beneficially to third parties (other than the recipient of a tainted gift) cannot be used to satisfy the confiscation order, if one is

^{80e} *Serious Organised Crime Agency v Szepietowski* [2009] EWHC 344 (Ch); [2009] 4 All E.R. 393 at [62]–[65].

^{80f} *ibid.*, at [58], [62]; and see § 34–21.

^{80g} *ibid.*, at [63]. For the right of indemnity, see §§ 21–48 *et seq.*

^{80h} *ibid.*, at [63], relying on Proceeds of Crime Act 2002, s.266(8A), inserted by Serious Organised Crime and Police Act 2005, s.109, Sch.6, paras.4, 15.

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made.^{85a} Ordinary principles of trust and property law are (save in relation to tainted gifts) applied for the purpose of determining whether assets belong beneficially to third parties.^{85b}

46–145 DELETE realizable IN THE FIRST SENTENCE AND REPLACE BY: realisable.

DELETE THE LAST SENTENCE AND N.90 AND REPLACE BY: The trust property may therefore be frozen and unavailable to fund a defence by the trustees or the beneficiaries. Parliament was told that community funding would be available instead⁹⁰ but in practice it was not. Trustees and beneficiaries will be in the same difficulties as with an interim receiving order or a property freezing order and the solutions already mentioned,^{90a} such as they are, will apply here too.

AFTER § 46–145 INSERT THE FOLLOWING NEW PARAGRAPH:

46–145A The Crown Court may appoint a receiver of any realisable property either when the restraint order is made or at any time thereafter.^{90b} The remuneration, costs and expenses of the receiver are payable out of the realisable property even if the receiver should not have been appointed at all or the order appointing him is quashed, or the accused is acquitted or his conviction is quashed on appeal.^{90c} Property held by the accused is realisable property even if he holds it on trust and has no beneficial interest in it; and hence although it cannot be used to satisfy any confiscation order (unless it belongs to a recipient of a tainted gift)^{90d} it is liable to satisfy the remuneration, costs and expenses of the receiver.^{90e}

^{85a} Proceeds of Crime Act 2002, s.69(3); *Sinclair v Glatt* [2008] EWCA Civ 176; [2009] 1 W.L.R. 1845 at [8], [39], on the predecessor provisions in Criminal Justice Act 1988. Cf. *Gibson v Revenue and Customs Prosecution Office* [2008] EWCA Civ 645; [2009] Q.B. 348.

^{85b} *Larkfield Ltd v Revenue and Customs Prosecution Office* [2010] EWCA Civ 521; [2010] W.T.L.R. 1315.

⁹⁰ See *Hansard*, May 13, 2002, col. 112.

^{90a} § 46–143.

^{90b} Proceeds of Crime Act 2002, s.48.

^{90c} *Mellor v Mellor* [1992] 1 W.L.R. 517; *Hughes v Customs and Excise Commissioners* [2002] EWCA Civ 734; [2003] 1 W.L.R. 177; *Capewell v R.C.C.* [2007] UKHL 2; [2007] 1 W.L.R. 386; *Sinclair v Glatt*, above.

^{90d} See § 46–144.

^{90e} *Sinclair v Glatt*, above.

TRUSTEES INVOLVED WITH CRIMINAL AND TERRORIST PROPERTY

46–146 DELETE THE THIRD SENTENCE AND NN.91 TO 93 AND REPLACE BY: The offender is conclusively deemed to be able to pay the full amount⁹¹ and in default of full payment the order can be enforced as a fine.⁹²

46–147 NOTE 94. DELETE AND REPLACE BY: See §§ 5–156 to 5–163.

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⁹¹ See *R v Wilkes* [2003] EWCA Crim 848; [2003] Cr.App.R.(S) 98 on the strength of the presumption.

⁹² Proceeds of Crime Act 2002, s.35, as amended by Serious Crime Act 2007, ss.74(2)(a), 92, Sch.8, Pt 1, paras.1, 19, Sch. 14.