A Practical Guide To POCA & Unused Material: A Defence Perspective

It is easy to forget or overlook the fact that the Criminal Procedure & Investigations Act 1996 applies equally to confiscation proceedings as it does to the substantive criminal proceedings that have resulted in the defendant being convicted in the first place (something that prosecutors do themselves on a regular basis and only appreciate its significance when the contents of their own website are brought to their attention, see "Chapter 21: Disclosure of Unused Material Created in the Course of Financial Investigations").

The provisions of the Act should therefore be the starting place for the preparation by the defence in relation to defending confiscation proceedings. By requesting sight of the contents of the unused material schedule in the first instance will demonstrate hopefully how thoroughly (or not as the case may be) the prosecution have undertaken the financial investigation into the defendant and what material for example they hold in their possession which may be useful to the defendant, for example in rebutting the assumptions inherent in the statutory confiscation process.

From a practical perspective, there seems to be an increasing reliance by financial investigators to plead an assertion without any or little evidence in support and thereafter to state its for the defendant to prove otherwise. A classic illustration of the above situation that arises in practice is where the phrase "unexplained credits" to the defendant's bank account(s) are raised in the prosecutor's statement without any accompanying narrative or evidence to justify or support the assertion. The reason being that more often than not, no investigation at all or has been undertaken to establish the provenance of those funds and the burden,cost and time is placed squarely upon the defendant (and the Legal Aid Agency) to undertake in some respects a financial investigation that should be undertaken by the prosecution in the first instance.

This issue also arises increasingly where the prosecution rely upon previous confiscation proceedings against the defendant and/or substantive criminal proceedings which did not result in charge or conviction but have been put into the "melting pot" against the defendant in relation to his current confiscation proceedings.

Targeted and structures requests for disclosure at the outset, normally enclosed in an appendix to the defendant's (preliminary) statement, is an effective tool to be deployed by the defence in establishing the veracity of the assertions levelled by the prosecution and ensuring the confiscation process is undertaken in accordance with well established principles of fairness by allowing the defence to have access to all material that may be relevant to the process in that it either undermines the prosecution case or assists the defence case.

A failure to address the defence disclosure requests by the prosecution can and should lead the defence to take the following tactical decisions if they take the view that the reasons advanced by the prosecution for non disclosure are either inadequate or unreasonable. Firstly, the defence can request a disclosure hearing before the Judge to ensure that the disclosure exercise is conducted in accordance with the statutory regime and that any concerns about the process and/or the merits surrounding individual requests for disclosure, can be raised by the defence and revisited by the Judge afresh. Further to the formal hearing for disclosure, if the prosecution won't address the decision to disclose the material deemed to be relevant or disclose it in an incomplete or redacted form, the defence should apply to stay in whole or in part the confiscation proceedings as an abuse of the court's process. Alternatively, the defence can apply to the court that certain sections of the confiscation proceedings should be excluded in their entirety either under the court's inherent common law discretion or pursuant to section 78 of the Police and Criminal Act 1984 in order to ensure the fairness of the proceedings.

The same pro-active approach in relation to disclosure is equally applicable to the ancillary orders that are increasingly being applied for by prosecutors in relation to serious organised crime, namely Financial Reporting Orders and Serious Crime Prevention Orders, especially so where allegations are contained within the applications for such orders that are independent from the index related offending by the defendant.

In conclusion it is hoped to demonstrate that the cornerstone of defending in confiscation proceedings is the same as in relation to the substantive proceedings, disclosure is the key. Without full and complete disclosure being undertaken effectively, the risk of injustice is ever present and it is inherent upon the defence to ensure that all steps are undertaken to protect the defendant's rights as much as possible in an area which is notoriously complex, difficult and draconian.

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