

Financial Reporting Orders: An Economic Tag or A Necessary Deterrent?

There has been an increasing deployment by the prosecuting authorities of late in relation to the application for Financial Reporting Orders (FROs) to be granted by the courts in conjunction with the imposition of a final order in the main substantive confiscation proceedings.

It is sometimes understandable to overlook the importance of these ancillary orders and their impact upon the defendant when one is engaged in contesting protracted and complex confiscation proceedings.

In the currency of this article, it is intended to address the most appropriate way to defend proceedings involving FROs; the generic legal arguments to be advanced upon a defendant's behalf and also to address the wider issue as to whether these orders are being applied for by the prosecuting agencies on the substantive merits of an individual case or whether in fact they are being applied for in order to allow the prosecuting authorities and most notably the police, to keep a defendant under 'economic surveillance' far better than they could previously have done without thought being given to the effect on an individual's liberty and freedom post their sentence and whether it is necessary, proportionate and legitimate.

Turning to the main purpose of FROs, they are intended to act as an 'economic tag' upon the defendant post his release from prison after he has served his sentence for serious organised criminality; it's notably used against defendants' whom have been convicted of large scale drugs supply offences, money laundering matters or complex fraud. The statutory provisions are intended to provide that these defendants disclose their financial activity post their release in order for the prosecution to be able to determine if they are involved again in criminal activity, in whatever form, at an early stage.

In effect, not only is it an 'economic tag' but also due to its penal provisions it is tantamount to a 'good behaviour bond' as non-compliance with the terms or duration of an order (the maximum length of an order being 15 years) will result in the order being breached, an offence in itself, resulting (if proven) in a consecutive sentence of imprisonment being imposed for their non-compliance. As can be seen from the summary above, the provisions and their application are just as draconian in their own way as the provisions applicable to confiscation orders.

When faced with defending in a case involving the application for an FRO by the prosecution, the starting point is obviously to see if the offence with which the defendant was convicted of is a qualifying offence and the application is procedurally compliant and thereafter, the usual requests for disclosure should be made if the defendant disputes any aspects of the application which go beyond the index offence for which he was convicted of.

It is important to remember that the provisions of the Criminal Procedure and Investigations Act 1996 do not cease to apply once the conviction is recorded against a defendant. Non-compliance with their disclosure responsibilities by the prosecution in relation to these types of ancillary orders will trigger the usual applications by the defence for the proceedings to be stayed or evidential matters purporting to support the application being excluded from the court's decision making process.

Once the procedural and disclosure aspects of defending these applications are addressed by the defence, the next stage must be to determine whether there is any prospect of a substantive challenge to the order being made. In our experience, once the prosecution can demonstrate that the defendant has committed a qualifying offence, the best means of defending these cases is to turn instead to issues relating to proportionality; the rights to privacy and a family life (due to the impact on third parties, normally family members) and the duration of the said order applied for by the prosecution. A substantive challenge, subject to a fact specific situation arising, is unlikely to succeed.

Further to the order and its ambit being agreed by the court, the defence must also be alive to the issue of subsequent application by the defendant to vary or discharge the order in due course after a period of time has elapsed and the defendant can demonstrate that no further offending has occurred.

What can be seen from above is that the imposition of an FRO, if applied for, is difficult to oppose but its terms, ambit and duration are key issues for the defence to concentrate upon during the litigation process as well as being alive to any procedural or disclosure issues that may protect the rights of the defendant.

Finally, their deployment by the prosecution raises wider issues of public policy for the defence to be alive to during the currency of individual substantive proceedings. Is there usage an indication of a pro-active approach by the prosecuting authorities in tackling perceived organised crime on a meritorious basis or is this an attempt on occasion to use these orders as a way of circumventing the traditional safeguards and measures which protect an individual's privacy and liberty?

The question needs to be asked and considered in all proceedings involving these orders, for if there is a concern that the latter proposition may be correct and/or there is a disproportionate or illegitimate intrusion into the life of an individual, the abuse of that process must be stopped to protect the individual's rights.

In this area of 'financial crime', issues relating to public policy are never far removed from the actual deployment of the law and it is always of importance to bear in mind the constitutional impact of proposed measures advanced by the prosecution and their bearing on the rights of the defendant.

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