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Albion Chambers CRIME TEAM NEWSLETTER

SOPOs revisited

Following a conviction for a sexual offence, a defence advocate's first reaction is to reach wearily for the Sentencing Council Guidelines for the relevant offence and calculate the length of the, almost inevitable, custodial sentence that will follow. Lurking in the background however is an issue that is becoming increasingly problematic and complicated, namely the potential imposition of a Sexual Offences Prevention Order.

The significance of such an order is that it places considerable restrictions on the liberty of the defendant and could result in the imposition of a further sentence of up to five years should the order be breached. Given the importance of these orders it is somewhat surprising that until recently they have simply been handed to the defence on the morning of sentence without any consideration for the need to consider carefully their proposed terms.

A recent authority has however served to focus the minds of the courts on these issues and has injected some clarity of thought into the process of the imposition of a SOPO:

R v Smith [2011] EWCA Crim 1772 reviewed the process and poses three questions that need to be answered before an order is imposed;

1. Is the making of an order necessary to protect from serious sexual harm through the commission of Scheduled Offences?

2. If some order is necessary are the terms proposed nevertheless oppressive?

3. Overall, are the terms proportionate?

Once these questions have been answered and an order is deemed to be appropriate, consideration must be given to the focus of the order to ensure the issue of proportionality is satisfied.

It must be remembered that a defendant convicted of sexual offences may be subject to at least three other relevant regimes: notification, disqualification from working with children, and licence. No order is needed if it merely duplicates another regime to which an offender is subject, and nor must it interfere with such a regime.

The order must be necessary and proportionate and its terms must be sufficiently clear for the offender and those who have to deal with him to understand, without difficulty or the need for expert legal advice, exactly what is prohibited. A defendant who cannot understand what he is being prevented from doing is unlikely to be dissuaded from doing it!

The usual rule is that, absent some unusual feature, an indeterminate sentence will require no order; by contrast, an order may plainly be necessary in the case of any other custodial sentence, as it can be extended beyond the term of any licence a sexual offences prevention order under the *Sexual Offences Act* or suspension period. Accordingly, an IPP or a life sentence will not require the imposition of a SOPO.

There is no objection to an order extending beyond the duration of the notification requirements, or vice versa, if the circumstances require it, but, absent some unusual feature, it would be wrong to include a term, which although couched as a prohibition, amounted in effect to an extension of the notification requirements;

An order containing a blanket prohibition on computer use or internet access is impermissible. Restricting internet use to job search, study, work, lawful recreation and purchases is also disproportionate. Prohibiting the possession of any computer or other internet-capable device without first notifying the local police is too onerous both for offenders and the police. The prohibition most likely to be effective is one that has the effect of requiring the preservation of a readable internet history coupled with submission to inspection on request; but there is no need for the order to invest the police with powers of forcible entry into private premises beyond the statutory ones that they already have. Where the risk includes the use of social networking sites or chat rooms to groom young people for sexual purposes, it may well be appropriate to prohibit communication via the internet with any young person known or believed to be under the age of 16, or even to prohibit use of such sites altogether. This approach to the issue of computers and the Internet recognizes that they are now an integral part of our lives and it is virtually impossible to function in modern society without access to either. It is however questionable as to whether or not it is impossible to draft an order that will restrict the activities of computer literate and sophisticated sex offenders.

If contact with children needs to be restricted, it should relate to those under 16, not 18, unless there is a genuine risk of the offender committing offences under sections 16 to 19 (abuse of position of trust) or 25 and 26 (familial sexual offences) of the 2003 Act.

If an offender has been convicted of viewing child pornography, it is not legitimate to impose multiple prohibitions on him just in case he commits a different kind of offence; prohibitions on contact with children may be necessary for some predatory paedophiles who seek out children for sexual purposes, but care must be taken with their terms, as the offender may have children of his own, or within his extended family; even if there is a history of abuse within the family, any order ought ordinarily to be subject

to any order made in family proceedings; where contact with children is prohibited it is essential to include a saving for incidental contact such as is inherent in everyday life.

There must be a written draft order, properly considered in advance of the sentencing hearing which should be served on the court and the offender not less than two clear days before, but in any event not at the hearing.

It is to be hoped that application of these principles will make the implementation of proportionate and clearly defined SOPOs a more regular feature of the sentencing process

Stephen Mooney

The Proceeds of Crime Act and matrimonial assets

A match made in hell!

[redacted] must apologise. I'm sorry, I truly am, but I can't help it, I like the Proceeds of Crime Act 2002 (POCA) and fraud. There now, I've said it. Now I've admitted it to you, it feels like a huge burden has been lifted from my shoulders - but I'm still worried that you won't respect me in the morning.

Nevertheless, I must push on. There have been endless articles, seminars, missives and workshops, all dealing with POCA. We know about the assumptions, we know how to calculate the assets and benefits figures and we know that even if the default term is triggered on non-payment, the debt continues into the future.

However, what has increasingly caused headaches for practitioners is the hybrid world of ancillary relief, POCA and mixed ownership of property or assets. Assuming for a moment, in the archetypal family, and acknowledging the risk of stereotyping; husband is the fraudster and the soon-to-be ex-wife is a stay-at-home mum, who gains precedence; the wife or the Crown?

Background and procedure

As we know, under POCA there are three distinct determinations to be made by the court; (i) whether the defendant benefited from his criminal conduct, (ii) the value of that benefit and (iii) the recoverable amount; the assets figure. Bearing in mind the assumptions that we all know and love and the fact that such assumptions can be displaced where they are shown to be incorrect or would present a serious risk of injustice (s.10(6)) this article will focus on the third category; the recoverable amount or realisable assets.

Under s.6 of POCA the 'parties to the proceedings' are the prosecution and the defendant which means that third parties such as the wife, have no right to intervene unless they are called as a witness to assist the court in relation to the ownership or interests in money, property or other items. However, the wife does have an absolute right to be heard during enforcement proceedings – see *Re: Norris* [2001] UKHL 34).

Of course, common sense dictates that if the parties are going through POCA and a divorce and ancillary proceedings are contemplated, then the preferable route would be to combine the proceedings in respect of confiscation and ancillary relief in the High Court as per Munby J's Judgment in the *W v H and Her Majesty's Customs and Excise* [2004] EWHC 526 (Fam/Admin). However, W v H was based upon the previous confiscation legislative framework and there is no mechanism under POCA for the proceedings to be combined – see Webber v Webber [2006] EWHC 2893 (Fam).

To complicate matters still further, the argument that the President of the Family Division had jurisdiction to sit as a Judge in the Crown Court when hearing family proceedings, was put, advanced and accepted in *T v B v RCPO* [2008] EWHC 3000 (Fam) although in fact the court declined to do so in that case. Therefore, the situation appears to be that you can't combine proceedings involving POCA and ancillary relief in the High Court, but a High Court Judge can sit as a Crown Court Judge if he is hearing the family proceedings. That means that the matters remain separate but can be dealt with by the same Judge, at the same time, if the Judge chooses to do so. Well, that's clear then. Following on, it would therefore also seem to be the case that it would be possible for a Crown Court Judge, who has been given a family ticket, to do likewise, if he or she so chooses; lucky them.

However, assuming that the proceedings remain separate, *Webber v Webber* proposes that the preferable way of dealing with tandem proceedings is to deal with the ancillary relief matter first, so this can be taken into account when the Crown Court decides upon 'available assets'. I though wonder how practical this will be given the strict two-year time limit for POCA to be completed following the conclusion of the criminal proceedings? Alternatively, if POCA is dealt with first and later ancillary proceedings 'ring fence' assets that had previously been part of the POCA pot, it would be necessary for the defendant to return to the Crown Court for variation, less he serve a term in default for non payment.

Top trumps

Further, on the allied theme of tension between the legislative fields, in *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039 [2003] Fam 55, a Court of Appeal authority, clearly disposed of the suggestion that the jurisdiction of the family court, under Part II of the Matrimonial Causes Act 1973, was ousted by, or obliged to take second place to, proceedings to enforce orders under Drug Trafficking Act 1994 (DTA) (for which read POCA). The competing interests of the legislation and associated parties must be weighed and balanced on a case by case basis. I'd argue that it is for this reason that it is preferable for the matters to be heard together, even if the legislative framework hinders such an approach.

However, for the purposes of this article, I will assume that the POCA order has been made in the Crown Court, with no reference whatsoever to any interest the wife may have in the asset or assets. I will further assume, for the most part, that the couple are childless, as the provision of maintenance and housing for a child complicates the matters still further (See S v S (2008) below).

A shift in mindset

The first thing to remember is that POCA is a civil action, and the Civil Procedure Rules, notionally, apply to the actions. If the case finds its way to the High Court, for instance it may be necessary to deal with Part 36 offers, and have conferences with the lay client about whether he will 'beat' an offer or not, and any cost implications of not doing so.

That requires a switch in mind set away from the rough and tumble of the criminal practice, to take a more surgical, authority based approach to the issues.

Competing Interests

Adopting the assumption I have made above, that of the POCA order having been made in the Crown Court and a soon-to-be ex-wife challenging it in the High Court, primary reference should be given to s.69 POCA. This section, in essence, sets out the rules in determining any competing rights and interests of the Crown, the defendant and a third party, such as the ex-wife. Subsection (2) and (3) provides as follows:

"(2) The powers –
(a) must be exercised with the view to the value of the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been made or may be made against the defendant;
(b) must be exercised, in a case where a confiscation order has not yet been made with a view to securing that there is no diminution in the value of the realisable property…

(3) Sub-section (2) has effect subject to the following rule –

(a) the powers must be exercised with a view to allowing a person other than the defendant or recipient of the tainted gift to retain or recover the value of any interest held by him…"

By use of the phrase "with a view to", the language of section 69 of POCA retains the same terminology as that of the DTA 1994 which means that the effects of authorities such as *Customs and Excise Commissioners v A* [2002] decided under the previous regime, still apply. This mechanism, allowing an innocent third party to retain their assets, was clearly endorsed by the President of the Family Division in *Webber v CPS* [2006];

"the phrase [with a view to] retains such "elasticity" as to permit a diminution in the available amount and it contemplates striking an appropriate balance between the same competing public policy considerations between confiscating the proceeds of crime and making proper financial provision for a wife. For the reasons given in Customs and Excise v A*, injustice may be caused by too rigid an application of the confiscation principle where the interests of an "innocent" or former spouse are concerned".*

Considering the title of the tribunal in that case, it was a brave stance adopted by the CPS in suggesting that the confiscation regime 'trumped' family legislation in ancillary relief proceedings!

Ancillary Relief

So, we're in the High Court representing the ex-wife, who wants her bit of the matrimonial home to assist her in being provided for in the future. However, the assets to which ancillary relief may apply, barely cover the confiscation order, or in fact, fall a little short. In such circumstances, which of the competing interests, POCA or ancillary relief, wins out?

Between 2004 and 2011, there has been a raft of authority from the Court of Appeal and House of Lords/ Supreme Court attempting to grapple with this balancing act. One of the primary authorities, *S v S* [2008] EWHC 1925 (Admin), (or alternatively, just type 'Stodgell' into your legal search engine) is the culmination of a long, tortuous and multifaceted sequence of litigation in which I, and seemingly half of Albion Chambers were involved. Indeed, this litigation saw members of chambers into both silk and to the bench prior to its conclusion. However, the last incarnation of the case that of *S v S*, gives a good insight into the competing considerations in this area.

Forgive this very potted history, but I'm running short of available column inches; husband was a successful art dealer, even more successful because he didn't pay tax, an omission of which the Inland Revenue thought somewhat dimly. He was prosecuted, convicted and sentenced. He and his wife (and associated children and step children) lived a very comfortable lifestyle. It was accepted that the wife did not know of her husband's dishonesty. The couple divorced.

Though technically, the Court was asked to consider the merits of whether to list the wife's ancillary relief case prior to the satisfaction of the confiscation order, the net effect of this seemingly innocuous question as to listing, was a detailed examination and balancing of the competing interests.

The Court, at Para: 36, posed the following question; *"on all the known facts and making the most favourable assumptions in favour of the wife/mother, might a court make an order for ancillary relief in her favour before, and in priority to satisfaction of, the confiscation order?"* Holman J reviewed the relevant authorities of *Customs and Excise Commissioners v A and another A v A* [2003] Fam 55 and CPS v Richards and Richards [2006] EWCA Civ 849, divining the single principle from them; it's in the Judge's discretion which interest takes priority.

To cut a long story (and Judgment) short, Holman J, decided in favour of the satisfaction of the confiscation order at the expense of providing for the ex-wife and children. The learned Judge acknowledged that the wife was wholly innocent in the case, and that the children of the marriage would suffer a detriment because of the decision but stated that *"the court cannot protect every child from every consequence of their parents' behaviour."* A tough decision we may think. For a couple of decisions that went the opposite way, please study the aforementioned case of *A v A* (2003) and the case of *H v CPS* [2007] EWHC 1291 (Admin) – also a Holman J decision.

Ownership of property and assets

Putting the peculiarities of POCA and ancillary relief to one side for a moment, it is of note that in the case of *R v May* [2008] UKHL 28, in which I was involved in satellite litigation, the House of Lords clearly stated that when assessing an entitlement to property for the purposes of confiscation, the ordinary and familiar common law principles of ownership and 'interest' should apply (See section s.69(3) POCA, as set out above) *may* also reaffirmed that POCA litigation does not depart from those principles in any way, bar where such departure is explicitly endorsed by statute (such as tainted gifts). So, bluntly, dust off your 'Trusts' books, it's going to be a wild ride!

Probably the leading case when dealing with property in this area is *Stack v Dowden* [2007] UKHL 17. The case concerned the breakdown of relationship; though the couple were not married they had lived together for almost two decades, and had a gaggle of children between them. The family home was purchased in its entirety (bar the mortgage) using money from the sale of a house owned by the 'husband', though the mortgage was in joint names. The interest element on mortgage was paid by the 'wife', both paid the capital element, but in unequal shares.

So in such a case, who owns what? The Court held that the starting point in circumstances where there was joint legal ownership was 'joint beneficial ownership', a 50/50 split. The onus of proof was upon the person seeking to show that the parties intended their beneficial interests to be different from their legal interests and in what way or to what extent. Essentially, context is king. The Court made clear that factors, other than financial contributions, could be relevant in divining the intention of the parties, and the Court set out a specimen, though not exhaustive, list.

As an aside, in this particular case, despite the fact that the couple had been

together for many years, the Court noted that they had kept their financial and legal affairs separate thus indicating that the parties had not intended to have equal shares in the property.

To complicate matters still further, the case of *Laskar v Laskar* [2008] EWCA Civ 347 involved a mother and daughter purchasing a council house which mother had rented from the council for a number of years. The property was offered to mother at a discounted rate, though she could not raise sufficient funds. As a result, her daughter became a named tenant, in order that the property could be purchased in joint names. Mother paid more than the daughter, but the mortgage, like Stack v Dowden, was in joint names. The property was then let and inevitably, in a Jeremy Kyle fashion, mother and daughter fell out, so raising the question as to how the property was to be divided.

The nub of the court's ruling in *Laskar* was based upon the 'nature' of the property; it was a commercial venture, rather than a family home. Therefore, despite the familial relationship, this was not determinative of the intentions of the parties, and as a result the court found that the presumption of joint ownership was not applicable in such circumstances. As a result, each share was in accordance with the individual's contributions, an unequal resulting trust.

Conclusions

Wake up! It's ok, it was only a nightmare; have a glass of warm milk and go back to bed.

For those who have read on until now, congratulations. So what have we learnt, what can we divine from the above? In short, we can boil down everything that has gone before into seven bullet points;

1. Where POCA and ancillary proceedings are in tandem, they cannot, easily be heard together;
2. The situation caused by 1 above is nonsense;
3. S.69 of POCA allows an innocent third party to recover what they own;
4. Neither POCA or the MCA 'trumps' the other;
5. Where such competing interests are in the balance, the conclusion is in the discretion of the Judge and entirely fact specific;
6. When assessing 'ownership' or 'proprietary interest', the traditional common law principles still apply and;
7. We can't escape the law of trusts, however hard we try.

Richard Shepherd

Harassment by any other name

There can be little doubt that in recent years there has been a discernable expansion of the range of 'ancillary orders' available to the criminal courts. By the same token, there can be little doubt that there has been a creeping increase in the burden of such orders upon their subjects, both in terms of the action they require or prohibit and in terms of the consequences of a failure to comply with their stipulations. As seen over, the greater prevalence of Sexual Offences Prevention Orders is perhaps one of the clearest examples of these trends. Another is the increase in the number of Restraining Orders made pursuant to the provisions of the Prevention from Harassment Act 1997 and, in particular, the making of Restraining Orders upon acquittal pursuant to s.5A of that act, as inserted by s.12 of the Domestic Violence, Crime and Victims Act 2004 which took effect as of 30th September 2009.

Subsection 1 of s.5A provides that:

'A court before which a person ("the defendant") is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order.'

A defendant who, without reasonable excuse, does anything which he his prohibited from doing by such an order is guilty of an offence punishable on indictment with five years imprisonment, a fine, or both.

It is barely necessary to note that the creation of this power represents, as a matter of principle, a significant expansion of the powers of the criminal courts, the desirability of which has been the subject of copious analysis and argument. However, aside from the arguments as to principle, there will be many practitioners who have felt concern (as with SOPOs) as to whether the procedure and consideration which precedes the making of such an order is always adequate, particularly when regard is had to the often onerous prohibitions of an order and the implications of breach.

In *R. v Brough (Stuart) [2011] EWCA Crim 2802; [2012] Crim. L.R. 228*, the Court of Appeal considered a case in which concerns of this nature arose. Mr Brough had been charged with Dangerous Driving. The essence of the allegation was that he had driven his car at and collided with his sometime partner, causing her injury as a result. The allegation was denied. In her witness statement, the complainant had given an account of the history of their relationship in which she gave examples of Mr Brough's previous conduct towards her and described him as *'jealous, abusive and controlling'.*

In advance of trial, documentation relating to a civil action brought by the complainant against Mr Brough was disclosed. It contained an account of the incident by the complainant which was materially different from her witness statement in the criminal proceedings. On the basis of a lack of realistic prospect of conviction the crown subsequently offered no evidence and a s.17 not-guilty verdict was entered. Notwithstanding this, an application was made for a restraining order under s.5A(1) PHA 1997 on the basis of the history as set out in the complainant's witness statement.

Although Mr Brough was able, through his counsel, to indicate his denial of the factual history of the relationship as set out in the complainant's witness statement, the judge proceeded, on the basis of the witness statement, to make the restraining order in terms which mirrored the previous bail conditions without hearing oral evidence and without giving reason as to why, on the balance of probabilities, he considered that an order in those terms was necessary within the meaning of s5A(1). No specific regard was had to the provisions of part 50 of the Criminal Procedure Rules 2010 and such partial compliance as there was appears to have been the result of chance. The judge seemed to have based the decision to make the order, to some extent, on the fact the Mr Brough had indicated that he had no desire to have anything to do with the complainant in future and so the order had no punitive impact and no harm could come from it.

In considering the appeal against the making of the restraining order the Court of Appeal had regard to the recent case of *R v Kapotra [2011] EWCA Crim 1843* in which the circumstances were closely comparable, albeit that the restraining order had been made by the court of its own motion rather than on an application by the crown. The Court of Appeal in *Kapotra* effectively set out the procedure that should be adopted in such circumstances, with

Continued on back page ▸

Harassment by any other name

continued from previous page

close regard to the applicable parts of the Criminal Procedure Rules. The appropriate procedure required consideration of adjournment of the case for the service of notices identifying the evidence upon which the court was invited to rely and, if necessary, the service of hearsay notices in advance of the application being considered at a hearing.

In allowing the appeal, the court in *Brough*, following *Kapotra* held, inter alia, that the judge had taken too summary an approach to the application and erred in not conducting the proper examination of the evidence and not explaining his reasons for imposing a restraining order.

Comment

While the specific circumstances of the making of the restraining orders in Brough and Kapotra may not be universally applicable, the judgements of the Court of Appeal in these cases establish a clear point of principle which will accord with the instinctive view of many practitioners. Restraining Orders of this nature are often onerous in their stipulations and the consequences of breach are significant. Accordingly, courts should not simply make such orders without adequate and methodical consideration of the evidence and without complying with the applicable procedural requirements.

Derek Perry

Mary, Mary, quite contrary

Constraints on cross-examination of children

A Renaissance artist, Cellini, boasts in his memoirs of how he secured his acquittal at a trial in 1540 through viscious cross-examination of the young girl who accused him of buggery:

"I said that I wanted her to explain exactly what I had done with her… I made her repeat it three times in succession; and when she had finished I said in a loud voice:

'She confesses her sin; as for me I have had no relations of any kind with her… the little whore and her mother began to cry'."

The young girl would be afforded far greater protection in our modern courts; her alleged abuser would not be permitted to cross-examine her himself, questions about other sexual experience would be prevented, and she would be afforded special measures to make her as comfortable as possible. Today, the young girl may be also afforded a new kind of protection, a severe limitation on the nature, tone and style of cross-examination.

The higher courts have moved into the arena of advocacy. In the case of Barker (2009), the Lord Chief Justice said:

'The forensic techniques of the advocate... have to be adapted to enable children to give the best evidence of which they are capable. At the same time the defendant's right to a fair trial must be undiminished. When the issue is whether the child is lying or mistaken… the advocate [should ask] short, simple questions which put the essential elements of the defendant's case to the witness... Aspects of evidence which undermine… the child's credibility must, of course, be revealed to the jury, but it is not necessarily appropriate for them to form the subject matter of detailed cross-examination of the child'.

The Court of Appeal in *W and M* [2010] upheld a conviction even though the 8-year-old complainant retracted most of her account in cross-examination. The Court of Appeal noted that much of the apparent retraction had come about when the child was answering 'tag questions' such as *'He didn't touch you with his willy, did he?'*. The Court of Appeal commented that children's answers to tag questions, and indeed to all leading questions may be of limited value, because the child may wish to bring matters to a swift end, or to please the questioner by giving the reply which is sought. The court suggested that cross-examiners should use *'questions that do not contain a statement of the answer that is sought'*. This advice is plainly contrary to the most basic techniques of cross-examination.

The Court of Appeal has recently gone even further in its guidance. In the case of *Wills* [2011], the court suggested that trial judges may want to draft a protocol of cross-examination practice for advocates to adhere to. The Court turned its back on Denman's Act (Criminal Procedure Act 1865) which requires that any inconsistent statement should be put to a witness before it is used as evidence of inconsistency and unreliability. The Court suggested that such inconsistencies did not need to be put to a child witness, but could be 'pointed out' after the witness had given evidence. The Court of Appeal was undecided about whether it should be the judge or the advocate who 'pointed out' inconsistencies.

A significant tension will be played out in every case involving a child witness. It is the tension between the aim of the judiciary (that the jury hears 'best evidence'), and the aim of defence counsel (that the jury doubt the evidence). Whilst it is plain that children should not suffer hostile and traumatic questioning, a defendant must be entitled to have a proper challenge put to every witness who he says is lying. The higher courts' guidance floats on a raft of presumptions; that cross-examination of children is a pointless exercise, that a child will rarely change their account when confronted with previous inconsistencies, that a child who changes her account is moving away from the truth, that a jury cannot find any clues as to whether a child is lying in their reaction to a challenge. It is an advanced skill of advocacy to be able to cross-examine a child in an effective way without alienating the child, and thereby the jury. In many cases, an advocate who faithfully follows the guidance in the recent cases will not be able to forcefully and meaningfully challenge the central evidence against the defendant.

As for Cellini, he tried again to take advantage of the lack of protection for child witnesses. In 1542 he was convicted of buggery of two boys and fined 50 scudi.

Kate Brunner

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