

The Newsletter from The Network of Independent Forensic Accountants

CONVICTED CRIMINALS LIVE UNDER THE SWORD OF DAMOCLES



Undischarged confiscation orders last for life and cannot be expunged even by bankruptcy.

It is now almost a decade since confiscation orders began being made against convicted criminals under the Proceeds of Crime Act 2002. The legislation provides that, in appropriate circumstances, the Court can make a confiscation order for the amount by which the defendant has benefitted from his or her illegal activity. However, the amount payable by the defendant is limited to whatever assets he or she has available at the relevant date.

Importantly, the difference between the amount of the confiscation order and the amount deemed to be available remains as an outstanding debt payable by the defendant at some unspecified future date. This debt cannot be expunged even by bankruptcy.

Going straight

This raises the interesting public policy question as to what incentive such an individual has for 'going straight'.

To date, the government has taken no steps to review its archive files of confiscation cases to determine whether there may now be opportunities to recover additional sums in relation to confiscation orders made several years ago in circumstances such as those described above.

The fact that it has not done so does not mean that it will not choose to do so in the future. Indeed an analogy can perhaps be drawn with the insolvency regime that existed during the late 1990's. At that time many thousands of individuals were made bankrupt in circumstances in which their homes were in negative equity. Although these properties automatically vested in the Official Receiver, bankrupts were typically given an option to reacquire their interests for a nominal fee.

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NIIFA WELCOMES A NEW MEMBER Ann Hansen, The Hansen Company, Glasgow.

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HOW TO CLEAN UP ‘GRUBBY’ DIVORCES BY WASHING ASSETS THROUGH TRUSTS

The creative use of a discretionary trust can lead to significant tax savings when non-business assets are being transferred between divorcing spouses.



A person with a cynical frame of mind might think that it is no coincidence that at a time of record low property prices (in today's terms), there seems to be a sharp increase in the number of husbands with property portfolios who are getting divorced. Certainly there have been a large number of cases recently in which property investment companies have had to be valued for the purposes of matrimonial ancillary relief proceedings.

A common problem in such cases can be taxation because investment properties and shares in investment property companies do not qualify for gift relief. Consequently, if a transfer of such assets takes place from one spouse to the other after the end of the tax year following the year of separation, the donor will be taxed on the disposal of the shares or properties as if they had been sold at market value.

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As assets are not being sold, a tax liability can arise which has to be met without there being any sale proceeds with which to meet it.

In such cases it is worth considering the use of a discretionary trust through which the properties or shares can be ‘washed’. If properly applied, such a technique can shelter gains of up to £325,000.

For larger cases it may be worth considering group de-merger provisions under Section 110 of The Insolvency Act 1986

or the relatively new statutory de-grouping procedures. Such strategies can be very tax effective but they will only ever be practical in cases where there is significant trust between the estranged spouses. Since this tends to be the exception rather than the rule, it is the Chancellor of the Exchequer who tends to benefit more often than not from family breakdown between high net worth individuals.

DAMAGES FOR PERSONAL INJURY INCREASE AS WE GET OLDER AND LIVE LONGER

The Government Actuary's Department released the new edition of the Ogden Tables (Ogden 7) on 10 October 2011. The structure of the Tables remains the same but there are important changes from the previous edition.

The use of updated mortality tables results in an increase in life expectancies for both males and females. Some increases are very significant. For example for males aged 75 the increase is just under 15% and for females it is just over 14%.

There are also significant increases in pension multipliers. For a male aged 40 with a loss of pension commencing at age 65 the increase is just under 8.5%. For a female with a loss of pension commencing at age 60 the increase at age 40 is just over 5.5%.

Another important change is to the definition of 'disabled'. Reference to 'progressive illness' has replaced reference to 'disability' and the definition now refers to the Equality Act 2010, rather than the Disability Discrimination Act to reflect changes in legislation. The definition of 'disability' has always been contentious, and further amendments are expected in the next edition of the Ogden Tables.

For fatal accidents, the Working Party notes that by section 7(1)(d) of the Damages (Scotland) Act 2011 in Scotland, unlike in England, the multiplier is now calculated at the date of trial not the date of death. This is the recommendation in Ogden 7.

Interestingly Ogden 7 now includes discount rates ranging from -2% to + 3% presumably to allow for a possible change in the prescribed discount rate as a result of the review currently being undertaken by the Lord Chancellor. Multipliers at negative rates are useful for the financial evaluation of periodical payments in the exercise which is required by the Damages (Scotland) Act 2011 in all cases for comparison with lump sums.

The Ogden Working Party has indicated that due to the length of time since the Ogden Tables were first introduced back in 1984, the Explanatory Notes now

require substantial re-drafting. In addition, further updated mortality projections are expected from the Office of National Statistics later in 2011. Ogden 7 should be seen as an 'interim version' and Ogden 8 incorporating these amendments is expected in Autumn 2012.

A full copy of Ogden 7 can be found at www.gad.gov.uk

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Many failed to do this which resulted in their homes, or in the case of jointly owned property, their share of their homes, remaining vested in their bankruptcy estates.

Very rude shock

Years later the government established a department known as the Protracted Realisations Unit to review these old insolvency cases, it came as a very rude shock to the bankrupts in question to receive a letter, many years after they had been discharged from bankruptcy, noting that their homes had greatly increased in value and that associated mortgages had largely been paid off and insisting that the properties be sold to discharge the bankruptcy debts plus interest and costs. The resulting publicity led to a change in the law but it was not retrospective and it did nothing to help those facing claims from the Protracted Realisations Unit. Most of those affected lost their homes.

It is not difficult to envisage a unit being set up at some point in the future to undertake a similar exercise in relation to outstanding confiscation orders. For that reason it remains extremely important for those advising defendants who face confiscation claims to put just as much effort into reducing, where possible, the quantum of the confiscation order itself, as into reducing the available amount.

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NEW BENCHMARK FOR ASSESSING 'RELIABILITY' OF EXPERTS' EVIDENCE PROPOSED

The Law Commission's parliamentary proposals in relation to expert evidence in the criminal courts may influence judges' attitudes to expert evidence in civil cases.

Prompted by recent high profile miscarriages of justice involving expert witnesses in the criminal courts, the Law Commission has presented proposals for a statutory framework to govern the admissibility of expert evidence in criminal proceedings in England and Wales.

Although the Law Commission's scope has been limited to criminal proceedings, its conclusions may well influence judges in the civil courts who consider the reliability of expert witness evidence presented to them.

Significantly the Law Commission recommends that expert witness evidence should not be considered reliable if;

- It is based on a hypothesis which has not been subjected to sufficient scrutiny;
- It is based on unjustifiable assumptions;
- It is based on flawed data.

Many of the Law Commission's proposals will not apply to accountancy evidence but will be more relevant to scientific disciplines. However, there are occasions in which accountancy experts rely on published data which may not have been subjected to sufficient scrutiny to satisfy the new test of reliability.

Specifically, the private company price index "PCPI", published by the accountancy practice BDO LLP, is widely used by accountants for the purposes of business valuations. However, the statistic is based on an undisclosed number of undisclosed transactions and is subject to various undisclosed adjustments. Consequently, some might argue that it is not sufficiently reliable to pass the scrutiny test set out by the Law Commission. On the other hand the PCPI has been accepted by the courts in a number of cases and therefore has a degree of judicial authority.

The Law Commission's proposals serve to give a good indication that expert evidence is likely to come under ever greater scrutiny in terms of its reliability.