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### PERSONAL INJURY AND CLINICAL NEGLIGENCE CLAIMS WHERE ACCOUNTANTS CAN ADD VALUE

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## FORENSIC ACCOUNTANTS IN



## CONFISCATION PROCEEDINGS

It has been said that the confiscation legislation under the Proceeds of Crime Act ("PoCA") 2002 is criminal.

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## NIIFA A FAIR DAY'S PAY FOR A FAIR DAY'S WORK?

Matrimonial lawyers and others who frequently review valuations prepared by forensic accountants will be only too familiar with the adjustment to maintainable earnings for directors' remuneration. Typically reports include a statement along the following lines:

*"As is common in privately owned companies, the directors' remuneration does not equate to that which would be paid if the company were managed and run by non shareholders. An appropriate market rate to reflect the management of the company would be £X"*

So, What should X be?



What do you do if you don't agree with the figure chosen by the forensic accountant, especially if s/he is acting as a single joint expert?

Is there any useful source of statistical data that can assist?

The answer to all three questions can be found in the survey of directors' rewards published by Croner Reward. This invaluable annual survey sets out details of directors' remuneration packages analysed by market sector and size of company.

The full survey costs £695 plus VAT, a cost that is likely to be difficult to justify in the context of all but the largest ancillary relief proceeding or shareholder disputes. So, in smaller cases in which directors' remuneration is a relevant issue, please contact us and we shall be pleased to provide advice and access to the relevant data.

# FORENSIC ACCOUNTANTS IN CONFISCATION PROCEEDINGS

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Surely to deprive a convicted criminal of the spoils of his criminal activity is no more than common sense? Maybe, but for those that believe that we have a legal system in which the accused are innocent until proven guilty and a prison system that encourages rehabilitation, the confiscation provisions will contain a few surprises.

## **Motive**

Chief constables are understandably keen to use the confiscation provisions of PoCA 2002, perhaps because their resource-starved forces are entitled to retain a share of any amounts that are successfully recovered.

## **Means**

Claims typically arise in circumstances in which the CPS forms the view that a defendant has a “criminal lifestyle” (as defined by section 75 PoCA 2002).

If the court shares this view, then the traditional principal under which the burden of proof lies with the prosecution is significantly shifted onto the shoulders of the defendant by virtue of the application of four statutory assumptions, namely that :

- Any property transferred to the defendant at any time after the ‘relevant day’ (the day six years prior to the day when proceedings for the offence were started against the defendant) was obtained by him as a result of his general criminal conduct;
- That any property held by the defendant at any time after the date of his conviction was obtained by him as a result of his general criminal conduct;
- That any expenditure incurred by the defendant at any time after the ‘relevant day’ was met from property obtained by him as a result of his general criminal conduct; and
- That, for the purpose of valuing any property obtained (or assumed to have been obtained) by the defendant, he obtained it free of any other interests in it.

The Court must make these assumptions unless, on the balance of probabilities:

- They are shown to be incorrect; or
- There would be a serious risk of injustice if the assumptions were made.

Consequently, a defendant’s benefit from criminal conduct is taken to be the aggregate of his benefit from the particular crime of which he has been convicted and, where he is held to have had a criminal lifestyle, his benefit from general criminal conduct calculated on the basis of the foregoing assumptions.

## Opportunity

In the light of the relative ease with which confiscation orders can be obtained, following conviction, opportunities for issuing proceedings abound.

What is of particular interest to the forensic accountant is the extent to which they can and should be defended.

In that context it is important to stress that, once made, a confiscation order lasts forever.

It cannot even be expunged by bankruptcy.

Of course the legislation was drafted to defeat the career criminal and, to the extent that it applies to such individuals, the principle of an effect in perpetuity makes perfect sense.

On the other hand, from a public policy point of view, what is the incentive for a convicted criminal to “Go straight”, if a substantial confiscation order is hanging over him? Consider, for example the case of an individual who serves several years in jail and subsequently builds up an asset base (house, pension etc) by entirely legitimate (and demonstrably legitimate) means. If he is subject to an unsatisfied confiscation order then there is nothing to prevent the confiscation of his assets to meet that historic liability at any time.

Defendants would therefore be well advised to make every effort to limit confiscation orders by:

Ensuring that wherever a legitimate source can be identified for an asset or income stream, it is highlighted so it can be excluded from the confiscation amount;

Seeking to reduce the “available amount”, being the aggregate of the total of the values of all the property then held by the defendant (subject to certain statutory deductions) and the total of the values of any tainted gifts. The confiscation order will be restricted to this sum.

Considering whether or not liability, if any, can be shared with third parties with whom he has been convicted jointly. In that context the judgement of the Court of Appeal in *R v Raymond George May and others* [2005] EWCA Crim 97 held that where several defendants were jointly responsible for a crime, and the property thus obtained was jointly held between them, each benefited in the whole amount jointly held and there was no requirement to apportion that amount between them. However the Court of Appeal also held that there was force in the argument that Article 1 of the First Protocol to the European Convention on Human Rights required proportionality to be exercised. It noted that accordingly in some cases this may require a Court to take an apportionment approach.





## PERSONAL INJURY AND CLINICAL NEGLIGENCE CLAIMS - WHERE FORENSIC ACCOUNTANTS CAN ADD VALUE

*The Top Ten reasons to use a forensic accountant:*

1. To calculate claims for loss of the State Second Pension (often overlooked)
2. To consider claims for loss for Working Tax Credit for low paid claimants (also easily missed)
3. To advise on the pros and cons of periodic payments compared with lump sums
4. To comment on appropriate indices (annual earnings, RPI etc) in relation to periodic payments
5. To explain the implications of specific annuity products to claimants who have been offered them by defendant insurance companies
6. To assist in cases where claimants have a history of under-declaring income for tax purposes
7. To assist with claims involving the loss of share options
8. To evaluate the financial implications of alternative career paths
9. To assist in the preparations of complex schedules of loss
10. To calculate losses of post-tax earnings for the self employed

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