



Trinity Term
[2012] UKSC 35

On appeal from: [2010] EWCA Civ 907; [2011] EWCA Civ 578

JUDGMENT

**Perry and others (Appellants) v Serious Organised
Crime Agency (Respondent)**

**Perry and others No. 2 (Appellants) v Serious
Organised Crime Agency (Respondent)**

before

Lord Phillips, President

Lady Hale

Lord Brown

Lord Judge

Lord Kerr

Lord Clarke

Lord Wilson

Lord Reed

Sir Anthony Hughes

JUDGMENT GIVEN ON

25 July 2012

Heard on 20, 21 and 22 March 2012

Appellants

Philip Jones QC
David Johnston QC
Daniel Lightman

(Instructed by Asserson
Law Offices)

Respondent

James Eadie QC
Richard Keen QC
Sarah Harman
Donald Lilly

(Instructed by Serious
Organised Crime Agency
Legal Department)

LORD PHILLIPS (WITH WHOM LADY HALE, LORD BROWN, LORD KERR AND LORD WILSON AGREE)

1. This is a judgment in two appeals that this Court heard together. They raise issues as to the scope of the powers conferred by the Proceeds of Crime Act 2002 (“POCA”). They arise out of attempts by the respondent (“SOCA”), acting apparently on its own initiative, to deprive the first appellant (“Mr Perry”), together with members of his family or entities associated with them, of the fruits of serious criminal fraud for which Mr Perry has been convicted in Israel, wherever in the world those fruits may be found. SOCA intends to achieve this aim by invoking the powers of civil recovery conferred on the High Court by Part 5 of POCA. So far, however, it has not got beyond preliminary steps aimed at ensuring that the substantive relief which it seeks is effective. One of those steps has been obtaining a worldwide property freezing order in respect of property held by the appellants in appeal 0143. I shall call this “the PFO appeal”. The other step has been to obtain a disclosure order, under which notices have been given to the appellants in appeal 0182. I shall call this “the DO appeal”. It is logical to consider the PFO appeal first, for the result of this appeal will have some bearing on the DO appeal.

THE PFO APPEAL

Introduction and factual background

2. Some of this introduction will be relevant to both appeals. The substantive relief that SOCA seeks consists of civil recovery orders in relation to property obtained through Mr Perry’s unlawful conduct. In order to prevent the dissipation of that property SOCA has obtained a worldwide property freezing order pursuant to section 245A of POCA (in future all statutory references will be to POCA unless I state otherwise). Section 245A gives SOCA the power to seek a property freezing order where it is empowered to take proceedings for a civil recovery order. It is common ground that a property freezing order can only relate to property that can properly be made the subject of a civil recovery order. The appellants contend that, subject to a limited exception, a civil recovery order can only be made in respect of property that is within the territorial jurisdiction of the court making it. On this ground the appellants attack the validity of the property freezing order in so far as this extends to property outside that jurisdiction. Thus the important issue raised by the PFO appeal is the extent to which a recovery order can be made in respect of property outside the United Kingdom.

3. Lea Perry is Mr Perry's wife and Tamar Greenspoon and Yael Perry are his daughters. Leadenhall Property Ltd is an Isle of Man company alleged to hold assets on behalf of Mr Perry.

4. On 24 October 2007 Mr Perry was convicted in Israel of a number of offences in relation to a pension scheme that he had operated in Israel. On 19 February 2008 he was sentenced to 12 years imprisonment and fined the equivalent of approximately £3m. He has paid that fine. Two subsequent appeals had limited success inasmuch as they resulted in a reduction of his sentence to 10 years imprisonment and a reduction in the finding of the amount that he had stolen.

5. In or about May 2008 Hoare's Bank in London disclosed to SOCA that Mr Perry, Tamar and Yael had accounts there. Subsequently SOCA discovered that Mr Perry had accounts in London in the Bank J Safra (Gibraltar) Ltd. The total in these various accounts amounted to approximately £14m.

6. On 8 August 2008 SOCA obtained a disclosure order from HH Judge Kay QC, sitting as a Deputy High Court Judge, on a paper application without notice. Notices under that order addressed to the DO appellants, all of whom were at all material times outside the jurisdiction, were communicated to them by letter addressed to a residence that Mr Perry maintains in Mayfair.

7. On 28 October 2009 SOCA obtained a worldwide property freezing order from Cranston J on an application without notice against eight respondents, including the appellants in the PFO appeal. So far as Mrs Perry was concerned, the order froze certain identified assets, but it froze worldwide all the assets of the other defendants. The order also required all the defendants to disclose all their worldwide assets.

The hearings below

8. The PFO appellants sought an order from Mitting J varying the property freezing order so as, inter alia, to exclude from its ambit property that was located outside England and Wales and to limit the disclosure obligations under the order to assets located within England and Wales. In a judgment dated 28 June 2010 [2010] EWHC 1711 (Admin); [2010] 1 WLR 2761 Mitting J varied some of the disclosure obligations but otherwise rejected the application. Mitting J's judgment was admirably clear and concise. He started with a presumption against giving the relevant provisions of POCA extraterritorial effect, but concluded that, with the exception of section 286, which applied only to an order made in Scotland, the

language of the relevant provisions so clearly applied to property outside the jurisdiction that it displaced this presumption.

9. The appellants' appeal to the Court of Appeal was heard on 8 and 9 December 2010 and judgment was delivered on 18 May 2011 [2011] EWCA Civ 578; [2011] 1 WLR 2817. The lengthy lead judgment of Hooper LJ was a reflection not only of the complexities of POCA but of the very detailed submissions advanced by Mr Philip Jones QC for the appellants, which were summarised at some length by the Lord Justice. Among many other arguments Mr Jones relied on the presumption against extraterritoriality. A civil recovery order vests property in a "trustee for civil recovery". Mr Jones submitted that such an order took effect in rem. He submitted that it would be a breach of international law for the English Court to make an order in rem in respect of property in a foreign jurisdiction, the more so if that property was real property. Hooper LJ rejected this argument. He held that a civil recovery order operated in personam against the holder of the property. The effect, if any, of a civil recovery order in relation to property in a foreign jurisdiction would depend upon the law applied in that jurisdiction and, in those circumstances, there was nothing untoward in making such an order. Like Mitting J, Hooper LJ concluded that the clear meaning of the relevant provisions was that a civil recovery order could be made in respect of property wherever in the world the property was located, and there was no reason not to give effect to the natural meaning of the language. Like Mitting J, Hooper LJ concluded that section 286 made an exception in the case of an order made in Scotland. Hooper LJ derived support for his conclusions from analogies with the law of bankruptcy and from the practice of issuing worldwide freezing orders.

10. In a shorter judgment Tomlinson LJ concurred both with the result reached by Hooper LJ and with his reasoning. Maurice Kay LJ agreed with both judgments.

11. It is common ground that, on its face, section 286 makes provision in respect of the scope of a recovery order that distinguishes the position in Scotland from that in the rest of the United Kingdom. There is a dispute as to the nature of that distinction and, whatever its nature, no one has yet been able to suggest an explanation for it.

A summary of my conclusions

12. Because of the complexity of the subject matter of this appeal I propose to follow the example of Hooper LJ by summarising my conclusions at the outset.

(i) The courts below placed undue weight on the definition of “property” in POCA.

(ii) The appellants have placed undue weight on the presumption that a statute does not have extraterritorial effect.

(iii) States have, by agreement, departed from the customary principles of international law in the case of confiscating the proceeds of crime. Of particular relevance is the 1990 Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (“the Strasbourg Convention”). POCA must be read in the light of that Convention.

(iv) The Convention recognises that the courts of state A may make an order purporting to vest in the authorities of state A property that is situated in state B in circumstances where the property is the proceeds of the criminal conduct of a defendant subject to the criminal jurisdiction of state A.

(v) The Convention provides that effect should be given to such an order by confiscation proceedings in state B at the request of state A.

(vi) The answer to the issue raised by the PFO appeal depends upon an analysis of both the scheme and the language of POCA considered in the light of the Convention.

(vii) Parts 2, 3 and 4 of POCA provide for (a) the imposition in personam of obligations in respect of property worldwide; (b) measures in rem to secure and realise property within the United Kingdom; and (c) requests to be made to other states to take such measures in respect of property within their territories.

(viii) Part 5 of POCA makes provision for in rem proceedings in respect of property within the United Kingdom but not outside it.

(ix) The scheme of POCA, as described above, accords with arrangements made by the Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) (“the Order”) for giving effect to requests from other states in relation to the confiscation of the proceeds of crime.

(x) The scheme of POCA as described above also accords with the requirements of a coherent international scheme for confiscation of the proceeds of crime and with principles of public international law. The converse is the case if SOCA's submissions as to the extraterritorial effect of Part 5 are correct.

(xi) Section 286 is an anomalous enigma and cannot justify giving the provisions of POCA that relate to the rest of the United Kingdom a meaning different from that which they would bear in the absence of section 286.

(xii) For all these reasons the PFO appeal should be allowed.

The definition

13. Part 5 of POCA places on the High Court in England and Wales and Northern Ireland and the Court of Session in Scotland the obligation, in prescribed circumstances, to make a civil recovery order in respect of property which is, or represents, property obtained through unlawful conduct. Section 316(4) has a definition of property ("the definition") that applies in Part 5:

"Property is all property wherever situated and includes

–

- (i) money,
- (ii) all forms of property, real or personal, heritable or moveable,
- (c) things in action and other intangible or incorporeal property."

Mitting J and the Court of Appeal were impressed by the natural meaning of the words "wherever situated" and concluded that these words should be applied, without restriction, to property in respect of which a recovery order could be made. Thus a recovery order could be made in respect of any form of property, whether real, personal or a chose in action, and wherever in the world that property was situated.

14. The words "wherever situated" do not describe the type of property to which Part 5 applies. Rather they indicate the location of the property to which the provisions of Part 5 can apply. The definition is repeated no less than eight times

in POCA - sections 84(1), 150(1), 232(1), 316(4), 326(9), 340(9), 414(1) and 447(4). POCA is peppered with references to “property”. All fall within the definition. But the definition cannot be applied so as to add to the words “property”, wherever it appears, the words “wherever situated”. As I shall demonstrate, most of the provisions of POCA apply only to property within England and Wales, Scotland or Northern Ireland. By way simply of example, I can refer to section 45(1) which confers on a constable the power to seize property “to prevent its removal from England and Wales”. Some provisions refer, however, to property worldwide. Whether or not the location of “property” to which a provision of POCA refers is subject to a territorial restriction depends upon the context. I so held, when giving the only reasoned speech, in *King v Director of the Serious Fraud Office* [2008] UKHL 17; [2009] 1 WLR 718, para 37. For these reasons I do not attach to the words in the definition “wherever situated” the weight that they have carried with the courts below. In order to decide on the scope of the application of Part 5 of POCA it is necessary to consider both the structure and the language of the Act having regard to relevant principles of international law.

The presumption against extraterritoriality and the Strasbourg Convention

15. Mr Jones QC for the appellants submitted that it was a breach of international law for a United Kingdom statute even to purport to vest in a United Kingdom authority property situated in the territory of another state.

16. Mitting J began his judgment by reference to the presumption of statutory interpretation that a statute will not have extraterritorial effect and to the statement of Lord Hoffmann in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, para 54:

“it is a general principle of international law that one sovereign state should not trespass upon the authority of another, by attempting to seize assets situated within the jurisdiction of the foreign state or compelling its citizens to do acts within its boundaries.”

17. Hooper LJ himself cited the statement of Lord Diplock in *R v Cuthbertson* [1981] AC 470, 485:

“Under English rules of conflict of laws it is in my view well established that an English court has no jurisdiction either in a criminal or a civil matter to make orders purporting ipso jure to transfer moveable property situate abroad.”

18. Confiscation of the proceeds of crime is, however, an activity in respect of which States have departed from these principles. Of particular relevance is the Strasbourg Convention, to which the United Kingdom is a party. The question of whether the exorbitant effect of Part 5 of POCA for which SOCA contends would involve a breach of international law must be considered in the light of the Strasbourg Convention. Hooper LJ set out relevant provisions of the Strasbourg Convention in some detail and I must do the same.

The Strasbourg Convention

19. Chapter I contains definitions which include:

“(b) ‘property’ includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property;

(c) ‘instrumentalities’ means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences;

(d) ‘confiscation’ means a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property; ...”

20. Chapter II deals with measures to be taken at national level to identify and trace properties subject to confiscation.

21. Chapter III deals with international co-operation. Section 1 sets out the relevant principles. Article 7 lays down general principles and measures for international co-operation. It provides:

“1. The Parties shall co-operate with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds.

2. Each Party shall adopt such legislative or other measures as may be necessary to enable it to comply, under the conditions provided for in this chapter, with requests:

a. for confiscation of specific items of property representing proceeds or instrumentalities, as well as for confiscation of proceeds consisting in a requirement to pay a sum of money corresponding to the value of proceeds;

b. for investigative assistance and provisional measures with a view to either form of confiscation referred to under a. above.”

22. The Explanatory Report submitted to the Committee of Ministers of the Council of Europe by the committee of experts who drew up the Convention, illuminates article 7:

“10. Where the law enforcement agencies and judicial authorities have gathered information through investigations, there should also be efficient means available to ensure that the offender does not remove the instruments and proceeds of his criminal activities. ‘Freezing’ of bank accounts, seizure of property or other measures of conservancy need to be taken to ensure this. Section 3 of Chapter III provides for international co-operation in respect of provisional measures.

In order to secure the confiscation of the instruments and proceeds from crime, the Convention provides in section 4 of Chapter III principally two forms of international co-operation, namely the execution by the requested State of a confiscation order made abroad and, secondly, the institution, under its own law, of national proceedings leading to a confiscation by the requested State at the request of another State. In respect of the first alternative, the Convention follows the pattern of the European Convention on the International Validity of Criminal Judgments. The second method of international co-operation could be compared to the one which is provided for in the European Convention on the Transfer of Proceedings in Criminal Matters. ”

23. Section 2 deals with mutual assistance in identifying and tracing property liable to confiscation and requires a party to comply with a request for assistance from another party to the extent compatible with the law of the former.

24. Section 3 deals with provisional measures. Where a party has instituted criminal proceedings or proceedings for the purpose of confiscation and so requests, another party must take provisional measures such as freezing or seizing to secure property which may become subject to confiscation, in so far as permitted by its domestic legislation. The same applies where a party receives a request for confiscation.

25. Section 4 deals with confiscation. It provides:

“Article 13 – Obligation to confiscate

1. A Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall:
 - a. enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or
 - b. submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.
2. For the purposes of applying paragraph 1.b of this article, any Party shall whenever necessary have competence to institute confiscation proceedings under its own law.
3. The provisions of paragraph 1 of this article shall also apply to confiscation consisting in a requirement to pay a sum of money corresponding to the value of proceeds, if property on which the confiscation can be enforced is located in the requested Party. In such cases, when enforcing confiscation pursuant to paragraph 1, the requested Party shall, if payment is not obtained, realise the claim on any property available for that purpose.
4. If a request for confiscation concerns a specific item of property, the Parties may agree that the requested Party may enforce the confiscation in the form of a requirement to pay a sum of money corresponding to the value of the property.

Article 14 – Execution of confiscation

1. The procedures for obtaining and enforcing the confiscation under article 13 shall be governed by the law of the requested Party.
2. The requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or

judicial decision of the requesting Party or in so far as such conviction or judicial decision is implicitly based on them.

3. Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that paragraph 2 of this article applies only subject to its constitutional principles and the basic concepts of its legal system....”

26. There was an issue in the Court of Appeal as to whether the Strasbourg Convention applied to Part 5 proceedings. Hooper LJ held at para 72 that it did. I agree with him. The Explanatory Report makes the following comment at para 15:

“The experts were also able to identify considerable differences in respect of the procedural organisation of the taking of decisions to confiscate (decisions taken by criminal courts, administrative courts, separate judicial authorities, in civil or criminal proceedings totally separate from those in which the guilt of the offender is determined (these proceedings are referred to in the text of the Convention as ‘proceedings for the purpose of confiscation’ and in the explanatory report sometimes as ‘in rem proceedings’), etc). It was also possible to distinguish differences in respect of the procedural framework of such decisions (presumptions of licitly/illicitly acquired property, time-limits, etc).

The experts agreed that it would be impossible to devise an efficient instrument of international co-operation without taking into account these basic differences in national legislation. On the other hand, effective co-operation must recognise that the systems may not be alike but that they aim to achieve the same goals. This is why the committee agreed to put the two systems (value and property confiscation) of confiscation on an equal footing and to make the text unambiguous on this point. ”

27. The Explanatory Report adds at para 43 in relation to article 13:

“Any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are

criminal in nature, that is, that they concern instrumentalities or proceeds. Such types of proceedings (which include, for instance, the so called ‘in rem proceedings’) are, as indicated under ‘General considerations’ above, referred to in the text of the Convention as ‘proceedings for the purpose of confiscation’.”

28. The Explanatory Report adds this further comment at para 48:

“[According to para 3 of article 13], parties must, for purposes of international co-operation in the confiscation of proceeds, be able to apply both the system of property confiscation and the system of value confiscation. This is made clear by article 7, paragraph 2.a. It may imply that Parties which have only a system of property confiscation in domestic cases have to introduce legislation providing for a system of value confiscation of proceeds, including the taking of provisional measures on any realisable property, in order to be able to comply with requests to that effect from value confiscation countries. On the other hand, Parties which have only a system of value confiscation of proceeds in domestic cases must introduce legislation providing for a system of property confiscation of proceeds in order to be able to comply with requests to that effect from property confiscation countries.”

29. “Confiscation” under the Strasbourg Convention has to be “ordered by a court following proceedings in relation to a criminal offence or criminal offences” – see article 1(d). Thus it would seem that the Convention applies to (i) a confiscation order in rem made by party A after conviction of a defendant within its territory in respect of property owned by the defendant situated within the territory of party B; (ii) a confiscation order in rem made by party A in respect of property situated within its territory after conviction of the owner of that property in the territory of party B. One thing is plain beyond doubt. The Strasbourg Convention envisages the courts in one state making an order confiscating property situated in another state. There would thus appear to be established, in respect of the proceeds of crime, an exception to the principle stated by Lord Diplock in *Cuthbertson* to which I have referred at para 17 above. I believe, however, that the exorbitant in rem confiscation order that the Strasbourg Convention envisages is one where the jurisdiction to make the order is an in personam jurisdiction founded on the conviction of the owner of the property by the court of the state making the order. The much wider exorbitant jurisdiction that SOCA contends is conferred by Part 5 is, so far as I am aware, without precedent anywhere in the world.

30. I can summarise the position as follows. The Strasbourg Convention envisages two types of confiscation proceedings: (i) value confiscation and (ii) confiscation of specific property. It requires parties to give effect, by proceedings within their own jurisdictions and in accordance with their own laws, to requests for assistance in respect of both types of confiscation proceedings that are taking place or have taken place in the jurisdictions of other parties.

The scheme of confiscation under POCA

Confiscation

31. Parts 2, 3 and 4 of POCA make provision for value confiscation by the criminal court, by means of what is described as a “confiscation order”. “Confiscation” is a misnomer. The scheme of these Parts involves the imposition of the obligation to make a money payment, which is enforced in the same way as a fine, on a person who has been convicted in the relevant jurisdiction. Thus the order is in personam and it is made as part of the criminal process. The amount of the confiscation order is the amount of benefit that the defendant has obtained from his criminal conduct, calculated in accordance with complex provisions of POCA and subject to an upper limit, which is the amount of the defendant’s available assets.

32. The provisions in Part 2 relate to England and Wales. Similar provision in relation to Scotland are set out in Part 3 and in relation to Northern Ireland in Part 4. I shall describe the effect of the provisions in Part 2. The confiscation order is made by the Crown Court after a defendant has been convicted by the court or committed to the court for sentencing or for the imposition of a confiscation order. Thus the order is in personam on a defendant who is within the jurisdiction of the Crown Court. To calculate the amount of the confiscation order, the court must (i) identify the property that the defendant initially obtained as a result of or in connection with his criminal conduct and value this; (ii) decide whether the defendant still holds that property, or property that represents it and value this; and (iii) identify all the realisable property that the defendant owns and value this. The confiscation order is made in the higher of the values arrived at under process (i) and process (ii) subject to an upper limit in the amount of the value arrived at under process (iii).

33. Where POCA speaks of “property” in the context of these processes, the property is worldwide. It matters not where in the world the defendant obtained property through his criminal conduct or where in the world he owns property when his realisable assets fall to be assessed. Thus where “property” is referred to

in sections 76 to 83, which deal with these matters, the property referred to is property “wherever situated” in the world.

34. Many of the provisions in Parts 2, 3 and 4 are concerned with identifying and securing property in each of the three jurisdictions, either in anticipation of the possibility of the making of a confiscation order or by way of enforcing a confiscation order. The relevant powers are conferred on the Crown Court in England and Wales and in Northern Ireland and on the Court of Session or the sheriff in Scotland. The provisions of the three Parts begin to apply as soon as a criminal investigation has been started in circumstances where there is reasonable cause to believe that the alleged offender has benefited from his criminal conduct. Although the terminology and the precise nature of the measures that can be ordered by the court differ in the case of Scotland from those in the other two jurisdictions, their effect is in substance the same. I shall refer to some of the more material provisions that relate to England and Wales.

35. Section 41 permits the Crown Court to make a restraint order prohibiting any specified person from dealing with any realisable property held by him. The property need not be described in the order. Section 45 permits a constable, *inter alios*, to seize realisable property to which a restraint order relates to prevent it being taken out of England and Wales. Section 48 permits the Crown Court to appoint a receiver, described as a “management receiver” in respect of realisable property to which the restraint order applies. Section 50 permits the Crown Court to appoint a receiver, described as an “enforcement receiver” in relation to realisable property for the purpose of the enforcement of a confiscation order that has been made.

36. While the restraint order takes effect in personam and is of worldwide effect, the provisions that relate to securing and realising property apply to such activities within England and Wales, for each of Parts 2, 3 and 4 deals with activities in the jurisdiction to which it relates. This is made plain by section 443 which provides, *inter alia*, for the making of Orders in Council (i) for an order made under Part 2 to be enforced in Scotland or Northern Ireland, for an order made under Part 3 to be enforced in England and Wales or Northern Ireland and for an order made under Part 4 to be enforced in England and Wales or Scotland; (ii) for a function of a receiver appointed pursuant to Part 2 to be exercisable in Scotland or Northern Ireland, for a function of an administrator appointed pursuant to Part 3 to be exercisable in England and Wales or Northern Ireland and for a function of a receiver appointed pursuant to Part 4 to be exercisable in England and Wales or Scotland. These provisions would seem to indicate, *a fortiori*, that the powers or functions conferred by Parts 2, 3 or 4 cannot be exercised outside the United Kingdom. Orders in Council pursuant to the above provisions have been made.

37. The effect of these provisions is as I have summarised them at para 12(vii) above. Value confiscation is ordered in personam having regard to property worldwide, but no power is granted to authorities within the United Kingdom to secure or realise property that is situated outside the jurisdiction. This situation is dealt with by section 74.

38. Section 74 relates to confiscation under Part 2 (sections 141 and 222 are analogous provisions in Parts 3 and 4). Section 74 deals with securing property abroad in anticipation of making a confiscation order and realising property in satisfaction of a confiscation order that has been made. It provides:

“Enforcement abroad

(1) This section applies if—

- (a) any of the conditions in section 40 is satisfied,
- (b) the prosecutor ... believes that realisable property is situated in a country or territory outside the United Kingdom (the receiving country), and
- (c) the prosecutor ... sends a request for assistance to the Secretary of State with a view to it being forwarded under this section.

(2) In a case where no confiscation order has been made, a request for assistance is a request to the government of the receiving country to secure that any person is prohibited from dealing with realisable property.

(3) In a case where a confiscation order has been made and has not been satisfied, discharged or quashed, a request for assistance is a request to the government of the receiving country to secure that—

- (a) any person is prohibited from dealing with realisable property;
- (b) realisable property is realised and the proceeds are applied in accordance with the law of the receiving country.

(4) No request for assistance may be made for the purposes of this section in a case where a confiscation order has been made and has been satisfied, discharged or quashed.

(5) If the Secretary of State believes it is appropriate to do so he may forward the request for assistance to the government of the receiving country.

(6) If property is realised in pursuance of a request under subsection (3) the amount ordered to be paid under the confiscation order must be taken to be reduced by an amount equal to the proceeds of realisation....”

These provisions are in accord with the scheme of the Strasbourg Convention.

Civil Recovery

39. As section 240, which introduces Part 5, explains, the purpose of that Part is to enable recovery in civil proceedings before the High Court or Court of Session of property which is, or represents, property obtained through unlawful conduct. Parts 2, 3 and 4 impose personal liability on defendants convicted of criminal conduct in each of the three jurisdictions. Part 5 is of very different effect. The focus is not on a particular defendant but upon property that is the product of criminal conduct, wherever in the world this is committed, as section 241 makes plain. It is not necessary that the person who holds or owns the property should be the person guilty of the criminal conduct. The claim form in the relevant proceedings has to be served on the holder of the property, wherever that person is domiciled, resident or present: see sections 243 and 244.

40. Sections 245A to 255 provide for the measures that a court in England and Wales or Northern Ireland can take to preserve property in respect of which a recovery order may be sought. Sections 255A to 265 make similar provisions in respect of Scotland. Section 245A provides for a property freezing order. As this is the order under attack in this appeal I shall set out the material part of its provisions in full:

“(1) Where the enforcement authority may take proceedings for a recovery order in the High Court, the authority may apply to the court for a property freezing order (whether before or after starting the proceedings).

(2) A property freezing order is an order that –

(a) specifies or describes the property to which it applies, and

(b) subject to any exclusions (see section 245C(1)(b) and (2)), prohibits any person to whose property the

order applies from in any way dealing with the property.

(3) An application for a property freezing order may be made without notice if the circumstances are such that notice of the application would prejudice any right of the enforcement authority to obtain a recovery order in respect of any property.

(4) The court may make a property freezing order on an application if it is satisfied that the condition in subsection (5) is met and, where applicable, that the condition in subsection (6) is met.

(5) The first condition is that there is a good arguable case –

(a) that the property to which the application for the order relates is or includes recoverable property ...”

41. Sections 245E to 245G make provision for the appointment by the High Court of a receiver in respect of property to which a property freezing order relates. Sections 246 to 247 make similar provision in relation to property that is not subject to such an order. In each case the order may require any person to whose property the order applies

“to bring the property to a place (in England and Wales or, as the case may be, Northern Ireland) specified by the receiver or to place it in the custody of the receiver (if, in either case, he is able to do so).”

42. Section 255A provides

“(1) Where the enforcement authority may take proceedings for a recovery order in the Court of Session, the authority may apply to the court for a prohibitory property order... ”

43. Section 266 sets out the circumstances in which the court must make a recovery order:

“(1) If in proceedings under this Chapter the court is satisfied that any property is recoverable, the court must make a recovery order.

(2) The recovery order must vest the recoverable property in the trustee for civil recovery.

(3) But the court may not make in a recovery order—

(a) any provision in respect of any recoverable property if each of the conditions in subsection (4) or (as the case may be) (5) is met and it would not be just and equitable to do so, or

(b) any provision which is incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998 (c 42)).

(4) In relation to a court in England and Wales or Northern Ireland, the conditions referred to in subsection (3)(a) are that—

(a) the respondent obtained the recoverable property in good faith,

(b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken if he had not believed he was going to obtain it,

(c) when he took the steps, he had no notice that the property was recoverable,

(d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him.”

The provisions in (4) are repeated virtually verbatim in (5) in relation to a court in Scotland.

44. The very fact that separate provision is made for making property recovery orders in England and Wales, Scotland and Northern Ireland indicates that these, and the ancillary steps in relation to securing and realising property, were, at least primarily, designed to apply to property within one of the three jurisdictions of the United Kingdom. Some of the provisions plainly relate exclusively to property within the United Kingdom, such as those in section 248, which deal with registration of property freezing orders and interim receiving orders in relation to land. The question raised by the PFO appeal is whether the totality of Part 5 relates exclusively to property within the United Kingdom.

Provisions of Part 5 that relate to the recovery order itself

45. Mr Jones drew attention to a number of provisions in relation to the recovery order itself, which he submitted could only apply in respect of property within the three jurisdictions of the United Kingdom. He relied upon the absence of any similar provisions that would apply in relation to property situated outside the United Kingdom as indicating that Part 5 did not apply to property outside the United Kingdom. Mr Eadie QC on behalf of SOCA did not accept that the provisions in question carried that significance. I shall refer to two exceptions.

46. Section 269(1) provides that a recovery order is to have effect in relation to any property despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict the vesting of the property. Section 269(2) then specifies a number of rights that are to be overridden by a recovery order. These include a “right of return or other similar right”, a right of return being defined as “any right under a provision for the return or reversion of property in specified circumstances”. Mr Eadie submitted that these provisions applied implicitly only to property within the jurisdiction. Mr Jones agreed with this submission, and argued that this was a further indication that recovery orders could only be made in respect of property within the jurisdiction.

47. Hooper LJ dealt with section 269 in a different way. He held at para 155 that section 269(1) should be interpreted as applying only to provisions of English law as it could never have been intended to apply to provisions of the law of a foreign country in relation to property situated in that country. Mr Jones accepted the last part of this proposition, but on the basis that Part 5 as a whole did not apply to property situated in a foreign country. He did not, however, accept that section 269(1) only applied to provisions of English law. He pointed out that under the English rules of conflict of laws foreign law is sometimes determinative of title to property situated in this country. On the premise that Part 5 applies only to property within this jurisdiction there is no basis for restricting the ambit of section 269(1) to rules of English law.

48. I found Mr Jones’ submissions compelling. Section 269 makes sense if Part 5 is concerned only with property within the United Kingdom. It does not make sense if the property is worldwide.

49. Section 269 deals with provisions that are overridden by a recovery order. Sections 281 and 282 deal with exemptions from the effect of a recovery order. The first of these, under section 281, arises where the victim of the offence to which the recovery order relates demonstrates to the court that the property belongs to him. The implications of this I shall consider when I come, at paras 65

and 66, to deal with the coherence of the scheme laid down by POCA. Section 282 sets out a number of other exemptions, including property held by the Financial Services Authority, property held by a person in his capacity as an insolvency practitioner and property subject to any of a number of charges under United Kingdom statutes. Mr Jones submitted that if property subject to a recovery order were worldwide property, there would have to be equivalent provisions, even if only in general terms, to acknowledge exceptions that would be required in order to accommodate the laws of the countries in which the property was situated. Mr Eadie's answer to this was that this was unnecessary as those laws would apply to defeat any claim based on the recovery order in any event. This is a fair response to Mr Jones' point. None the less, these domestic provisions in relation to the reach of a recovery order add force to the submission that Part 5 is concerned only with property within the United Kingdom.

50. In summary, apart from the definition of property in section 316(4), and the enigmatic section 286, there is nothing in Part 5, from first to last, that suggests that its application extends to property outside England and Wales, Scotland and Northern Ireland. Many of its provisions clearly relate to property within those jurisdictions. What then of the definition? If a recovery order can only be made in respect of property within England and Wales, Scotland and Northern Ireland, can the words in the definition "wherever situated", which appear in the definition of property in Part 5, have any application in Part 5 at all?

51. The answer to that question is that there are places in Part 5 where "property" means "property wherever situated", even if a recovery order can only be made in respect of property within the United Kingdom. Section 240 provides in relation to Part 5:

"(1) This Part has effect for the purposes of—

(a) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct,..."

Even if "property" when first used means property within the United Kingdom Courts, the second time that the word is used it unquestionably means "property wherever situated". Property within the United Kingdom that "represents" property obtained by criminal conduct, wherever the property was when obtained, is on any view, covered by Part 5. The same point can be made in relation to "property" in section 242, which deals with the initial obtaining of property through unlawful

conduct, and to “the original property” in section 305, which deals with tracing property that represents the original property.

52. Thus it is not right to postulate that the words “wherever situated” in the definition of property in section 316 make no sense if Part 5 does not permit the making of a recovery order in respect of property abroad.

53. For these reasons, giving the words of Part 5 their natural meaning, and ignoring section 286, I would conclude that the provisions that they make in relation to an order for civil recovery apply only within the United Kingdom.

54. Thus far I have been considering the provisions that appear in Part 5. Of perhaps greater significance are the provisions that do not appear in that Part. There are no provisions in relation to enforcement abroad to mirror those that appear at sections 74, 141 and 222 in relation to Parts 2, 3 and 4. Mr Jones submitted to the Court of Appeal that this indicated that Parliament did not intend that civil recovery orders could be made in respect of property situated abroad. Hooper LJ dismissed this submission out of hand at para 113 of his judgment. He held that, having taken the view that the Strasbourg Convention applied to enforcement orders made in civil proceedings, SOCA was entitled to seek to enforce both interim and final Part 5 orders abroad in those countries in which the Convention was in force or in which provisions similar to the Convention had been implemented.

55. I find Hooper LJ’s conclusions surprising. They are at odds with the scheme of the Strasbourg Convention: see para 30 above. I do not understand how SOCA could seek to enforce abroad interim or final orders under Part 5. Part 5 makes no provisions for SOCA to take steps to secure property or enforce confiscation abroad. The relevant provisions in Part 5 in relation to securing property apply within the United Kingdom: see para 44 above. Realisation of confiscated property is exclusively a matter for the trustee for civil recovery in whom property vests under a recovery order. The suggestion that he would be able to recover property situated abroad is unrealistic: see para 71 below.

56. Had Parliament, or those responsible for drafting POCA, intended Part 5 confiscation to extend to property outside the United Kingdom they would surely have included provisions parallel to section 74. The fact that they did not do so strongly suggests that there was no intention that Part 5 should have extraterritorial effect.

Reciprocity

57. I now turn to demonstrate that provisions for giving effect to requests for assistance from other states accord with an interpretation of Part 5 that restricts its application to property within the United Kingdom.

58. One obvious explanation for the provisions of Part 5 is that they were intended to comply with the obligations of the United Kingdom in respect of incoming requests under the Strasbourg Convention, and to afford similar assistance to states not party to that convention. Section 444(1) provides for the making of an Order in Council to make provision for a prohibition on dealing with property which is the subject of an external request and for the realisation of property for the purpose of giving effect to an external order. Section 444(2) provides that such an Order may include provision which (subject to any specified modification) corresponds to any provision of Part 2, 3, 4 or 5, excluding Chapter 3, which deals with cash seizure. Section 447 defines an “external request” and an “external order” as follows:

“(1) An external request is a request by an overseas authority to prohibit dealing with relevant property which is identified in the request.

(2) An external order is an order which—

- (a) is made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and
- (b) is for the recovery of specified property or a specified sum of money.”

59. Thus, where a foreign court makes a finding that property has been, or is believed to have been, obtained as a result of or in connection with criminal conduct and orders the recovery of specified property or a specified sum of money, section 444 provides for an Order in Council that permits realisation of property to give effect to the order of the foreign court. Section 444 addresses both forms of confiscation order referred to in the Explanatory Report to the Strasbourg Convention: see para 28 above. Section 444 does not provide in terms that the property to be realised should be within the United Kingdom.

60. The power conferred by section 444 was exercised by the making of the Order. The Order enables the powers conferred by Parts 2, 3, 4 and 5 of POCA to be exercised for the purpose of giving effect to external requests and external orders, so that the provisions of the Order mirror the provisions of POCA. Part 2 of

the Order provides for the Secretary of State to refer an external request in connection with criminal investigation or proceedings, or an external order arising from a criminal conviction, to, among others in England and Wales, the Director of Public Prosecutions. He will then apply to the Crown Court for the exercise of the powers conferred by Part 2. Parts 3 and 4 of the Order make equivalent provisions in respect of Scotland and Northern Ireland. Parts 2, 3 and 4 provide for measures to secure and realise “relevant property”. Section 447(7) of POCA states that property is “relevant property” if there are reasonable grounds to believe that it may be needed to satisfy an external order which has been or may be made. Part 2 of the Order is headed “Giving Effect in England and Wales to External Requests in Connection with Criminal Investigations or Proceedings and to External Orders Arising from Such Proceedings”. Parts 3 and 4 have equivalent headings. Parts 2, 3 and 4 of the Order expressly provide that the external request or order must relate to property in, respectively, England and Wales, Scotland and Northern Ireland. In *King v Director of the Serious Fraud Office* [2009] UKHL 17; [2009] 1 WLR 718 the House of Lords held that the provisions of Part 2 of the Order only permitted a restraint order to be made in respect of property within England and Wales and that the same territorial restriction applied in respect of seizure and enforcement provisions.

61. Why do Parts 2, 3 and 4 of the Order expressly limit the assistance that can be sought by the foreign state to assistance in respect of property within England and Wales, Scotland and Northern Ireland? The answer must be that which I gave in *King v Director of the Serious Fraud Office* at para 31:

“If a country wishes assistance from other countries in preserving or recovering property that is related to criminal activity, it makes sense for its request to each of those other countries to be restricted to the provision of assistance in relation to property located within its own jurisdiction. If each country were requested to take steps to procure the preservation or recovery of property on a worldwide basis, this would lead to a confusing, and possibly conflicting, overlap of international requests for assistance. Not only would such multiplication of activity be confusing, it would involve significant and unnecessary multiplication of effort and expense.”

This reasoning underlies the scheme for assistance laid down in the Strasbourg Convention.

62. Part 5 of the Order provides for the Secretary of State to forward an external order to the enforcement authority in the United Kingdom for the purpose of enabling the enforcement authority to realise recoverable property in civil

proceedings for the purpose of giving effect to the external order. The procedure for a civil recovery order in response to the external order is thus put in train.

63. Part 5 of the Order is headed: “Giving Effect *in the United Kingdom* to External Orders by Means of Civil Recovery” (my emphasis). In contrast to Parts 2, 3 and 4, however, the body of Part 5 contains no express territorial limitation in relation to the property to which the Order relates. There would seem to be two possible explanations for this. One is that SOCA is correct in contending that Part 5 of POCA has extraterritorial effect and Part 5 of the Order is similarly intended to apply without territorial limitation. The other is that Part 5 of POCA applies only to property within the United Kingdom, so that there was no need to insert a territorial restriction in Part 5 of the Order. I believe that the latter is the correct explanation. In the first place that accords with the heading of Part 5 of the Order. In the second place, if Part 5 of POCA had extraterritorial effect, there would seem no reason to restrict Parts 2, 3 and 4 of the Order to property within the United Kingdom but to impose no such restriction in relation to Part 5.

64. In summary, the terms of the Order accord with an interpretation of POCA that restricts the making of recovery orders under Part 5 to property that is situated within the United Kingdom.

A coherent scheme that accords with international law

65. The provisions of Part 5 of POCA comply with the requirements of reciprocity contained in the Strasbourg Convention. If a foreign court makes an order by way of value confiscation, the property of the defendant in England and Wales, Scotland or Northern Ireland can be seized and realised in satisfaction, or part satisfaction, of the order. If, after conviction, a foreign court makes an order for the confiscation of specific proceeds of crime which are in one of the three United Kingdom jurisdictions, they can be seized and realised. However Part 5 of POCA goes further than is necessary to meet the requirements of the Strasbourg Convention. Section 241 requires the court or sheriff to decide on a balance of probabilities whether the property is or represents property obtained through unlawful conduct, irrespective of whether such conduct occurred in the United Kingdom or abroad. If it is, or does, the Court must, subject to the provisions of Part 5, make a recovery order in respect of the property, whether or not any proceedings have been brought for an offence in connection with the property: see section 240(2). The claim form has to be served on the person holding the property and on any person holding “associated property” which the authority wishes to be subject to a recovery order, “wherever domiciled, resident or present” (section 243(2)).

66. Part 5 makes complex provision for the protection of the rights of holders of associated property and of third parties who claim ownership of property that is subject to Part 5 proceedings. Those provisions require those persons to make their claims before the court in England and Wales, Scotland or Northern Ireland seised of the Part 5 proceedings.

67. If the jurisdiction described above is founded on the presence of the property in question within the jurisdiction of the Court making the order, the action permitted by Part 5 is neither unreasonable nor contrary to international law. It is perfectly understandable that Parliament should wish to make provision for the confiscation of proceeds of crime held in the United Kingdom by someone outside the jurisdiction and proper that anyone holding that property, or associated property, should be served with the claim to confiscate it and that anyone claiming ownership of it or an interest in it should be expected to assert that claim before the court conducting the confiscation proceedings.

68. Part 5 proceedings brought in respect of property held within the jurisdiction are also likely to be effective, thanks to the provisions in Part 5 for securing and realising the property in question. Thus the scheme of Part 5 is simple and rational. If property is identified in England and Wales, Scotland or Northern Ireland that is believed to be or to represent the proceeds of a crime committed outside the United Kingdom, recovery proceedings can be begun in the jurisdiction concerned. Steps can be taken to secure the property in question and subsequently to realise it within the jurisdiction in question. The proceeds of realisation of the property will be available to defray the cost of the proceedings. The holder of the property, and any holder of associated property or person claiming to own the property can reasonably be expected to take part in the proceedings to assert his right or otherwise to challenge the making of the recovery order.

69. The picture is very different if SOCA's submissions as to the scope of Part 5 proceedings are correct. Part 5 proceedings in respect of property outside the jurisdiction would involve the assertion of an exorbitant jurisdiction in personam without any basis in international law. They would also be likely to prove ineffective.

70. At para 14 of his judgment Hooper LJ cited the following description by the appellants of the effect of SOCA's submissions:

“Parliament has conferred authority on the enforcement authorities to bring proceedings to vest in a trustee for civil recovery property situated abroad which derives entirely from unlawful conduct abroad where neither the holder of the property, nor any intermediate

holders of the property, or property from which the holder's property is derived, have ever been domiciled, resident or present within the jurisdiction; in other words, where there is no connection with the jurisdiction whatsoever.”

Hooper LJ accepted that this result was startling. He was right to do so. Asserting in personam jurisdiction over the holder of such property, or of associated property, has, as I have said, no precedent in international law. It would not be reasonable to expect the holder of the property, or any person holding associated property or claiming to own the property, to submit to the jurisdiction of a United Kingdom court when neither they nor the property had any connection with that jurisdiction. Any order made would be likely to be made unopposed.

71. In these circumstances the exorbitant confiscation proceedings that had resulted in an unopposed recovery order would be unlikely to bear fruit. Hooper LJ stated on a number of occasions that the recovery order would operate in personam so as to give the trustee for civil recovery a right against the holder of the property. Such a right would, however, be likely to be nugatory, for there would be no basis upon which the trustee for civil recovery could found jurisdiction in the United Kingdom over the holder of the property or any associated property so long as they remained outside the jurisdiction. The fact that they had been served in the Part 5 proceedings would not confer jurisdiction in relation to a claim by the trustee. It was common ground that if in such circumstances the trustee sought to bring a civil claim in respect of the property in the state where it was located, his title would not be likely to be recognised.

72. Hooper LJ advanced the following practical justification for according Part 5 extraterritorial effect. He held, at para 15, that if the appellants were correct:

“a court in this jurisdiction would be unable to make a civil recovery order in respect of land or other property in Spain bought with the proceeds of crimes committed here by a person resident here. Unable to obtain a civil recovery order, the enforcement authority could not take any steps here to require the person to hand over the property in Spain. Nor (so it appears) could the United Kingdom take enforcement action in Spain pursuant to [the Strasbourg Convention] (to which I return below) because there would be no order of the court to enforce: see paragraph 81 below.”

This reasoning is not compelling. The appropriate course in the circumstances envisaged by Hooper LJ would be to obtain a confiscation order under Part 2, 3 or

4 and to make a request for assistance via the Secretary of State in accordance with section 74.

73. I can see no compelling reason why Parliament should have wished to confer on SOCA a right to seek a civil recovery order in respect of the proceeds of a crime that was not committed within the United Kingdom where those proceeds are not within the United Kingdom. There will, of course, be the possibility that SOCA will become aware of the existence of property in another jurisdiction that it has reason to believe is, or may be, the proceeds of crime. The natural course in those circumstances will be to pass on such information as it has about the property to the appropriate authorities in the country where the property is situated.

74. For all these reasons, but for the effect of section 286, I would have reached the firm conclusion that the jurisdiction to make a civil recovery order conferred by Part 5 of POCA applied only in respect of property that is situated in England and Wales, Scotland or Northern Ireland. What is the effect of section 286?

The enigma

75. Section 286 provides:

- “(1) Orders under this Chapter may be made by the Court of Session in respect of a person wherever domiciled, resident or present.
- (2) Such an order may be made by the Court of Session in respect of moveable property wherever situated.
- (3) But such an order in respect of a person’s moveable property may not be made by the Court of Session where—
 - (a) the person is not domiciled, resident or present in Scotland, and
 - (b) the property is not situated in Scotland, unless the unlawful conduct took place in Scotland.”

76. It is implicit in this provision that, if POCA did not include it, the jurisdiction that it confers would not exist. Thus section 286(2) purports to confer on the Court of Session the jurisdiction to make an order in respect of moveable property outside Scotland provided either that the holder is domiciled, resident or present in Scotland or the unlawful conduct through which the property was obtained took place in Scotland. The only thing that is agreed about this provision is that it purports to create for Scotland a position that differs from that which the Act provides in relation to the rest of the United Kingdom. This is puzzling as, when moving the amendment that introduced it in the House of Lords, Lord

Goldsmith stated on 25 June 2002 that the intention was to achieve the same effect in all the jurisdictions of the United Kingdom: see Hansard (HL Debates), 25 June 2002, vol 636, col 1291. Equally puzzling is section 399 in the Explanatory Notes to the Act, the second sentence of which echoes a comment that Lord Goldsmith made on the same occasion:

“399. The section provides that the Court of Session may make an order in respect of a person whether or not he is domiciled, present or resident in the United Kingdom. No similar provision is required in respect of England, Wales and Northern Ireland, due to the jurisdiction of the civil courts and the general provisions on property in section 316.”

In relation to this note Hooper LJ understandably remarked at para 128 that he could not understand the reference to section 316 of the Act as this applied to all three jurisdictions.

77. No one has been able to proffer a satisfactory explanation for section 286(2). Part 3 of POCA would be the normal and appropriate route for confiscation in relation to property outside Scotland that was or represented proceeds of unlawful conduct that had taken place in Scotland. Why, in the case of Scotland, should special provision be made to bring such property within the scope of Part 5? Section 286(2) remains an enigma. It does not lead me to alter the conclusion that I have expressed in para 74 above, at least in so far as it relates to the position in England and Wales and Northern Ireland.

Conclusion

78. The High Court of England and Wales has no jurisdiction under Part 5 to make a recovery order in relation to property outside England and Wales. It follows that the court had no jurisdiction to make the worldwide property freezing order that was made in this case. The PFO appeal should be allowed and the property freezing order redrawn so that it applies only to property within the jurisdiction of the Court. It may be necessary for the Court to hear further argument as to how this should be done, for a question remains, that has not yet been addressed, as to whether the form of the order made in this case is appropriate even if its ambit is restricted to property within the jurisdiction.

79. The foundation of the jurisdiction conferred under Part 5 of POCA is the existence of property believed to be the proceeds of crime. The existence of such property enables SOCA, as the enforcement authority, to serve a claim form on the

holder of the property and on any other person who SOCA thinks holds associated property, even if that person is outside the jurisdiction, if SOCA wishes the property to be the subject of a civil recovery order – see section 243. Section 243(3) requires the property either to be specified or described in the form in general terms.

80. Section 245A, which I have set out at para 40 above, sets out the requirements of a property freezing order. Subsection (2)(a) states that a property freezing order is one that “specifies or describes” the property to which it applies.

81. The property freezing order obtained in this case set out schedules of property to which the order applied. But the order was not restricted to specific property. It provided that the prohibition on disposal of assets

“applies, but is not limited to, the following categories of assets:

- (1) all real property, including, but not limited to the properties listed at Schedule 1 to this Order;
- (2) the balances standing to the credit of any bank and/or building society accounts, including, but not limited to the accounts listed at Schedule 2 to this Order;
- (3) any Personal Equity Plan (PEP);
- (4) any endowment policy;
- (5) any securities, including any debentures or shares in any company (wheresoever incorporated); and
- (6) any chattels, motor vehicles, or other personal property valued in excess of £2000, including, but not limited to the property listed at Schedule 3 to this Order.

... wheresoever located (whether within England and Wales or otherwise).”

It is questionable whether these general descriptions “specify” or “describe” property as required by section 245A.

82. The property freezing order also required all the PFO appellants, together with the other respondents to the property freezing order, to disclose all their worldwide assets. It is not clear to me how the court had jurisdiction to make such an order. Part 8 of POCA expressly deals with disclosure, which is the subject of the DO appeal.

83. If this Court is invited to make a revised property freezing order in which property is described in terms as general and speculative as have been adopted in this case it will require to be satisfied that they fall within the scope of section 245A. If the Court is invited to include in the revised freezing order an order for disclosure of assets it will require to be satisfied that it has jurisdiction to do so.

The DO appeal

84. This appeal challenges the validity of information notices addressed to Mr Perry and his daughters by SOCA pursuant to the disclosure order issued by Judge Kay QC on 8 August 2008: see para 6 above. The disclosure order was issued under Part 8 of POCA, which deals with “Investigations”. Part 8 applies to both confiscation proceedings under Parts 2, 3 and 4 of POCA and civil recovery proceedings under Part 5. In relation to Part 5 a disclosure order can be made only if property specified in the application for the order is subject to a civil recovery investigation and the order is sought for the purposes of the investigation: see section 357(3)(b). A civil recovery investigation is defined by section 341(2):

“For the purposes of this Part a civil recovery investigation is an investigation into—

- (a) whether property is recoverable property or associated property,
- (b) who holds the property, or
- (c) its extent or whereabouts.”

85. Section 357 defines a disclosure order as follows:

“(4) A disclosure order is an order authorising an appropriate officer to give to any person the appropriate officer considers has relevant

information notice in writing requiring him to do, with respect to any matter relevant to the investigation for the purposes of which the order is sought, any or all of the following—

(a) answer questions, either at a time specified in the notice or at once, at a place so specified;

(b) provide information specified in the notice, by a time and in a manner so specified;

(c) produce documents, or documents of a description, specified in the notice, either at or by a time so specified or at once, and in a manner so specified.

(5) Relevant information is information (whether or not contained in a document) which the appropriate officer concerned considers to be relevant to the investigation.”

86. Section 358 sets out the requirements for making a "disclosure order":

“(1) These are the requirements for the making of a disclosure order.

(2) There must be reasonable grounds for suspecting that—

...

(b) in the case of a civil recovery investigation, the property specified in the application for the order is recoverable property or associated property....

(3) There must be reasonable grounds for believing that information which may be provided in compliance with a requirement imposed under the order is likely to be of substantial value (whether or not by itself) to the investigation for the purposes of which the order is sought.

(4) There must be reasonable grounds for believing that it is in the public interest for the information to be provided, having regard to the benefit likely to accrue to the investigation if the information is obtained.”

87. Section 359(1) provides that a person commits an offence if without reasonable excuse he fails to comply with a requirement imposed on him under a disclosure order. The offence carries a maximum sentence on summary conviction of imprisonment for six months. Section 359(3) provides for the more serious offence of knowingly or recklessly making a false statement in purported compliance with a requirement imposed under a disclosure order. This carries a maximum sentence of two years imprisonment in respect of a conviction after a trial on indictment.

88. SOCA's application for a disclosure order was supported by a witness statement of Vanessa Ewing, a Financial Investigator on SOCA's staff. The application notice named as respondents Mr Perry, Mrs Lea Perry, Mrs Greenspoon, Miss Yael Perry and "any other individual or entity specifically associated to" the named respondents and "property identified as relevant to the civil recovery investigation conducted by the Director General". In para 5.7 Miss Ewing described the property that was subject to the civil recovery investigation as

"any property held by or on behalf of Perry including, but not limited to, the following: (i) monies which have been credited to or have passed through the following: (a) accounts held by or on behalf of Israel Perry, including accounts held by his wife, Mrs Lea Lili Perry, and/or his two adult daughters, Mrs Tamar Greenspoon and Miss Yael Perry."

89. In explaining why the order was sought in relation to Mr Perry's wife and daughters, Miss Ewing explained:

"I believe that it is common practice for criminals to use the proceeds of crime to acquire property held in the names of other family members or trusted associates. Persons involved in criminal activity often seek to reduce the amount of money and other property held in their own names in an attempt to minimise their exposure to the risk of confiscation or to avoid paying tax.

It is therefore reasonable for the investigation to include property owned by Mrs Lea Lili Perry, Miss Yael Perry and Mrs Tamar Greenspoon in order to ascertain whether such property has a legitimate origin or whether it represents the proceeds of criminal conduct."

90. The Order made by Judge Kay was addressed to all those named in the application notice, included, inappropriately, a penal notice, and conferred authority on SOCA in the general terms of section 357(4). The property referred to by Miss Ewing in her application was described in the most general terms. The purpose of the application, as explained by her, appears to have been to enable SOCA to carry out a roving commission aimed at identifying any property that might be the proceeds of Mr Perry's criminal conduct. A number of notices were issued by Miss Ewing pursuant to the disclosure order. Some sought information of funds in specific accounts. Some sought information in the following terms:

“(1) Provide the following information under section 357(4)(b) of the Act:

- (i) A statement of assets held by, or on behalf of, Israel PERRY in the United Kingdom including Crown Dependencies and British Overseas Territories;
- (ii) A statement of assets held by, or on behalf of, Israel PERRY in any other country other than the United Kingdom.

The information sought includes, but is not limited to, the following:

- (a) Any assets held by a legal entity of which Mr PERRY is the beneficiary including worldwide companies, trusts and corporations;
- (b) Any precious metals and gems held by, or on behalf of, Israel PERRY;
- (c) Any valuable art, antiques and the like held by, or on behalf of, Israel PERRY;
- (d) Any loans made by, or on behalf of, Israel PERRY;
- (e) Any real estate held by, or on behalf of, Israel PERRY;

- (f) Any vehicles, pleasure craft etc held by, or on behalf of, Israel PERRY;
- (g) Any stocks, bonds, shares, bearer bonds, negotiable instruments, investment funds etc held by, or on behalf of, Israel PERRY;
- (h) Any bank accounts, in any currency, held by, or on behalf of, Israel PERRY;”

The exercise carried out by Miss Ewing seems to go beyond the purpose of a civil recovery investigation as defined in section 341(2). That investigation, as I understand the relevant provisions, relates to property whose existence has already been identified. Similar questions arise in relation to the scope of the disclosure order and some of the notices served under it as to those that I have raised in paras 79 to 83 above in relation to the scope of the property freezing order. Under section 357(4) the authority conferred by a disclosure order is restricted to enquiries “with respect to any matter relevant to the investigation for the purposes of which the order is sought”. It is questionable whether this authority extends beyond seeking information about property whose existence has already been identified. Mr Jones has not, however, sought to challenge the scope of the order or of the notices issued under it. He has made a more fundamental attack on SOCA’s authority to issue the notices.

91. Those notices were given to persons who were, and were known by SOCA to be, outside the jurisdiction of the United Kingdom. It was Mr Jones’ submission, advanced before the Court of Appeal, that the authority given by a disclosure order to give disclosure notices only applies to notices given to persons within the jurisdiction. In making this submission Mr Jones relied particularly on the presumption that, unless it clearly provides to the contrary, a statute will not have extraterritorial effect.

92. The majority of the Court of Appeal, Ward and Carnwath LJJ, rejected the appellants’ attack on the validity of the notices; Richards LJ dissented [2010] EWCA Civ 907; [2011] 1 WLR 542. The gist of the reasoning of Carnwath LJ appears in the following short passage of his judgment:

“50. ... is there any reason why persons who are reasonably considered to have an interest in property validly subject to a disclosure order, and who have a sufficient presence within the

jurisdiction for a notice to be effectively given to them, should be treated as outside the 'legislative grasp' of the statutory scheme?

51. As a matter of common sense, it is difficult to see why mere presence in or absence from the country at the time of sending or delivery of the notice is the critical factor. For example, a person normally resident at an address in this country could not sensibly seek to deny that the notice had been 'given' to him at that address, merely because he happened to be out of the country at the time (for example, on a business or holiday trip)."

93. Ward LJ proceeded on the premise that a recovery order could be made in respect of property outside the jurisdiction. He commented at para 77 that the extraterritorial effect of Part 5 could not be denied and that he could not see why Part 8 should not act in the same way. For the reasons that I have given I consider that he proceeded on a false premise.

94. The point is a very short one. No authority is required under English law for a person to request information from another person anywhere in the world. But section 357 authorises orders for requests for information with which the recipient is obliged to comply, subject to penal sanction. Subject to limited exceptions, it is contrary to international law for country A to purport to make criminal conduct in country B committed by persons who are not citizens of country A. Section 357, read with section 359, does not simply make proscribed conduct a criminal offence. It confers on a United Kingdom public authority the power to impose on persons positive obligations to provide information subject to criminal sanction in the event of non-compliance. To confer such authority in respect of persons outside the jurisdiction would be a particularly startling breach of international law. For this reason alone I consider it implicit that the authority given under section 357 can only be exercised in respect of persons who are within the jurisdiction.

95. Mr Jones referred to a number of other provisions of POCA which, so he submitted, indicated that notices under a disclosure order could only be given to persons within the jurisdiction. He pointed out that Part 8 applies to confiscation as well as to civil recovery. Section 376 as originally drafted included provision for the issue by the judge of a letter of request for the purpose of obtaining information relevant to a confiscation order. He submitted that this provision would have been superfluous if the authority conferred by section 357 extended to persons beyond the United Kingdom.

96. Part 8 gives other investigatory powers, including the power to make a production order in relation to specified material, the power to issue search and seizure warrants and the power to make a customer information order. Mr Jones submitted that the provisions conferring these powers, either as a matter of language or because of the presumption against extraterritoriality, could only be exercised within the United Kingdom.

97. These submissions have some merit and reinforce my view of the limited ambit of section 357.

98. For these reasons I would also allow the DO appeal. I agree with Mr Jones' suggestion that the appropriate relief is a declaration that the Disclosure Order made by Judge Kay does not authorise sending information notices to persons who are outside the United Kingdom.

LORD REED

99. I agree with Lord Phillips, for all the reasons that he gives, that these appeals must be allowed. In relation to the appeal concerning the property freezing order, however, I wish to consider further section 286 of POCA, in view of the extent to which the submissions of the parties, and the division of opinion in the court, have focused upon that provision.

100. In expressing views about it, I am conscious that the provision is concerned with the jurisdiction of the Court of Session, that these are not Scottish appeals, and that this court has not had the benefit of consideration of the provision by the Scottish courts. In those circumstances, it would be undesirable to express any definite view about the effect of section 286 unless it is necessary to do so in order to determine the present appeal; and, in my view, it is not. Nevertheless, since the provision appears in a United Kingdom statute which must be read and understood as a whole, it is potentially relevant to the construction of the provisions with which the appeal is directly concerned. It was also the subject of much of the argument in the present appeal. Some consideration of its effect is therefore unavoidable.

101. In recognition of that, both parties adduced expert evidence from Scottish counsel before the Court of Appeal. This court, on the other hand, as the final court of appeal in civil matters from all parts of the United Kingdom, has judicial knowledge of Scots, English and Northern Irish law, and may take cognisance of the law of one jurisdiction in an appeal originating in another (*Elliot v Joicey* [1935] AC 209; 1935 SC (HL) 57; *Bank of East Asia Ltd v Scottish Enterprise*

1997 SLT 1213). Both the appellants and the respondent were therefore represented by Scottish as well as English counsel.

The international background

102. In order to understand the relevant provisions of POCA, including section 286, it is necessary to begin by considering an important aspect of the background to the legislation. As Lord Phillips has explained, POCA is intended to fulfil certain international obligations of the United Kingdom. These include, in particular, the obligations arising under the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna, 20 December 1988), the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (Strasbourg, 8 November 1990), and the Council Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime (OJ 5.7.2001, L182/1). The legislation must therefore be considered in the light of those instruments. For present purposes, the most significant of them are the Vienna Convention and the Strasbourg Convention.

The Vienna Convention

103. The Vienna Convention is concerned with drugs offences. Article 5 relates to confiscation, defined by article 1 as meaning the permanent deprivation of property by order of a court or other competent authority. Article 5(1) requires each party to adopt such measures as may be necessary to enable confiscation of proceeds derived from relevant offences. Proceeds are defined in article 1 as meaning any property derived from or obtained, directly or indirectly, through the commission of a relevant offence. Article 5(2) requires each party also to adopt such measures as may be necessary to enable its authorities to identify, trace, and freeze or seize proceeds for the purpose of eventual confiscation.

104. Article 5(4) relates to international co-operation. Put shortly, article 5(4)(a) envisages that a request may be made by a party having jurisdiction over an offence to another party in whose territory proceeds referred to in article 5(1) - that is to say, proceeds derived from offences - are situated. On receipt of such a request, the party requested must either submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it, or it must submit to its competent authorities an order of confiscation issued by the requesting party, with a view to giving effect to it in so far as it relates to proceeds situated in its territory. Article 5(4)(b) in addition provides for effect to be given to requests for the taking of provisional measures for the purpose of eventual confiscation. In terms of article 5(5)(a), proceeds

confiscated by a party pursuant to article 5(4) are to be disposed of by that party according to its domestic law.

The Strasbourg Convention

105. The Strasbourg Convention is wider in its subject-matter than the Vienna Convention, in that it applies to criminal offences generally, but narrower in its geographical scope, in so far as it was made under the auspices of the Council of Europe rather than the United Nations, and fewer states are party to it.

106. Chapter III is concerned with international co-operation in relation to confiscation of the proceeds of crime. The relevant provisions have been set out by Lord Phillips. “Confiscation” is defined by article 1(d) as meaning “a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property”. It is to be noted that, as in the Vienna Convention, the term “confiscation” has a wider scope than a “confiscation order” within the meaning of Parts 2, 3 and 4 of POCA, and is apt to include recovery orders of the kind for which Part 5 makes provision.

107. Section 1 of Chapter III of the Convention, comprising article 7, sets out the general principles in relation to international co-operation. In particular, article 7(2) imposes an obligation upon each party to the Convention to adopt such legislative and other measures as may be necessary to enable it to comply, under the conditions provided for in that chapter, with requests for confiscation, and with requests for investigative assistance and provisional measures with a view to confiscation.

108. Section 2, comprising articles 8 to 10, is concerned with investigative assistance. In terms of article 8, in particular, parties undertake to afford each other, upon request, the widest possible measure of assistance in the identification and tracing of proceeds and other property liable to confiscation. Such assistance is to include any measure providing and securing evidence as to, amongst other matters, the existence and location of such property.

109. Section 3, comprising articles 11 and 12, is concerned with provisional measures. In terms of article 11(1), in particular, parties are obliged, at the request of another party which has instituted criminal proceedings or proceedings for the purpose of confiscation, to take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

110. Section 4, comprising articles 13 to 17, is concerned with confiscation. Article 13, in particular, is concerned with the obligation to confiscate. Following the dual scheme created by article 5(4) of the Vienna Convention, article 13(1) of the Strasbourg Convention envisages alternative means by which a party may respond to a request made by another party for the confiscation of proceeds of crime which are situated in its territory. The first alternative, set out in article 13(1)(a), is that the requested party may enforce a confiscation order made by a court of the requesting party. The second alternative, set out in article 13(1)(b), is that the requesting party may submit a request to the competent authorities of the requested party so that the latter may obtain and enforce a confiscation order.

111. Finally, in relation to the Strasbourg Convention, article 15 follows article 5(5)(a) of the Vienna Convention in providing that any property confiscated by the requested party shall be disposed of by that party in accordance with its domestic law, unless otherwise agreed by the parties concerned. As I shall explain, that provision is not reflected in the effect of a recovery order made under Part 5 of POCA. The contrast is relevant to the question whether such orders can be of the kind contemplated by article 13(1)(a) of the Convention, and therefore to the question whether such orders may fall within the scope of that exception to the ordinary principles of international law.

The Framework Decision

112. The Framework Decision seeks to ensure the effective implementation of the Strasbourg Convention within the EU. It does not however add anything of significance in relation to the issues with which the appeal is concerned.

Parts 2, 3 and 4 of POCA

113. Parts 2, 3 and 4 of POCA are concerned primarily with confiscation orders: orders, that is to say, made against a person convicted in criminal proceedings, for the payment of a sum of money equivalent to the value of any property or pecuniary advantage obtained as a result of or in connection with his criminal conduct (or such lesser amount as may be available). Such orders can be made in criminal proceedings in England and Wales, Scotland or Northern Ireland: see section 6 in relation to England and Wales, section 92 in relation to Scotland, and section 156 in relation to Northern Ireland. The order operates in personam, and the person against whom it is made is necessarily subject to the criminal jurisdiction of the court which makes the order.

114. The courts are also empowered to order provisional measures. In particular, a restraint order can be made if, put shortly, a criminal investigation or criminal proceedings have been started in England and Wales, Scotland or Northern Ireland, and there is reasonable cause to believe that the alleged offender or defendant has benefited from his criminal conduct: see sections 41, 120 and 190. Such orders again operate in personam. The courts can also order enforcement measures, including measures authorising the securing and realisation of property. Such orders operate in rem.

115. Parts 2, 3 and 4 each contain a provision concerned with overseas jurisdictions. If the conditions for the making of a restraint order are met, and the prosecutor believes that realisable property – that is to say, property held by the defendant or by the recipient of a tainted gift – is situated in a country outside the United Kingdom, then the prosecutor can send a request to the Secretary of State, with a view to its being forwarded to the government of the country where the property is situated: see sections 74, 141 and 222. In a case where no confiscation order has been made, the request is to secure that any person is prohibited from dealing with the property. If a confiscation order has been made and has not been satisfied, the request is also to secure that the property is realised and the proceeds are applied in accordance with the law of the requested country. These provisions fall within the ambit of articles 5(4) and (5) of the Vienna Convention and 11 and 13(3) of the Strasbourg Convention.

116. It appears, therefore, that although “property” is defined by section 84(1), and by the corresponding provisions for Scotland and Northern Ireland, as “all property wherever situated”, and the powers to make restraint orders under sections 41, 120 and 190 can therefore be exercised in relation to property situated overseas, it is envisaged that the securing and realisation of such property will be dealt with by means of requests to foreign governments for assistance. That is as one would expect, since it is only the authorities of the jurisdiction where the property is situated which have the power to make effective orders of that nature in respect of such property. The wide definition of property is nevertheless essential in the context of Parts 2, 3 and 4, not only for the purposes of sections 74, 141 and 222 but more generally. In particular, as I have explained, a confiscation order is an order for the payment of a sum of money equal to the value of any property or pecuniary advantage obtained by the defendant from his criminal conduct. Although the court must have jurisdiction over the defendant in the criminal proceedings, there is no reason why the property obtained as a result of or in connection with the offence need also be situated within the United Kingdom, or within the part of the United Kingdom where the court is located.

Part 5 of POCA

117. As section 240(1) of POCA states, Part 5 has two purposes. The first, with which the present case is concerned, is to enable the enforcement authority to recover, in civil proceedings before the High Court or the Court of Session, property which is or represents property obtained through unlawful conduct. The Act thus creates an entirely new form of remedy. Section 240(2) makes it clear that such proceedings may be brought whether or not any criminal proceedings have been brought for an offence in connection with the property.

118. Section 241 explains what is meant by “unlawful conduct”, and in particular that such conduct may occur in the United Kingdom or elsewhere. Accordingly, in distinction to Parts 2, 3 and 4, proceedings can be brought under Part 5 in circumstances where the court has no jurisdiction in respect of the offence in question.

119. Chapter 2 of Part 5 is concerned with civil recovery. In particular, sections 243 and 244 are concerned with proceedings for recovery orders in England and Wales or Northern Ireland, and in Scotland, respectively. Each provision permits proceedings for a recovery order to be taken against any person who the enforcement authority thinks holds recoverable property, and requires the enforcement authority to serve the claim form or application upon the respondent “wherever domiciled, resident or present”. Accordingly, proceedings for a recovery order can be brought in circumstances where not only the court has no jurisdiction in respect of the offence in question, but the defendant is not domiciled, resident or present within the jurisdiction of the court.

120. Having read only this far into the legislation, if one were to ask what connecting factor is required in order for the Court of Session to have jurisdiction in proceedings under Part 5, if the respondent is not domiciled, resident or present in Scotland, and if the Scottish courts do not have criminal jurisdiction over him, the answer which one would naturally expect is that the necessary connecting factor is the situation within Scotland of the property which is sought to be recovered. It is difficult to see what else it might be. It is however necessary to read further to find out whether that expectation is well-founded.

121. This is perhaps an appropriate point at which to note SOCA’s submission that there need not be any connecting factor: POCA, it is argued, enables the enforcement authorities to bring proceedings in the High Court or the Court of Session to vest property situated abroad in a trustee for civil recovery, even where there is no connection with the United Kingdom whatsoever. As it is put in SOCA’s written case, “Parliament has decided that a Chinese thief, living in

China, who has stolen property in China from a Chinese citizen may be the subject of civil recovery action”. It is however inherently unlikely that such a result could have been intended by Parliament: in such circumstances, there would be no reason for the holder of the property to submit to the jurisdiction of the courts of this country, and no likelihood that any order granted by those courts without appearance would be given effect overseas. Again, however, it is necessary to examine the legislation further in order to determine what Parliament has done.

122. A recovery order “must vest the recoverable property in the trustee for civil recovery”: section 266(2). The order “may sever any property”: section 266(7). Furthermore, the order “may impose conditions as to the manner in which the trustee for civil recovery may deal with any property vested by the order for the purpose of realising it”: section 266(8). The trustee for civil recovery is a person appointed by the court to give effect to a recovery order: section 267(1). His functions include securing the detention, custody or preservation of any property vested in him by the recovery order and realising the value of the property, other than money: section 267(3). By virtue of section 267(6), he has the powers mentioned in Schedule 7. The first of these is power to sell the property: paragraph 1. There is no equivalent of these provisions in Parts 2, 3 or 4.

123. These provisions suggest strongly, if not conclusively, that a recovery order operates in rem to transfer title to the property to the trustee. That is the usual, although not invariable, sense in which the concept of vesting is employed, and that sense is consistent with the power to sever the property, and with the power of the trustee to sell the property and his function of realising its value.

124. This interpretation of section 266 derives further support from section 269, which is concerned with rights, such as rights of pre-emption or irritancy, which might otherwise be triggered by the vesting of the property in the trustee. Section 269 provides, so far as material:

“(1) A recovery order is to have effect in relation to any property despite any provision (of whatever nature) which would otherwise prevent, penalise or restrict the vesting of the property.

(2) A right of pre-emption, right of irritancy, right of return or other similar right does not operate or become exercisable as a result of the vesting of any property under a recovery order. A right of return means any right under a provision for the return or reversion of property in specified circumstances.

(3) Where property is vested under a recovery order, any such right is to have effect as if the person in whom the property is vested were the same person in law as the person who held the property and as if no transfer of the property had taken place.”

125. The most significant of these provisions for present purposes is section 269(3), since that provision implies that the vesting of property under a recovery order involves the transfer of the property, so that it is held by the trustee rather than by the person who formerly held it. It was also accepted on behalf of SOCA that section 269(2) is one of a number of provisions in Part 5 which can only apply to property if POCA forms part of the *lex situs*: in other words, if the property is situated in one of the parts of the United Kingdom.

126. One would ordinarily expect an order having the effect of transferring a real right of ownership to apply only in relation to property situated in the territory of the state where the order is made. As Lord Mance, delivering the judgment of the Board, said in *Pattni v Ali* [2006] UKPC 51; [2007] 2 AC 85 (para 24):

“Their Lordships also note the existence of a more general principle. The actual transfer or disposition of property is, in principle, a matter for the legislature and courts of the jurisdiction where the property is situate (state A), and will be recognised accordingly by courts in any other state (state B) ... It follows from it, conversely, that in the unlikely event that the courts of state A were to purport actually to transfer or dispose of property in state B, the purported transfer or disposal should not be recognised as effective in courts outside state A.”

That principle would apply with particular force if the order were made for the purpose of seizure or confiscation: *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260, para 54 per Lord Hoffmann; *Government of the Republic of Spain v National Bank of Scotland* 1939 SC 413. Lord Justice-Clerk Aitchison said in the latter case (at pp 433-434):

“such ‘decrees’ of a foreign country as purport to have extra-territorial effect, and to attach property in a subject situated, and at a time when it is situated, within this country or its territorial waters, will not be recognised by our laws and courts.”

127. As I have previously explained, however, article 5(4) of the Vienna Convention and article 13(1)(a) of the Strasbourg Convention allow for the

possibility that a party may make an order confiscating property situated in the territory of another party, to which the latter party may choose to give effect, but is not obliged to do so. It therefore cannot be taken for granted that POCA does not allow for that possibility. It is necessary to examine the legislation further in order to decide whether POCA does so or not.

128. Other provisions in Chapter 2 concern provisional measures. The available measures in England and Wales, and in Northern Ireland, are property freezing orders and interim receiving orders. The corresponding measures in Scotland are prohibitory property orders and interim administration orders.

129. A property freezing order and a prohibitory property order are orders that prohibit any person to whose property the order applies from dealing with the property: sections 245A(2)(b) and 255A(2)(b). The court can make such an order only if it is satisfied that there is a good arguable case that the property to which the application for the order relates is or includes recoverable property, and that, if any of it is not recoverable property, it is associated property: sections 245A(4) and (5), and 255A(4) and (5). One consequence of that requirement is that such orders can be made only in respect of property which is, in principle, capable of being made the subject of a recovery order, or is mixed with such property in such a way as to be “associated property” as defined in section 245. If a recovery order operates in rem, as one might infer for the reasons I have explained at paragraphs 123 to 125, it follows that the scope of property freezing orders and prohibitory property orders is more limited than the nature of the orders themselves might otherwise have led one to expect.

130. Part 5 contains no provision concerned with overseas jurisdictions. There is, in particular, no equivalent of sections 74, 141 and 222. This contrast with Parts 2, 3 and 4 (and also with Part 8, as originally enacted: see section 376) provides further support for the view that recovery orders are concerned solely with property situated within the part of the United Kingdom where the order was made. If such orders had extraterritorial scope, the absence of any provision corresponding to sections 74, 141 and 222 would be difficult to understand.

131. In that connection, it is also relevant to note that Part 5 requires that the realised proceeds of property vested in the trustee must be applied in accordance with section 280. That section requires that the net proceeds, after payment of the remuneration and expenses of the trustee, must be paid to the enforcement authority. No provision is made for the possibility that the proceeds of realization of property situated in another jurisdiction might be applied in accordance with the law of that jurisdiction, as envisaged by article 5(5)(a) of the Vienna Convention and article 15 of the Strasbourg Convention. In that respect, recovery orders again differ from confiscation orders made under Parts 2, 3 and 4: in the case of those

orders, sections 74(3), 141(3) and 222(3) provide, in relation to enforcement abroad, that the request is to be that “realisable property is realised and the proceeds are applied in accordance with the law of the receiving country”.

132. I shall return to section 286, which is concerned with the power of the Court of Session to make orders under Chapter 2 of Part 5, and to section 316(4), which defines “property” for the purposes of Part 5.

Part 11 of POCA

133. It is also relevant to note one of the provisions in Part 11 of POCA, which is concerned with co-operation.

134. Section 444 deals with external requests and orders. It allows provision to be made by Order in Council for a prohibition on dealing with property which is the subject of an external request, or for the realisation of property for the purpose of giving effect to an external order. An external request is a request by an overseas authority to prohibit dealing with property which may be needed to satisfy an external order which has been or may be made: section 447(1) and (7). An external order is an order made by an overseas court where property is found or believed to have been obtained as a result of or in connection with criminal conduct, and is for the recovery of specified property or a specified sum of money. Such an Order in Council may include provision which (subject to any specified modifications) corresponds to any provision of Part 2, 3 or 4 or Part 5, except Chapter 3, which concerns the recovery of cash in summary proceedings. Section 444 thus enables articles 11 and 13(1) of the Strasbourg Convention, and the corresponding provisions of the Vienna Convention, to be implemented by the United Kingdom.

135. The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005 (SI 2005/3181) was made under sections 444 and 459(2) of POCA. Part 5 of the Order concerns recovery orders, and contains articles corresponding to sections 286 and 316(4) of POCA: see articles 197 and 213(4) respectively. The Order was construed by the House of Lords in *King v Director of the Serious Fraud Office* [2009] UKHL 17; [2009] 1 WLR 718 as conferring jurisdiction upon the Crown Court to make a restraint order in response to an external request only where the request concerned property in England and Wales. The same territorial requirement was also held to apply to the seizure and enforcement provisions of Part 2 of the Order. Although the terms of the Order differ in some significant respects from the terms of POCA, the speech of Lord Phillips, with which the other members of the committee agreed, contains observations which are equally germane to the present case. In particular, Lord Phillips rejected the contention that

an Order made under section 444 might have been intended to enable foreign countries to obtain worldwide orders from the British courts (para 37). His Lordship also observed that, although “property” was defined by section 447(4) of POCA as meaning “property wherever situated”, whether the word bore that meaning depended on the context in which the word was used. Thus, where the Order expressly or by implication referred to property in England and Wales, it necessarily referred only to property there situated (para 37).

Section 316(4)

136. It is necessary next to consider section 316(4), which defines “property” for the purposes of Part 5 as “all property wherever situated”. At first sight, that might be thought to entail that the power to make a recovery order extended to property anywhere in the world, provided that it had been obtained through unlawful conduct occurring anywhere in the world and was therefore recoverable property as defined in section 304(1). As I have explained, however, there are a number of factors which point away from that conclusion. To recap:

- (1) Part 5, unlike Parts 2, 3 and 4, makes no provision in respect of overseas jurisdictions;
- (2) Part 5, unlike Parts 2, 3 and 4, makes no provision for the proceeds of realisation of recoverable property to be applied in accordance with foreign law, as contemplated by article 5(5)(a) of the Vienna Convention and article 15 of the Strasbourg Convention;
- (3) recovery orders under Part 5, unlike confiscation and restraint orders under Parts 2, 3 and 4, appear on the face of the provisions (notably sections 266, 267, 269 and Schedule 7) to operate in rem;
- (4) orders taking effect in rem ordinarily apply only to property situated within the territorial jurisdiction of the court;
- (5) there is a presumption that Parliament does not intend to legislate in respect of property outside the United Kingdom, and in particular that legislation is not intended to authorise the seizure or confiscation of property situated outside the United Kingdom;
- (6) courts in the United Kingdom have no power to make effective orders purporting to transfer real rights of ownership of property situated outside the jurisdiction of the court; and
- (7) it is accepted that references to “property” in a number of other provisions of POCA, including provisions of Part 5, can refer only to property situated in the United Kingdom.

Some of these points have greater force than others. Cumulatively, however, they provide compelling support for the conclusion that the ambit of recovery orders is

intended to be confined to property located within the part of the United Kingdom where the court in question exercises jurisdiction.

137. Subject to section 286, it appears therefore that, although “property” is defined so widely by section 316(4) that the power to make recovery orders under section 266 might be understood as extending to property located overseas, such an interpretation of section 266 would be mistaken: in the context of the section, the word “property” has to be understood as referring only to property situated within the territorial jurisdiction of the High Court or the Court of Session, as the case may be.

138. The wide definition of property is nevertheless essential in the context of other provisions of Part 5. In particular, the tracing provisions in Part 5 have the consequence that a recovery order may be appropriate in respect of property located within the jurisdiction of the court which represents property unlawfully obtained elsewhere: see, for example, section 305.

Civil jurisdiction in the Scottish courts

139. Before coming finally to section 286, it is necessary to explain in outline the relevant aspects of Scots law in relation to jurisdiction, apart from POCA. I should emphasise that my purpose here is merely to explain matters in the most general terms, so as to provide some background against which to attempt to understand the effect of section 286.

140. In most ordinary civil proceedings before the Scottish courts, jurisdiction is regulated by the rules contained in Schedule 8 to the Civil Jurisdiction and Judgments Act 1982, as amended. In the present context, it is convenient to begin with rule 5(1)(a), which confers upon the courts for the place where immovable property is situated exclusive jurisdiction in “proceedings which have as their object rights in rem in ... immovable property” (*sic*: the terms “movable” and “immovable” are derived from the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters rather than the Scots law of property, which distinguishes between heritable and moveable property. It is the latter terminology which is employed in section 316(4) of POCA). The exclusive jurisdiction of the *forum rei* is reinforced by rule 5(2), which precludes a Scottish court from exercising jurisdiction in a case where immovable property is situated outside Scotland and the court would have exclusive jurisdiction if the property were situated in Scotland. A similar rule applies to the allocation of jurisdiction within the United Kingdom: Schedule 4, rule 11(a)(i).

141. Even before the enactment of the 1982 Act, that approach had long been established under the common law. For example, in *Cathcart v Cathcart* (1902) 12 SLT 182 Lord Low declined to grant a declarator that the pursuer was entitled to a liferent of land situated in England. He observed, at p 185:

“Real estate in England is beyond the jurisdiction of the Scotch courts ... Further, if decree of declarator in terms of the second conclusion was pronounced, this court would have no power to give practical effect to the right thereby declared. The pursuer would require to go to England to obtain his remedy. Would the English courts, according to the principles of international law, be bound to recognise and act upon the declarator of this court? I am of opinion that they would not ... I think that the answer would be that it was for the court of the country where the real estate was situated to say what was the result, as regards the rights of the parties [of the relevant events]. I am therefore of opinion that the question ... is one with which this court is not competent to deal.”

142. In relation to proceedings concerned with moveable property, Schedule 8 contains a number of relevant rules. Under rule 1, the general rule is that persons can be sued in Scotland if they are domiciled there. The concept of domicile is defined for this purpose on the basis of residence: section 41. Under rule 2, there are also a number of special grounds on which the Scottish courts may have jurisdiction. In particular, under rule 2(i) a person may be sued in Scotland in proceedings which are brought to assert, declare or determine proprietary or possessory interests, or rights of security, in or over moveable property, or to obtain authority to dispose of moveable property, if the property is situated in Scotland. There are in addition other rules which may be relevant to confer jurisdiction in particular circumstances. Broadly similar rules apply to the allocation of jurisdiction within the United Kingdom, under Schedule 4, rules 1 and 3(h)(ii). The Scottish courts may therefore have jurisdiction in proceedings concerned with the ownership of moveable property situated outside Scotland. In practice, however, as I have explained, the courts in Scotland, as in the other parts of the United Kingdom, would be unlikely to make an order in rem purporting to transfer or dispose of property in another state.

143. Accordingly, summarising the matter broadly, proceedings concerned with rights in rem can ordinarily be brought in the Scottish courts in relation to heritable property only if the property is situated in Scotland. They can ordinarily be brought in relation to moveable property if the property is situated in Scotland or if the defender is domiciled in Scotland. They cannot otherwise ordinarily be brought, in the absence of particular circumstances in which other grounds of jurisdiction may arise (for example, under rule 2(h) of Schedule 8).

144. There are a number of circumstances where jurisdiction is not governed by Schedules 4 or 8. In particular, those schedules do not affect the operation of any enactment which confers jurisdiction on a Scottish court in respect of a specific subject matter on specific grounds: sections 17(1) and 21(1)(a) of the 1982 Act. Section 286 of POCA is an example of such an enactment.

Section 286

145. I can now turn at last to section 286 itself. It is headed “Scope of powers (Scotland)”, and provides:

“(1) Orders under this Chapter may be made by the Court of Session in respect of a person wherever domiciled, resident or present.

(2) Such an order may be made by the Court of Session in respect of moveable property wherever situated.

(3) But such an order in respect of a person's moveable property may not be made by the Court of Session where-

(a) the person is not domiciled, resident or present in Scotland, and

(b) the property is not situated in Scotland, unless the unlawful conduct took place in Scotland.”

146. The words “this Chapter” refer to Chapter 2 of Part 5 of POCA, which as I have explained is concerned with civil recovery. The orders which may be made by the Court of Session under Chapter 2 are recovery orders, prohibitory property orders, interim administration orders and consent orders (made under section 276). Since these orders can only be made in respect of property which is at least arguably recoverable (or associated property), it is the extent of the court’s jurisdiction in relation to the power to make recovery orders which is of critical importance.

147. Section 286 provides further support for the conclusion that the definition of “property” in section 316(4) does not have the effect of enabling a recovery order to be made under section 266 in respect of property anywhere in the world. If section 266, read with section 316(4), had that effect, the provision made by

section 286(2) in respect of moveable property would be redundant, and the distinction implicitly drawn between heritable and moveable property would be inexplicable. Section 286(3) is also difficult to reconcile with such an interpretation, since it qualifies the jurisdiction conferred by section 286(2) in relation to moveable property. This supports the view that section 266 does not itself define the court's jurisdiction to make a recovery order, but confers a power which can be exercised in circumstances in which the court possesses jurisdiction, based upon some independent foundation. A distinction has to be drawn, that is to say, between the nature of the power conferred by section 266, on the one hand, and the jurisdiction of the court: a jurisdiction arising, in relation to the Court of Session, from section 286 and from the background rules of civil jurisdiction, so far as they are not implicitly displaced.

148. If recovery orders operate in rem, and the jurisdiction of the Scottish courts to make orders of that character is not ordinarily conditional upon the holder of the property being domiciled, resident or present in Scotland, section 286(1) is as one would expect. It also enables the jurisdiction of the court to meet the requirements of article 5(4) of the Vienna Convention and article 13 of the Strasbourg Convention.

149. The absence from section 286 of any provision in respect of heritable property is also as one would expect. As I have explained, one would not expect the court to have jurisdiction to make orders in rem in respect of heritable property outside Scotland. Since the court would not possess such a jurisdiction under the 1982 Act or under the common law, there is no necessity for POCA to alter that position.

150. In relation to moveable property, on the other hand, the position is different. As I have explained, the ordinary rules of civil jurisdiction in Scotland enable the courts to exercise jurisdiction in relation to moveable property outside Scotland (including questions concerning proprietary rights in respect of such property), provided the defender is domiciled in Scotland or other requirements specified in the 1982 Act are met. At the same time, one would not expect the court to exercise a power to transfer or dispose of moveable property situated outside Scotland, in accordance with the principle explained in *Pattni v Ali* [2006] UKPC 51; [2007] 2 AC 85, or to purport to confiscate moveable property situated in another sovereign state, in accordance with the principles discussed in *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30; [2004] 1 AC 260 and in *Government of the Republic of Spain v National Bank of Scotland* 1939 SC 413. The width of the court's formal jurisdiction does not therefore entail that the court will exercise its powers to the limits of its jurisdiction, where for example such an exercise would be ineffective or would contravene recognized principles of international law.

151. The jurisdiction conferred by section 286(2) and (3) in relation to moveable property differs in a number of respects from the court's ordinary jurisdiction: instead of the possible grounds of jurisdiction set out, in particular, in rules 1 and 2 of Schedule 8 to the 1982 Act, the apparent effect of section 286(2) and (3) is to confer jurisdiction upon the court, for the purposes of chapter 2 of Part 5 of POCA, where moveable property is situated in Scotland, and also where it is situated elsewhere and either (a) the holder of the property is domiciled, resident or present in Scotland, or (b) the unlawful conduct took place in Scotland.

152. The rationale of such a wide jurisdiction is not obvious, given that the power conferred by section 266 to make a recovery order (and therefore the powers to make other orders in respect of property which is at least arguably recoverable) is more limited in scope, as I have explained. In the circumstances, counsel referred the court to the legislative history of the provision, and in particular to statements made in Parliament during the passage of the Bill. These statements, even if admissible as an aid to interpretation, do not however provide any clear explanation of the intention of section 286(2) and (3). They confirm that section 286 was intended to regulate the question of jurisdiction, and indicate that its effect was intended to be the same as was achieved for England and Wales and Northern Ireland by a combination of the provisions on property in section 316 and the general rules on the jurisdiction of the civil courts. One matter on which all parties to these proceedings are agreed, however, is that that is not the case: on any view, the position in England and Wales and Northern Ireland is not the same as that set out in section 286(2) and (3). It appears therefore to be possible that the drafting of section 286(2) and (3) may have reflected a misunderstanding.

153. Since POCA deals with matters falling partly within the competence of the Scottish Parliament, proceedings also took place in that Parliament in accordance with the arrangements known colloquially as the Sewel convention: see Hansard (HL Debates), 21 July 1998, col 791. Section 286 was not however specifically considered, and neither the discussion in the Parliament nor the "Sewel memorandum" prepared by the Scottish Executive appears to shed any light on its intended effect. As Sir Winston Churchill once said in another context, it is a riddle, wrapped in a mystery, inside an enigma.

154. The effect of section 286 is however not of critical importance in the present context. If section 266 is to be understood as referring to property within the territorial jurisdiction of the relevant court, for the reasons I have explained, then it follows that the power conferred by section 266 is consequently restricted to such property. The fact that the jurisdiction of the Court of Session, as regulated by section 286 for the purposes of chapter 2 of Part 5, may be wider than that of the High Court does not alter the meaning and effect of section 266 in relation to the High Court, which is the issue at the heart of the present appeal. If section 266 confers the same power upon courts in all parts of the United Kingdom, as it

appears to do, then it may be that section 286 has equally little practical effect upon the ambit of recovery orders made by the Court of Session. That is not however an issue which need be, or ought to be, decided in the present case.

SIR ANTHONY HUGHES

155. I respectfully agree with Lord Phillips that both appeals must be allowed, and for the reasons which he gives. I add only some very brief words about the PFO appeal.

156. For my part, if it were possible to construe the complex provisions of POCA in such a way as to admit of limited extraterritorial effect for Part 5, but only where there is a sufficient jurisdictional connection between a part of the UK and the criminal proceeds, I should have wished to do so. I am, however, reluctantly persuaded that this cannot be achieved by construction and would involve illegitimately re-writing the statute.

157. For the reasons explained by Hooper LJ, cited by Lord Phillips at para 72 above, it would make excellent sense for the English court to have jurisdiction to make a civil recovery order in relation to real or personal property in Spain bought with the profits of crime by an English criminal, or by someone who committed his offence in England and Wales. It will not always be possible to achieve removal of such proceeds by means of a post-conviction confiscation order under Part 2; there may, for a number of reasons, be no conviction – for example the criminal may be dead, or untriable because resident in a country from which no extradition is possible. It seems to me that the kind of jurisdictional links contemplated by section 286 for the limited case of moveable property in the case of Scottish courts could sensibly serve as a model for all property and for all UK courts: that is to say links (1) because the crime was committed here, (2) because the offender or holder of the property is domiciled, resident or present here, or (3) because the relevant property is here. Such jurisdiction would not, as it seems to me at least, be exorbitant, nor would it offend the sovereignty of other States.

158. That, however, is not what the statute can be made to say. What cannot, as it seems to me, be the correct construction is that, as SOCA was obliged to submit, it has jurisdiction to seek a (mandatory) civil recovery order over property in China which is the product of a crime committed in China by an offender who has never left that country.

LORD JUDGE AND LORD CLARKE

159. We will explain briefly why we are unable to agree with the conclusions of the majority of the Court that the appeal in relation to the worldwide property freezing order (PFO) should be allowed.

160. We agree that the Proceeds of Crime Act 2002 (“the Act”) is poorly drafted. Nevertheless its objective is clear and can be explained in uncomplicated terms. Those who engage in criminal or unlawful conduct, whether here or abroad, should be deprived of the property which is or which represents the proceeds of their crimes or unlawful conduct.

161. Part 2 of the Act addresses confiscation orders which may be made following convictions recorded in England and Wales. For these purposes section 84(1) provides:

“Property is all property wherever situated and includes –

- (a) money;
- (b) all forms of real or personal property;
- (c) things in action and other intangible or incorporeal property.”

For present purposes, there are two crucial features. First, the property extends to “all property” including “all forms of real or personal property” and it applies to all such property “wherever” in the world it is “situated”. It was not suggested in the course of argument that, where these words appear in Part 2, they should be given a limited meaning. They mean what they say, that is, wherever in the world the property (whatever form it may take) is situated.

162. Given the ease with which professional criminals in particular can move their assets around the world, by section 74 the Act unsurprisingly makes provision for the enforcement of confiscation orders abroad. It is an elementary principle of statutory construction that legislation in this country which purports to have effect abroad requires to be expressed in unequivocal language. Sovereign states are sovereign. We do not interfere in the affairs of a sovereign country in order to enforce orders made here which impact on people living and property located abroad. Accordingly, the provisions relating to the enforcement abroad of a confiscation order made here are structured so as to give full recognition to these principles, and the structures created for these purposes have not been called into question.

163. Part 5 of the Act is concerned with the recovery of the proceeds of unlawful conduct when there is no criminal conviction in this jurisdiction. It applies to conduct which is unlawful within the United Kingdom or conduct which would be criminal abroad and which would be recognised as criminal here. Among its other wide-ranging effects, it provides the statutory process by which those convicted of crimes abroad (including citizens of the relevant country) may be deprived of the proceeds or profits which have found their way into this country. Where the statutory conditions are satisfied the court is *required* to make a civil recovery order: by contrast, the effect of the order is that the enforcement authority is *enabled* to take the appropriate steps to enforce it.

164. For the purposes of a civil recovery order under Part 5, property is identified in identical terms to the property which may be made the subject of the confiscation processes in Part 2 of the Act. An almost identical definition of property to that in section 84(1) is contained in Parts 3, 4, 5, 6, 7, 8 and 11 of the Act. Section 316 is the general interpretation section for the purposes of Part 5. Section 316(2) provides that the following provisions apply for the purposes of Part 5. Those provisions include section 316(4), which provides:

“Property is all property wherever situated and includes –

- (a) money,
- (b) all forms of property, real or personal, heritable or moveable,
- (c) things in action and other intangible or incorporeal property.”

It can be seen that the language is the same as that in section 84, save that it expressly includes language referable to Scottish property. In our judgment the expression “all property wherever situated” must have the same meaning in each of the sections in which it appears, including section 316(4). With respect to those who take a contrary view, it seems to us that the language unequivocally describes not only the whereabouts of the property encompassed within Part 5, but also the nature and type of property covered by it.

165. This does not mean that absolutely every provision in the Act which refers to property must be taken as a reference to property wherever situated because it might be clear from the particular provision that it must be more limited. A good example is section 45(1) which is referred to in paras 14 and 35 above. It confers on a constable the power to seize property “to prevent its removal from England and Wales”. Since the power only arises in the case of property in England and Wales, it cannot refer to property wherever situated. Subject to such cases, the definition sections are of general effect.

166. Until Mr James Eadie QC addressed the problems to which this appeal has given rise, we suspect that the extent of the control mechanisms built into the statutory processes had not been fully appreciated. However, as it seems to us, a civil recovery order in relation to property situated outside the jurisdiction of the United Kingdom is not designed to have extra-territorial effect in the sense that it should operate so as to oblige a court or authority in a foreign country, or for that matter anyone living in that country, to obey the order. That would contravene the sovereignty principle. Indeed, if the enforcement authorities or the trustee for civil recovery were to barge into a foreign country demanding the return of property situated there on the basis of a civil recovery order made here, the response would almost certainly be decidedly cold, and ultimately ineffective. On the other hand, when properly informed that a court in this jurisdiction has made such an order, the authorities abroad would be likely to appreciate that there is or may be property within its jurisdiction which represents the proceeds of unlawful conduct and that, in accordance with their own procedures, this might, with advantage, be removed from the criminal, and dealt with in accordance with domestic principles within its own jurisdiction. In this way the criminal would be deprived of the proceeds and profits of crime or unlawful conduct.

167. Notwithstanding the requirement on the court here to make a recovery order if satisfied that the necessary conditions are satisfied, we believe that control mechanisms have been created within Part 5 to ensure that the order may be made subject to appropriate conditions which would avoid any improper extra-territorial effect or infringement of the principle of sovereignty. In the language of section 266(8) the order may address “the manner in which the trustee for civil recovery may deal with any property vested by the order for the purpose of realising it.” Section 267(5) acknowledges that the obligation on the trustee to maximise the amount payable to the enforcement authority must be realised only “so far as practicable”. The powers of the trustee under Schedule 7 extend to starting or continuing legal proceedings in relation to property, that is, property “wherever situated”. In our judgment this provides the trustee with the power to do so where the property is situated abroad. If so, any such proceedings would be governed by the legal structures which obtain in the relevant foreign country. Mr Eadie accepted in argument that the exercise of the functions of the trustee for civil recovery specified in section 267 of and Schedule 7 to the Act are subject to the powers of our court to impose conditions in relation to the recovery process which acknowledge the sovereignty principle and give effect to it. We agree.

168. Some reliance was placed on section 269. However, in our opinion section 269 is directed only to the courts of England and Wales, Scotland or Northern Ireland as the case might be. It tells those courts which legal rights must take priority over a recovery order. These may include rights under provisions of foreign law, where those provisions of foreign law are applicable under English

conflicts rules. However section 269 does not purport to tell foreign courts what rules they may or may not apply. It therefore respects the principle of sovereignty.

169. Section 243 provides that the enforcement authority must serve the claim form on the respondent wherever domiciled, resident or present. The parties agreed that it was not necessary to obtain permission to serve the claim form out of the jurisdiction on the basis that this is a claim “which the court has power to determine” within CPR 6.33(3). We assume for present purposes (without deciding) that that is correct. The claim form must then be served in accordance with CPR 6.40, which includes safeguards and, at any rate in many cases, requires service in accordance with the local law.

170. In short, in relation to property situated abroad, to which Part 5 applies, we believe that it is open to the court making a civil recovery order to direct that any attempt to enforce the order abroad should not be made, save and except through the legal processes which obtain in the country where the property is situated, or in accordance with the procedures which apply to the enforcement of a confiscation order abroad, or subject to any other appropriate conditions. Viewed in this way, Part 5 of the Act is not inconsistent with and does not contravene the sovereignty principle. We recognise that the Strasbourg Convention does not expressly authorise proceedings of this kind but there is nothing in it which prohibits them.

171. There is in our opinion nothing in the scheme or language of the Act which supports the conclusion that Part 5 is limited to property within the jurisdiction. Indeed section 286 shows that it was not so restricted. Section 286 is part of a series of sections entitled “*Miscellaneous*” and is itself entitled “Scope of powers (Scotland)”. It provides:

“(1) Orders under this Chapter may be made by the Court of Session in respect of a person wherever domiciled, resident or present.

(2) Such an order may be made by the Court of Session in respect of moveable property wherever situated.

(3) But such an order in respect of a person’s moveable property may not be made by the Court of Session where –

(a) the person is not domiciled, resident or present in Scotland, and

(b) the property is not situated in Scotland,

unless the unlawful conduct took place in Scotland.”

172. The section thus provides for the making of a recovery order where the relevant person is not domiciled, resident or present in Scotland and where the property is not situated in Scotland. The view expressed by the majority is inconsistent with that section, which (whether or not it is an enigma) is part of the Act. It is true that the section does require that in such circumstances a recovery order can only be made where the unlawful conduct took place in Scotland but that is not relevant to the question which divides the court, which is whether Part 5 applies to property outside the jurisdiction.

173. Section 286 also provides assistance on the true construction of section 316(4). The expression “wherever domiciled, resident or present” in section 286(1) plainly means wherever situated in the world and the expression “in respect of moveable property wherever situated” in section 286(2) equally plainly means wherever the moveable property is situated in the world. The contrary is not suggested. In our judgment, there is no escape from the conclusion that “wherever situated” in section 316(4) means the same. It follows that, if, as the majority say at para 44, the question raised by the PFO appeal is whether the totality of Part 5 relates exclusively to property within the United Kingdom, the question must be answered in the negative.

174. That conclusion seems to us to be supported by the scheme of Part 5. The general purpose of Part 5 is set out in section 240, which is defined in section 240(1) as for the purposes of

“enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct.”

175. The majority recognise that the second reference to property in that subsection must be to property wherever situated because section 241(2) makes it clear that unlawful conduct includes conduct which takes place outside the United Kingdom provided that it is unlawful in the place where it occurs and would be unlawful if it took place in the United Kingdom. There is nothing in section 240(1) which supports the conclusion that “property” where it is first used is to have a different meaning from “property” in the same section. Indeed, read naturally, it has the same meaning. The section provides for a recovery order to “recover ... property which is ... property obtained through unlawful conduct”. Given that it is agreed that “property obtained through unlawful conduct” can be property outside the jurisdiction, it must follow that “property which is” such property can be property outside the jurisdiction. The plain effect of section 240(1) read together with the definition section in section 316(4), which by section 316(2) applies for the purposes of Part 5, is that both references to “property” are references to property wherever situated. So too, as is accepted, are the references to obtaining

property by unlawful conduct in section 242. This conclusion does not depend upon section 286 but is supported by it because it provides a particular example of a case where a recovery order may be made in respect of property outside the jurisdiction.

176. So far as moveable property is concerned, the position in Scotland is clear. Section 286 shows that it includes moveable property anywhere in the world. It does not however apply in England. The provisions which apply in England are not limited in any relevant respect. As already stated, the definitions of property as being “wherever situated” in sections 84(1) in Part 2 and section 316(4) in Part 5 are part of the central provisions of those Parts. Moreover, section 240(2) provides that the powers conferred by Part 5 are exercisable in relation to “any property” regardless of whether any proceedings have been brought for an offence in connection with the property.

177. Section 266(1) provides that “If in proceedings under this Chapter the court is satisfied that any property is recoverable, the court must make a recovery order.” By section 304(1) property obtained through unlawful conduct is recoverable property. It follows that (subject to the exceptions in section 308), recoverable property is a very wide term. It thus appears to us that property in section 266(1) is the property defined in section 316(4), which is all property wherever situated in the world.

178. It was submitted that, by reason of the principles of international sovereignty, property situated abroad must be excluded because of section 266(2), which provides that the recovery order “must vest the recoverable property in the trustee for civil recovery”. We have already expressed our view that those principles are not infringed merely by including foreign property in the order because the order would be subject to the local law or *lex situs*.

179. The problem is said to arise from the use of the word “vest” in section 266(2). There are two reasons why in our view there is no such problem. The first is that the majority accept that the expression “moveable property wherever situated” in section 286(2) means wherever situated in the world. In cases falling outside the restriction imposed by section 286(3), the majority therefore accept that moveable property situated anywhere in the world may be made the subject of a recovery order. Indeed, it must be made the subject of a recovery order under section 266(1) if the other criteria are satisfied. It follows that the majority see no problem with the making of an order in Scottish proceedings which vests moveable property which is outside the jurisdiction in the trustee for civil recovery. This is no doubt because, as explained above, any such order must be subject to the provisions of the local law and may be subject to appropriate conditions under section 266(8). Moreover, under section 267(5) the trustee’s

obligation to sell the property is expressly limited by what is practicable. If there are no problems with applying section 266(1) and (2) to moveable property in the case of orders made by the Scottish courts, it follows that there are no problems in applying them to moveable property in the case of orders made by the English courts. The only difference between the jurisdiction of the two courts, so far as moveable property is concerned, is that the Scottish courts cannot make an order if the restriction imposed by section 286(3) is satisfied, whereas the jurisdiction of the English courts is not limited in the same way.

180. The second reason why the use of the word “vest” does not give rise to a difficulty is that it is capable of operating in personam. Mr Eadie relies upon the similar use of the verb “vests” in section 306(1) of the Insolvency Act 1986, which provides that a bankrupt’s estate shall vest in the trustee immediately upon his appointment taking effect. He relies upon the decision of the Court of Appeal in *Ashurst v Pollard* [2001] Ch 595, which related to real property in Portugal which was owned by the bankrupt and his wife. Jonathan Parker LJ (with whom Kennedy and Potter LJJ agreed) said at para 11 that the vesting provisions of section 306 “cannot effect a change in the Portuguese register of title, which continues to record Mr and Mrs Pollard as the joint owners of the property.” Thus in those circumstances, as here, the mere making of a vesting order does not have the inevitable consequence of transferring the legal interest in (or legal title to) real property to the trustee in bankruptcy or (here) the trustee for civil recovery. We would accept Mr Eadie’s submission that the consequences of a vesting order in relation to property situate abroad depend upon the local law or *lex situs*. We recognise that there are differences between the Insolvency Act and the Act but in our opinion the Insolvency Act provides a valuable pointer to the correct conclusion under Part 5 of the Act, namely that, as Tomlinson LJ concisely put it in the Court of Appeal at para 168,

“‘vest’ is simply an ordinary English word which takes its meaning from its context and is not here used as a term of art which carries with it inevitable consequences as to the effective transfer of title.”

181. In these circumstances, given the fact that section 266 must be construed so that it does not offend against the principles of sovereignty in international law, we see no difficulty in applying it to orders relating to moveable property made by the English courts. What then of immoveable property? Again, we see no reason in either the language of the Act or the principles of international law to prohibit a recovery order in such a case. The effectiveness of such an order would simply be subject to the rules of the *lex situs*. The definition of property in sections 84(1) and 316(4) expressly applies to all forms of property including real property wherever situated. It thus applies on its face to real property outside the United Kingdom and, whatever the position in Scotland in the light of section 286(2), the Act gives

the English courts jurisdiction to make a recovery order in respect of such real property.

182. The provisions of Part 5 of the Act, at any rate in relation to proceedings in England and Wales, are in our view unequivocal. They plainly apply to all property, whether real or personal and wherever situated in the world. Moreover they reflect the purpose behind the Act, namely to deprive criminals of their ill-gotten gains. We recognise that how effective the approach we favour will be depends upon the co-operation of courts elsewhere. However, for the reasons we have given, we are firmly of the view that nothing we have said infringes or would infringe the sovereignty of other states or the principles of international law. We prefer the views of Mitting J at first instance and of Maurice Kay, Hooper and Tomlinson LJ in the Court of Appeal to those of the majority. For these reasons we would dismiss the PFO appeal.

183. As to the disclosure order (“DO”) appeal, we agree that the appeal should be allowed for the reasons given by Lord Phillips in para 94 above. There is nothing in section 357 or 358 to indicate that it was intended that a notice under a disclosure order could be given to a person outside the jurisdiction. The position under section 357 is not inconsistent with our analysis of Part 5.

184. A core feature of our analysis of Part 5 is that recovery orders take effect in personam subject to the local law, or *lex situs*. In other words, they have no legal consequences outside the United Kingdom except those positively prescribed by local law. For this reason, recovery orders do not impinge upon the sovereignty of foreign states. By contrast, an information notice given to someone outside the United Kingdom has the potential to criminalise acts and omissions committed abroad by foreign citizens who are outside the jurisdiction of the United Kingdom courts. There is no scope for reading the relevant provisions of Part 8 as taking effect subject to the local law or *lex situs*. The statutory language is clear and unequivocal – unless the recipient of an information notice has a “reasonable excuse” he is guilty of an offence if he fails to comply with an information notice.

185. Further, Part 5 clearly contemplates service on persons anywhere in the world. Section 243(2) states that the claim form must be served on the respondent “wherever domiciled, resident or present”. If Parliament intended SOCA to have authority to give information notices anywhere in the world, one would expect to see an equivalent provision in Part 8. However Part 8 contains no such provision. Section 357(4) defines a disclosure order as an order authorising SOCA “to give” information notices “to any person the appropriate officer considers has relevant information”. There is nothing in this language to suggest that SOCA’s power may be exercised extra-territorially.

186. In addition, paragraph 15 of Practice Direction – Civil Recovery Proceedings states:

“Disclosure order

15.1 The application notice should normally name as respondents the persons on whom the appropriate officer intends to serve notices under the disclosure order sought.

15.2 A disclosure order must -

- (1) give an indication of the nature of the investigation for the purposes of which the order is made;
- (2) set out the action which the order authorises the appropriate officer to take in accordance with section 357(4) of the Act;
- (3) contain a statement of –
 - (a) the offences relating to disclosure orders under section 359 of the Act; and
 - (b) the right of any person affected by the order to apply to discharge or vary the order.

15.3 Where, pursuant to a disclosure order, the appropriate officer gives to any person a notice under section 357(4) of the Act, he must also at the same time serve on that person a copy of the disclosure order.”

187. Paragraph 15.3 suggests that the recipient of an information notice is not obliged to comply with the notice unless and until SOCA serves a copy of the disclosure order on him. Presumably, that service must take place in accordance with the CPR. However it is not at all clear by what mechanism under the CPR SOCA could serve a copy of a disclosure order on a person outside the United Kingdom. This reinforces the view that information notices can only be served on persons who are physically present within the United Kingdom.

188. We agree that the appropriate relief is a declaration that the DO does not authorise sending information notices to persons who are outside the United Kingdom.