Enforcing financial penalties: the case of confiscation orders

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Abstract

Financial penalties are the most widely used sentence in England and Wales, but present difficulties for enforcement. This paper examines the enforcement of confiscation orders - a relatively poorly understood financial penalty. Drawing on interviews with actors in the confiscation order process this paper examines the processes through which confiscation orders are enforced. It is argued that enforcement is the result of an interaction of factors which include the initial decision making of police officers, financial investigators and prosecutors; the accuracy of information about offenders’ financial affairs; enforcement powers, intelligence and operational support; and, the behaviour and attitudes of the offender.

Key words

Enforcement, confiscation orders, financial penalties, sentencing
A Bromley organised crime boss has not paid any of the £3m a court ordered him to pay seven years ago for his crimes. Raymond May, from south-east London, was told to hand over £3.26m in 2002 after being convicted for his part in a £12m VAT fraud. The 53-year-old, who claims he is an odd-job man and gardener, owns a 20-room house with an underground swimming pool in Bromley worth £2.5m, a yacht and a string of other assets, it was reported. In 2002, he was alleged in evidence cited in a Court of Appeal ruling to be a "massive" cocaine importer suspected of involvement in several murders. The lawyer who prosecuted the original case warned the failure to seize the assets risked sending a message to other 'Mr Big' crime bosses they could escape the law. Oliver Sells QC said: "It is a signal failure that so little has yet been recovered from a confiscation order which has been upheld by the Court of Appeal and the House of Lords. It is obviously in the public interest that orders should be enforced in good time because failure to do so will risk conveying to convicted criminals the message that protracted delay will diminish the prospect of recovery and that in turn may weaken the effectiveness of the law in other cases."

Kirsty Ross, the London Paper, 6th August 2009

Introduction

This paper examines the enforcement of confiscation orders – a relatively poorly understood financial penalty. Financial penalties form an important component of the sentencing framework but historically have presented particular problems for enforcement (Raine et al, 2003). Whilst fines are by far the most commonly used financial penalty, interest in other types has been increasing. The confiscation order seeks to recover the benefit an offender has made from crime or, since the full benefit is often not longer available, a smaller amount which reflects the assets an offender does have available. In comparison with the fine the use of confiscation orders is limited, but its use is growing. In England and Wales 4,109 were granted in the year 2007/08 compared with 2,068 in the year 2004/05.
The problem for enforcement

Concerns have been raised about the enforcement of confiscation orders. It can be difficult to reconcile the value of the confiscation orders granted by the courts with the amount ultimately recovered because offenders have time to pay their order. Nevertheless, in 2000 a Cabinet Office report found that the collection rate was in the region of 40 per cent (Cabinet Office, 2000). A subsequent report by Her Majesty’s Inspectorate of Constabulary (HMIC) (2004) expressed concern about the enforcement of orders noting ‘what the figures show very clearly is that, while the amounts carried forward each year as not enforced are increasing significantly, the amounts remitted fell in 2003/04 compared with the previous year’ (HMIC, 2004: 46).

Bullock et al (2009) reported that after a period of nine months 3 of 1,390 orders imposed in the period April-August 2006, 77% had been paid in full, 11% in part and the rest unpaid. Clearly over three-quarters of the orders were paid. However an examination of the value of the orders paid presented a rather different picture. The total value of the 1,390 orders examined was just under £43million of which approximately 40% had been recovered after the nine month period. A collection rate reflecting the Cabinet Office analysis conducted some years earlier. Indeed, as illustrated by the quote at the beginning of this paper, the very largest orders are the least likely to be paid. Of the orders between £10 and £100, 98% were paid but this steadily declined to 35% for those between £100,000 and £1million (Bullock et al, 2009).

Various reasons have been proffered for the difficulties encountered when enforcing confiscation orders. First, there may be little reason for prosecutors or court staff to pursue enforcement unless the value recovered was thought likely to exceed the costs of doing so (Levi and Osofsky, 1995). Second, enforcing confiscation orders demands specialist skills (more on which later) and historically the small number of confiscation orders actually obtained has made it difficult for enforcement staff to develop these skills (HMIC, 2004). Third, administrative problems have led to delays in sending complete and timely information regarding orders from the Crown Court to magistrates’ courts enforcement teams in turn creating delays in the enforcement of the order (HMIC, 2004). Lastly, the successful enforcement depends on ‘end-to-end’, joined-up working by all the agencies involved in the confiscation process and historically this has not always happened (HMIC, 2004).
Following the publication of the Cabinet Office (2000) and HMIC (2004) reports, some attempts to improve the enforcement of confiscation orders have been made. For example, there has been a stronger emphasis on the Crown Court and magistrates courts working together (strengthened by the unification of the administration of magistrates’ and the Crown Courts in 2005); practice guides (such as the Home Office National Best Practice Guide to Confiscation Order Enforcement) have been developed and disseminated; a central multi-agency Enforcement Task Force (now disbanded) was set up in 2003 to help enforce large, pre-Proceeds of Crime Act (2002) orders; and, locally based ‘regional centres of excellence’ to centralise the administration and enforcement of confiscation orders on a regional basis have been set up.

This paper

This paper is concerned with understanding the processes through which confiscation orders are enforced and to identify factors which shape whether the orders are enforced or otherwise. In doing so, the paper aims to contribute to the limited understanding of the proceeds of crime regime as well as to the evidence base regarding the enforcement of financial penalties. The paper has been written with a practitioner audience in mind in the hope that the findings may be useful for those working within the confiscation order regime.

The paper draws on data collected for the Home Office (see Bullock et al, 2009 for details). Approximately one hundred financial investigators working in asset recovery teams in six police services (Greater Manchester Police, Merseyside, Kent, Surrey, South Yorkshire and Lancashire) and with the north-west regional asset recovery team were interviewed. Supplementary interviews were conducted with a small sample of practitioners from the wider criminal justice system. These included representatives from the Crown Prosecution Service (both regionally and centrally), Revenue and Customs Prosecution staff, prosecution and defence counsel, the judiciary, HM court service staff responsible for enforcement (and the enforcement taskforce) along with a representative of the Association of Chief Police Officers(ACPO). All data were collected in early 2007.
Factors which shape the enforcement of confiscation orders

Initial decision making of practitioners and the role of restraint orders

The initial decisions made by financial investigators and their colleagues during the confiscation investigation have implications for whether they are ultimately paid. Particularly important here is the role played by restraint orders (the provisions for which are contained in part two of the 2002 Proceeds of Crime Act). The Crown Prosecution Service (CPS) or an accredited financial investigator can apply to the court for a restraint order. The aim of which is to prevent defendants’ dissipating their assets and so to maximise the amount available for recovery. Restraint can operate in two ways. Property or money may have been physically seized during an operation and retained by the police service. The movement of a defendant’s assets (bank accounts, houses) may be prohibited. Businesses can also be restrained. Restraint orders can be instigated at an early stage of an investigation (even before an offender is charged).

Restraint has been considered to be very important to the operation of the confiscation order regime. Financial investigators (and others) interviewed reported that it is, of course, much easier to enforce a confiscation order where a defendant’s assets are restrained, as this practitioner from an enforcement team notes:

‘In terms of trying to push the matters through, very much restraint is crucial as far as I’m concerned, absolutely crucial, not only because it gives us a degree of control over the satisfaction of the order.’ (Enforcement worker).

However, it is far from the case that assets are always restrained. Bullock et al (2009) reported that only one fifth of 3, 604 confiscation orders examined in 2006/07 had a restraint order in place. Decisions have to be made about whether to restrain the assets of defendants or not. Given the assumed importance of restraint for the enforcement of the orders, the following sections examine the factors that were found to shape the decision whether to restrain defendants’ assets in detail.

Legal, practical and operational constraints
There are various constraints on the exercise of restraint orders which must be considered in applications to the court. A police investigation (broadly conceived) must have started, there needs to be reasonable grounds to believe that a suspect had benefited from crime (mere suspicion would not be enough for a court to grant an order) and any application needs to have been made within reasonable time of the offence/s having taken place. Rees et al (2008) describe how the court is not obliged to grant a restraint order and can exercise discretion. A restraint order prevents people dealing with assets and this may have adverse affects for both the defendant and third parties. As such in making decisions regarding restraint orders the court should consider, for example, the reasonableness of the grounds for believing a suspect was involved in crime, whether there is a real likelihood of dissipation of assets and the possible impact (personally or professionally) a restraint order may have on the suspect and third parties. In addition, Article 8 of the European Convention on Human Rights (ECHR) (respect for family and private life) along with Article 1 of the First Protocol (entitlement to peaceful enjoyment of possessions) both apply so there is a burden on the court to act proportionally (Rees et al, 2008).

With these constraints in mind interviewees felt that the limited experience of practitioners with the processes and procedures involved in applying to the court for a restraint order had affected the number of applications made by the CPS. This financial investigator notes:

‘The only problem is getting it through the CPS, because whether it is lack of knowledge or lack of training or whatever, but there seems to be some quarters that are reluctant to apply for a restraint.’ (Financial investigator).

This issue would appear to be exacerbated because there are risks in obtaining restraint in some circumstances. It is possible for a defendant to claim compensation in the event of loss resulting from restraint of their assets. Respondents noted that this risk may have resulted in prosecutors being circumspect in their applications for restraint. The 2002 Proceeds of Crime Act actually only allows compensation in very limited circumstances. It is more likely that any concerns about the application of restraint reflected lack of experience.
In some circumstances gaining a restraint order is not viable for operational reasons. The court insists on full and complete disclosure of all information which might influence the decision whether or not to grant the order and any omission, especially if it is deliberate, could result in discharge of the order (Rees et al, 2008). Thus applying for restraint orders may alert suspects to an investigation. Reflecting this interviewees noted that decisions to apply for restraint are made with regard to the best interests of any wider criminal investigation despite any potential benefits of early restraint to maximise what is recovered.

**Availability and suitability of assets**

The decision to apply for a restraint order is shaped by whether the defendant actually has any suitable assets. Bullock et al (2009) demonstrated the wide range of values of confiscation orders - up to £30m in the year 2006/7. However, generally the orders are for relatively low values. Forty-five percent of the orders made were for values less than £1,000 and a small minority (0.5%) of the orders were for more than £1 million. Financial investigators indeed described cases where the defendants’ assets were so minimal that, together with the CPS, they decide that there is no point in restraining them. In other cases the defendants’ primary assets had been already been seized by the police at the point of arrest. Under the 2002 Proceeds of Crime Act police can seize cash. Police can seize other property under the 1984 Police and Criminal Evidence Act although this should be returned once it ceases to have evidential value.

As well as available, assets also have to be suitable for restraint. Financial investigators generally agreed that restraining cash deposits in bank accounts (which can be dissipated by defendants very quickly) could be important in enforcing orders. Financial investigators disagreed about the value of restraining houses. Some were of the opinion that houses were not priorities because they are difficult to sell quickly and movement can be monitored (with information from the land registry for example). However, others gave examples of properties being sold from under their noses, usually for less than their market value perhaps to friends or family and the assets subsequently dissipated quickly. This financial investigator describes his decision making:
‘We didn’t restrain the house. It might have been a case for restraining. It all depends whether you take the attitude, I'll restrain everything from the outset on the off chance, or whether you wait till you receive some sort of information or inkling that he's trying to dissipate his assets. Certain things that we can do in relation to properties that do give us the heads up that somebody may be intending to sell the property. Certain things happen, land registry etc. that give us the inkling’. (Financial investigator).

**Defendants’ behaviour, lifestyle and environment**

It has been seen that the court requires evidence that a defendant may dissipate assets when granting restraint orders. Financial investigators reported that they weighed up the likelihood of a defendant dissipating assets on a number of aspects of his or her behaviour, lifestyle and environment:

1. Financial investigators felt that defendants who were conducting fairly stable lives, perhaps living in the family home or running their own businesses were unlikely to dissipate those assets.
2. If defendants were known to associate with other offenders or had offended in groups, financial investigators felt the risks of dissipation were higher.
3. In a small number of cases defendants had failed to pay orders in the past and this was considered to increase the risks of them dissipating assets.
4. Where offending was especially serious or extensive financial investigators reported being more likely to seek restraint orders.

**Accuracy of financial information**

Having access to accurate financial information has been associated with setting financial penalties which offenders can afford and hence are more likely to pay. Sentencers have not always had accurate information about defendants’ financial circumstances when determining the of size fines because offenders do not always provide information regarding their financial affairs and the court does little to verify financial information (Raine et al, 2003).

This should not be the case for confiscation orders. In determining the value of a confiscation order the court should have access to detailed information about a
defendant’s financial affairs and the assets that they have available. This should help enforcement because the size of the order should reflect what defendants can pay. Nevertheless this point should be qualified in certain respects. In many cases the size of the confiscation order will reflect the value of defendant’s material possessions, such as houses, cars, jewellery and other property. In principle, defendants do not have to sell specific assets to satisfy an order (they can pay them however they like). Very often however defendants (or the police or a representative for the defendant) will have to sell specific property (such as a car) to satisfy an order, usually by auction. Respondents reported that it is quite common for property to be sold at auction for less than its value agreed in court when determining the size of the order. This may be because the goods have depreciated in value or more generally because it is difficult to predict what they might make at auction. Cars regularly feature in statements of defendants’ assets. Cars are particularly prone to depreciate in value over time. If property is sold for less than the estimated value there may be a shortfall in the value recovered, as this enforcement practitioner describes:

“You send your bailiffs in to pick it [a car] up, and the doors are hanging off, it is rusted and all the rest of it. You just will not get the full valuation placed on it, plus you’ve got to then take up the bailiff’s costs as well, and the auction costs, so you’re reducing it all the time’. (Enforcement worker).

Reflecting this, financial investigators (and others) often argued that they should have the power to sell defendants’ assets as soon as they are seized (even before they are found guilty) in order to maximise the value that is achieved for them.

The situation in respect to houses is more complex. The value of a house may well comprise a significant proportion of an offender’s assets. Levi and Osofsky (1995) noted that the downward trend in the property market in the period following 1989 – coupled with reluctance to value property lower than an offender’s benefit from crime – resulted in over-optimistic benefit figures and confiscation orders which could not be fully enforced. Under the 2002 Proceeds of Crime Act strictly the market value at the time the property was obtained should apply. Indeed, Rees et al (2008) describe a case where a judge correctly valued a house at the market value at the time of its purchase, adjusted by the retail price index, notwithstanding a valuation from a
chartered surveyor which suggested its value had fallen. At the time that this field work was conducted house prices were generally increasing and interviewees gave no examples of failure of enforce orders because of falling market value of houses. At the time of writing the reverse is the case and defendants may find their property worth less than they paid for it. It seems likely that situations similar to those described by Levi and Osofsky (1995) will re-surface if the court fails to account for this.

**Third party interests in property and other costs**

There are sometimes unresolved third party interests in property which limits what can be enforced. Outstanding debts such loans and mortgages should be paid before the confiscation order is enforced. Interviews indicated that this generally is the case though there may be isolated cases where, say, a loan is not accounted for which results in a shortfall in the enforcement of the order.

As has been seen, a defendant may well have a considerable stake in a home and it may be necessary to sell it to pay an order. Rees et al (2008) describe how the potential hardship of innocent third parties – such as partners and children – is irrelevant to the calculation of confiscation order value and that this has been shown to be compatible with the European Convention on Human Rights (ECHR). The ECHR implications arise later, at the stage of enforcement. Thus in enforcing an order Article 8 rights of those affected are engaged and the issue of whether loss of the home is proportionate is considered.

This research suggested that it is more common for the issue of third parties rights to the family home to be resolved earlier in the proceedings, certainly by the point that the confiscation order is issued, if not before. Perhaps financial investigators are anticipating future ECHR implications at the enforcement stage. Financial investigators did however describe cases where third party interests had not been resolved at the time of enforcement – which leads to delays and may mean that the full confiscation order is ultimately not realised.

**Enforcement powers, intelligence and operational support**
Confiscation orders have historically been enforced in the same way as fines. That is, they have been left to the enforcement arm of the magistrate’s court. This arrangement was not considered appropriate by financial investigators. This point was also made HMIC (2004). Respondents reported various reasons why confiscation orders should not be enforced in the same way as fines – in particularly because some offenders go to lengths to hide their assets. As such enforcement was seen to potentially require additional investigative resources including for example, access to police intelligence systems and operational support. For these reasons financial investigators reported that they did get involved with the enforcement of confiscation orders, even if it was not strictly within their remit. Financial investigator involvement occurs on a rather ad hoc basis however. Some seemed to be very enthusiastic about making enquiries and searching intelligence systems to facilitate enforcement of the order others less so. This enforcement practitioner put it as follows:

‘Some FIs [financial investigators] are very enthusiastic, you can ring them and they'll make enquiries, they’ll do searches, they’ll ring banks and others you ring them and they’re like, oh, I’ve closed the file on that one, I don’t know anything about that one. Or it’s too long ago to remember. So I think it’s just luck of the draw, really, what FI you get, but [in] some of our areas they are so helpful, they couldn’t be more helpful’. (Enforcement worker).

**Offender attitudes and behaviour**

Respondents indicated that the payment of orders was shaped by defendants’ attitudes and behaviour, especially their views about serving a default sentence. If an order is not paid within a set period of time, defendants face imprisonment (or additional time in prison if they are already there) the term of which increases with the size of the order\(^7\). In their study of the operation of the confiscation regime Levi and Osofsky (1995) noted that many of the police officers (and some of the offenders) that they interviewed felt that a prisoner might prefer to continue the term of imprisonment rather than pay the confiscation order. Reflecting this, respondents in this study felt that the deterrent effect of the default sentence may be limited where offenders were already in prison, as this enforcement worker notes:
‘I think the ones that are out of prison and have got the threat of going into prison, that it’s a very good deterrent, the default sentence because they’re out there and don’t want to go back or they’ve never been and they don’t fancy that. The ones that are maybe in and they are due to be released in a year, two years…’ (Enforcement worker)

Once an offender has served a default sentence the options to recover assets become limited. Strictly, payment should not be evaded by serving the default prison term because the court can appoint enforcement receivers to realise defendants’ assets. However, where enforcement receivers are employed, their costs (plus any associated auctioneers costs) are paid before the order is satisfied. Financial investigators pointed to how the cost of appointing receivers can have a considerable impact on the amount ultimately recovered.

Respondents reported that other aspects of defendants’ behaviour could influence whether orders were enforced. Enforcement is especially difficult where offenders’ assets are held abroad, as this enforcement practitioner notes:

‘They will hide assets, they will hide assets abroad. I’ve got a suspicion a lot of the career crims [criminals] are getting wise to putting their assets abroad, because it is harder to trace. It is harder to enforce’. (Enforcement worker).

Certain provision is made for this. Where a prosecutor believes that realisable property is held outside of the UK s/he may send a ‘request for assistance’ to the Home Secretary who in turn may forward the request to the relevant government asking that country to apply any co-operation treaties and so prohibit dealing in that property (Rees et al 2008). Even so, financial investigators noted that it is labour intensive and costly to locate and recover assets held abroad.

Enforcing the full criminal ‘benefit’ and revisiting cases
As has been seen, defendants are required to pay a confiscation order the size of which reflects the assets that they have available. Many do not repay the full ‘benefit’ they have made from crime as this is no longer available (see Bullock et al, 2009 for a discussion of the reasons for this). However, the 2002 Proceeds of Crime Act gives
financial investigators scope to revisit that original benefit. If, at some point in the future, an offender is found to have accumulated new assets (legitimately or illegitimately) the original benefit could be enforced. Financial investigators interviewed were certainly mindful of this prospect and many discussed cases which might be suitable for re-visiting in the future. Despite acknowledgement of the scope for enforcing full criminal benefit in this way, there was mixed evidence of cases being revisited systematically at the time the field work was conducted.

This is related to the costs of revisiting cases coupled with the difficulties of systematically monitoring whether defendants have acquired further assets. In many cases the scope to revisit cases is limited because the benefit figure was low to begin with. Some police services did systematically revisit cases however. One police service, for example, addressed this by flagging, via the Police National Computer (PNC), the names of defendants whose full benefit figure had not been realised. The aim was to alert police officers to offenders who display signs of having acquired new assets which financial investigators could investigate and potentially recover. At the time of writing practice is not systematic and this is an area which may benefit from further research and a central drive to determine what, if anything, may be achievable.

**Conclusion**

Failure to enforce confiscation orders can be assumed to have various effects: any deterrent effect is removed; the amount of money recovered is reduced; and, public confidence in the criminal justice system may be undermined. Indeed newspaper reports, such as that noted at the beginning of this paper, of failure to enforce high value orders will do little for confidence in the utility of these orders. Failure to enforce the orders may further undermine sentencers’ faith in their effectiveness and influence whether they are granted in the first place.

Concerns have indeed been raised about the enforcement of confiscation orders (e.g. Cabinet Office, 2000; HMIC, 2004). However we have seen that the majority (over three quarters) of confiscation orders are actually paid in full. It is the enforcement of high value orders – which are much less likely to be paid – which needs attention. Failure to pay high value orders can no doubt be explained by the complexity of these
cases and the greater efforts which these offenders go to avoid paying these large sums. This paper has identified the factors which shape whether confiscation orders are enforced. The confiscation order is, of course, part of the sentence of a guilty defendant. However, as others have noted in respect to the enforcement of fines, enforcement of confiscation orders is shaped by more than the practices and procedures which follow sentence. Hence, criminal justice practitioners need to consider how their decision making may ultimately shape enforcement at all stages of the process, especially when dealing with serious and organised offenders who have high value assets.

The process of enforcement is firstly influenced by early police and financial investigator decision making. The decision to restrain defendants’ assets has been considered to be important in determining whether orders are ultimately paid but restraint is not automatically obtained. Decisions to restrain assets were shaped by the availability and suitability of defendants’ assets; legal, practical and operational considerations; and, the behaviour and environment of suspects. The circumstances of arrest further shape the process. Where the police have seized defendants’ assets on arrest – especially cash – enforcement may ultimately be more straightforward. Secondly, the accuracy of financial information available to the court is important: offenders are ordered to pay what they should be able to afford. Enforcement of the orders is nevertheless influenced by assets selling for under their estimated values; depreciation of the value of items, especially cars; unresolved third party interests in defendants’ assets; and, the cost of receivers. Thirdly offender behaviour and attitudes play a role in whether orders are enforced. Options for enforcement may, in practice, be limited after an offender has served a default prison sentence. Further some offenders are skilful at hiding assets through for example, putting them in other peoples’ names. Where assets were held abroad it was considered very difficult to enforce them. Lastly, enforcing orders can require access to on going interagency intelligence, knowledge, expertise and operational support.
The 2002 Proceeds of Crime Act allows the Crown Court to impose a confiscation order following conviction in two sets of circumstances. For 1) a specific offence from which an offender has gained financially and 2) on the basis of offender sustained criminal activity (so called criminal “lifestyle”). Investigators derive estimates of financial benefit from accessing information regarding defendant’s financial affairs. The guilty defendant is ordered to pay a confiscation order the size of which reflects that estimated benefit. Should that full benefit amount not be available, however, the order would be made for an amount reflecting the assets that the defendant does have available. This will often be significantly less.

Figures obtained from the Crown Prosecution Service via a freedom of information request.

Offenders are generally given 6 months to pay though it should be stressed that it can be increased and in some cases enforcement is ongoing.
Although no examples were given by interviewees others working in the confiscation order regime have noted that some defendants mortgage or remortgage property with the view to dissipating the cash quickly. This can be achieved easily under the radar of financial investigators.

Interviewees were very clear that restraint was critical for enforcing orders. However quantitative analysis of 3,604 cases identified only 'some evidence' that restraint was effective and that restraint actually was more likely to be applied in smaller cases rather than the higher value ones (Bullock et al, 2009: iii)

For example an amount not exceeding £200 incurs a seven day default sentence, an amount exceeding £5,000 but not exceeding £10,000 incurs six months, an amount exceeding £250,000 but not exceeding £1m incurs five years and an amount exceeding £1m incurs ten years.

In fact informal communication with financial investigators suggests that little, if anything, is recovered where assets are held abroad.