

Restraint orders under scrutiny:

The case of R v Windsor

Earlier this year, the Criminal Division of the Court of Appeal handed down their judgment in the case of *R v Windsor* [2011] EWCA Crim 143, causing a flurry of interest among criminal lawyers. The significance of the judgment is not that it broke any new ground in its interpretation of the provisions of POCA but that it contains an implicit warning that these restrictive orders should only be granted after considerable scrutiny.

Mr Windsor and others, including a retail company, had been served with restraint and receivership orders under Part 2 of the Proceeds of Crime Act 2002. The orders were sought and served in early December of last year, just ahead of the busy and profitable Christmas period, a calamity for the trading company. The Court of Appeal examined the evidence put before the judge at first instance and concluded that there had been insufficient evidence upon which to determine that there was reasonable cause to believe that the alleged offenders had benefited from their criminal conduct (one of the conditions that must be satisfied before a restraint order is granted). The CPS was given the opportunity to improve its evidence in a further hearing before the Central Criminal Court, but it was unable to do so and so the orders were quashed.

In *Windsor*, the decision to grant the restraint order was made following an ex parte application which lasted 40 minutes. This length of time was compared with the day and half which it took the Court of Appeal (following two days of preparation) to decide the one

issue of the appeal. After making the observation that, ‘giving those affected an early opportunity to apply to set aside or vary the restraint orders and receivership orders (whilst important) are not a substitute for a fair, ex parte hearing’, Lord Justice Hooper made a number of points to be considered in cases of similar complexity:

- they should be listed days (if not longer) before the day on which arrests were to occur
- sufficient time be provided to read and absorb the papers
- in a case of serious fraud, these should be listed before a High Court or Circuit Court judge with experience of such cases.

This simple guidance, which firmly suggests that the judiciary must take control of the process of making restraint orders and not take a prosecuting authority’s application at face value, gives defence practitioners much more scope to challenge the legality of these orders.

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