
STATUTORY INSTRUMENTS

2005 No. 3181

The Proceeds of Crime Act 2002 (External Requests and Orders) Order 2005

PART 3

GIVING EFFECT IN SCOTLAND TO EXTERNAL REQUESTS IN CONNECTION WITH CRIMINAL INVESTIGATIONS OR PROCEEDINGS AND TO EXTERNAL ORDERS ARISING FROM SUCH PROCEEDINGS

CHAPTER 1

EXTERNAL REQUESTS

Action on receipt of external request in connection with criminal investigations or proceedings

56.—(1) The Lord Advocate may make an application under article 59 where—

- (a) he receives an external request in relation to relevant property in Scotland; and
- (b) he considers that the request is likely to satisfy either of the conditions in article 57.

(2) The Lord Advocate may ask the overseas authority which made the request for such further information as may be necessary to determine whether the request is likely to satisfy either of the conditions in article 57.

(3) Where a request concerns relevant property which is in England and Wales or Northern Ireland as well as Scotland, so much of the request as concerns such property shall be dealt with under Part 2 or 4 respectively.

Conditions for court to give effect to external request

57.—(1) The court may exercise the powers conferred by article 58 if either of the following conditions is satisfied.

(2) The first condition is that—

- (a) relevant property within Scotland is identified in the external request;
- (b) a criminal investigation has been instituted in the country from which the external request was made with regard to an offence; and
- (c) there is reasonable cause to believe that the alleged offender named in the request has benefited from his criminal conduct.

(3) The second condition is that—

- (a) relevant property within Scotland is identified in the external request;
- (b) proceedings for an offence have been instituted in the country from which the external request was made and not concluded, and

- (c) there is reasonable cause to believe that the accused named in the request has benefited from his criminal conduct.
- (4) In determining whether the conditions are satisfied and whether the request is an external request within the meaning of the Act, the court must have regard to the definitions in subsections (1), (4) to (8) and (11) of section 447 of the Act.
- (5) If the first condition is satisfied references in this Chapter to the accused are to the alleged offender.

Restraint orders

58.—(1) If either condition set out in article 57 is satisfied, the court may make an order (“a restraint order”) interdicting any specified person from dealing with relevant property which is identified in the external request and specified in the order.

- (2) A restraint order may be made subject to exceptions, and an exception may in particular—
 - (a) make provision for reasonable living expenses and reasonable legal expenses in connection with the proceedings seeking a restraint order or the registration of an external order;
 - (b) make provision for the purpose of enabling any person to carry on any trade, business, profession or occupation;
 - (c) be made subject to conditions.
- (3) But an exception to a restraint order must not make provision for any legal expenses which—
 - (a) relate to the criminal conduct mentioned in article 57(2), if the first condition is satisfied, or article 57(3), if the second condition is satisfied; and
 - (b) are incurred by a person against whom proceedings for the offence have been instituted or by a recipient of a tainted gift.
- (4) The court may make such order as it believes is appropriate for the purpose of ensuring that the restraint order is effective.
- (5) A restraint order does not affect property for the time being subject to a charge under—
 - (a) section 9 of the Drug Trafficking Offences Act 1986⁽¹⁾;
 - (b) section 78 of the Criminal Justice Act 1988⁽²⁾;
 - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990⁽³⁾;
 - (d) section 27 of the Drug Trafficking Act 1994⁽⁴⁾;
 - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996⁽⁵⁾.
- (6) Dealing with property includes removing the property from Scotland.

Application, recall and variation

- 59.**—(1) A restraint order may be made on an ex parte application by the Lord Advocate, which may be heard in chambers.
- (2) The Lord Advocate must intimate an order to every person affected by it.
 - (3) Paragraph (2) does not affect the time when the order becomes effective.

(1) 1986 c. 32.
 (2) 1988 c. 33.
 (3) S.I. 1990/2588 (N.I. 17).
 (4) 1994 c. 37.
 (5) S.I. 1996/1299 (N.I. 9).

(4) The Lord Advocate and any person affected by the order may apply to the court to recall the order or to vary it and paragraphs (5) to (7) apply in such a case.

(5) If an application under paragraph (4) in relation to an order has been made but not determined, realisable property to which the order applies must not be realised.

(6) The court may—

- (a) recall the order;
- (b) vary the order.

(7) If the condition in article 57 which was satisfied was that proceedings were instituted, the court must recall the order if, at the conclusion of the proceedings, no external order has been made.

(8) If the condition in article 57 which was satisfied was that proceedings were instituted, the court must recall the order if within a reasonable time an external order has not been registered under Chapter 2 of this Part.

(9) If the condition in article 57 which was satisfied was that an investigation was instituted, the court must recall the order if within a reasonable time proceedings for the offence are not instituted.

Appeals

60.—(1) If on an application for a restraint order the court decides not to make one, the Lord Advocate may reclaim against the decision.

(2) The Lord Advocate and any person affected by the order may reclaim against the decision of the court on an application under article 59(4).

Inhibition of property affected by order

61.—(1) On the application of the Lord Advocate, the court may, in relation to the property mentioned in paragraph (2), grant warrant for inhibition against any person specified in a restraint order.

(2) That property is the heritable realisable property to which the restraint order applies (whether generally or such of it as is specified in the application).

(3) The warrant for inhibition—

- (a) has effect as if granted on the dependence of an action for debt by the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly, and
- (b) has the effect of letters of inhibition and must forthwith be registered by the Lord Advocate in the Register of Inhibitions and Adjudications.

(4) Section 155 of the Titles to Land Consolidation (Scotland) Act 1868(6) (effective date of inhibition) applies in relation to an inhibition for which warrant is granted under paragraph (1) as it applies to an inhibition by separate letters or contained in a summons.

(5) The execution of an inhibition under this article in respect of property does not prejudice the exercise of an administrator's powers under or for the purposes of this Part in respect of that property.

(6) An inhibition executed under this article ceases to have effect when, or in so far as, the restraint order ceases to apply in respect of the property in relation to which the warrant for inhibition was granted.

(7) If an inhibition ceases to have effect to any extent by virtue of paragraph (6) the Lord Advocate must—

- (a) apply for the recall or, as the case may be, the restriction of the inhibition, and

- (b) ensure that the recall or restriction is reflected in the Register of Inhibitions and Adjudications.

Arrestment of property affected by order

62.—(1) On the application of the Lord Advocate the court may, in relation to moveable realisable property to which a restraint order applies (whether generally or such of it as is specified in the application), grant warrant for arrestment.

(2) Such a warrant for arrestment may be granted only if the property would be arrestable if the person entitled to it were a debtor.

(3) A warrant under paragraph (1) has effect as if granted on the dependence of an action for debt at the instance of the Lord Advocate against the person and may be executed, recalled, loosed or restricted accordingly.

(4) The execution of an arrestment under this article in respect of property does not prejudice the exercise of an administrator's powers under or for the purposes of this Part in respect of that property.

(5) An arrestment executed under this article ceases to have effect when, or in so far as, the restraint order ceases to apply in respect of the property in relation to which the warrant for arrestment was granted.

(6) If an arrestment ceases to have effect to any extent by virtue of paragraph (5) the Lord Advocate must apply to the court for an order recalling, or as the case may be, restricting the arrestment.

Management administrators

63.—(1) If the court makes a restraint order it may at any time, on the application of the Lord Advocate—

- (a) appoint an administrator to take possession of any realisable property to which the order applies and (in accordance with the court's directions) to manage or otherwise deal with the property;
- (b) order a person who has possession of property in respect of which an administrator is appointed to give him possession of it.

(2) An appointment of an administrator may be made subject to conditions or exceptions.

(3) Where the court makes an order under paragraph (1)(b), the clerk of court must notify the accused and any person subject to the order of the making of the order.

(4) Any dealing of the accused or any such person in relation to property to which the order applies is of no effect in a question with the administrator unless the accused or, as the case may be, that person had no knowledge of the administrator's appointment.

(5) The court—

- (a) may order a person holding an interest in realisable property to which the restraint order applies to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the accused or the recipient of a tainted gift;
- (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property.

(6) The court must not—

- (a) confer the power mentioned in paragraph (1) to manage or otherwise deal with the property, or
- (b) exercise the power conferred on it by paragraph (5),

unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.

(7) The court may order that a power conferred by an order under this article is subject to such conditions and exceptions as it specifies.

(8) Managing or otherwise dealing with property includes—

- (a) selling the property or any part of it or interest in it;
- (b) carrying on or arranging for another person to carry on any trade or business the assets of which are or are part of the property;
- (c) incurring capital expenditure in respect of the property.

(9) Paragraphs (1)(b) and (5) do not apply to property for the time being subject to a charge under—

- (a) section 9 of the Drug Trafficking Offences Act 1986(7);
- (b) section 78 of the Criminal Justice Act 1988(8);
- (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990(9);
- (d) section 27 of the Drug Trafficking Act 1994(10);
- (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996(11).

Seizure in pursuance of restraint order

64.—(1) If a restraint order is in force a constable or a relevant officer of Revenue and Customs may seize any realisable property to which it applies to prevent its removal from Scotland.

(2) Property seized under paragraph (1) must be dealt with in accordance with the directions of the court which made the order.

Restraint orders: restrictions on proceedings and remedies

65.—(1) While a restraint order has effect, the court may sist any action, execution or any legal process in respect of the property to which the order applies.

(2) If the court in which proceedings are pending in respect of any property is satisfied that a restraint order has been applied for or made in respect of the property, the court may either sist the proceedings or allow them to continue on any terms it thinks fit.

(3) Before exercising any power conferred by paragraph (2), the court must give an opportunity to be heard to—

- (a) the Lord Advocate, and
- (b) any administrator appointed in respect of the property under article 63.

(7) 1986 c. 32.

(8) 1988 c. 33.

(9) S.I. 1990/2588 N.I.17.

(10) 1994 c. 37.

(11) S.I. 1996/1299 N.I.9.

CHAPTER 2

EXTERNAL ORDERS

Application to give effect to external orders

66.—(1) Where the Lord Advocate receives an external order arising from a criminal conviction and concerning relevant property in Scotland, he may make an ex parte application to the court to give effect to the order.

(2) No application to give effect to such an order may be made otherwise than under paragraph (1).

(3) An application under paragraph (1) may be heard in chambers.

(4) Where an order concerns relevant property which is in England and Wales or Northern Ireland as well as Scotland, so much of the request as concerns such property shall be dealt with under Part 2 or 4 respectively.

Authentication by an overseas court

67.—(1) Paragraph (2) applies where an overseas court has authenticated its involvement in—

(a) any judgement;

(b) any order;

(c) any other document concerned with such a judgement or order or proceedings relating to it.

(2) Where this paragraph applies, any statement in the judgement, order or document is admissible in evidence in proceedings under this Chapter.

Conditions for the court to give effect to external orders

68.—(1) The court must decide to give effect to an external order by registering it where all of the following conditions are satisfied.

(2) The first condition is that the external order was made consequent on the conviction of the person named in the order and no appeal is outstanding in respect of that conviction.

(3) The second condition is that the order is in force and no appeal is outstanding in respect of it.

(4) The third condition is that giving effect to the order would not be incompatible with any of the Convention rights (within the meaning of the Human Rights Act 1998⁽¹²⁾) of any person affected by it.

(5) The fourth condition applies only in respect of an external order which authorises the confiscation of property other than money that is specified in the order.

(6) That condition is that the specified property must not be subject to a charge under—

(a) section 9 of the Drug Trafficking Offences Act 1986⁽¹³⁾;

(b) section 78 of the Criminal Justice Act 1988⁽¹⁴⁾;

(c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990⁽¹⁵⁾;

(d) section 27 of the Drug Trafficking Act 1994⁽¹⁶⁾; or

(e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996⁽¹⁷⁾.

⁽¹²⁾ 1998 c. 42.

⁽¹³⁾ 1986 c. 32.

⁽¹⁴⁾ 1988 c. 33.

⁽¹⁵⁾ S.I. 1990/2588 (N.I. 17).

⁽¹⁶⁾ 1994 c. 37.

⁽¹⁷⁾ S.I. 1996/1299 (N.I. 9).

(7) In determining whether the order is an external order within the meaning of the Act the court must have regard to the definitions in subsections (2), (4), (5), (6), (8) and (10) of section 447 of the Act.

(8) In paragraph (3) “appeal” includes—

- (a) any proceedings by way of discharging or setting aside the order; and
- (b) an application for a new trial or suspension or delay in execution of any penalty or sentence.

Registration of external orders

69.—(1) Where the court decides to give effect to an external order, it must—

- (a) register the order;
- (b) provide for notice of the registration to be given to any person affected by it; and
- (c) appoint a sheriff clerk for the purposes of the receipt of payment under articles 72(2) and 77(6).

(2) Only an external order registered by the court may be implemented under this Chapter.

(3) The court may cancel the registration of the external order, or vary the property to which it applies, on an application by the Lord Advocate or any person affected by it if, or to the extent that, the court is of the opinion that any of the conditions in article 68 is not satisfied.

(4) Notice of an application under paragraph (3) must be given—

- (a) in the case of an application by the Lord Advocate, to any person affected by the registration of the external order; and
- (b) in any other case, to the Lord Advocate and any other person affected by the registration of the external order.

(5) The court shall not cancel the registration of the external order or vary the property to which it applies under paragraph (3) unless it gives the Lord Advocate and any person affected by it the opportunity to make representations to it.

(6) The court must cancel the registration of the external order on an application by the Lord Advocate or any person affected by it, if it appears to the court that the order has been satisfied—

- (a) in the case of an order for the recovery of a sum of money specified in it, by payment of the amount due under it, or
- (b) in the case of an order for the recovery of specified property, by the surrender of the property, or
- (c) by any other means.

(7) Where the registration of an external order is cancelled or varied under paragraph (3) or (6), the court must provide for notice of this to be given to the Lord Advocate and any person affected by it.

Appeal about external orders

70.—(1) If on an application for the court to give effect to an external order by registering it, the court decides not to do so, the Lord Advocate may reclaim against the decision.

(2) If an application is made under article 69(3) or (6) in relation to the registration of an external order, the following persons may reclaim against the court’s decision on the application—

- (a) the Lord Advocate;
- (b) any person affected by the registration.

(3) On a reclaiming motion under paragraph (1) or (2) the court may—

- (a) confirm or set aside the decision to register; or
- (b) direct the court to register the external order (or so much of it as relates to property other than that to which article 68(6) applies).

Sums in currency other than sterling

71.—(1) This article applies where the external order which is registered under article 69 specifies a sum of money.

(2) If the sum of money which is specified is expressed in a currency other than sterling, the sum of money to be recovered is to be taken to be the sterling equivalent calculated in accordance with the rate of exchange prevailing at the end of the working day immediately preceding the day when the court registered the external order under article 69.

(3) The sterling equivalent must be calculated by the Lord Advocate.

(4) The notice referred to in article 69(1)(b) and (7) must set out the amount in sterling which is to be paid.

(5) In this article “working day” means any day other than—

- (a) a Saturday or Sunday;
- (b) Christmas Day; or
- (c) Good Friday;
- (d) any day that is a bank holiday in Scotland under the Banking and Financial Dealings Act 1971(18).

Time for payment

72.—(1) This article applies where the external order is for the recovery of a specified sum of money.

(2) Subject to paragraphs (3) to (6), the amount ordered to be paid under—

- (a) an external order that has been registered under article 69; or
- (b) where article 71 applies, the notice under article 69(1)(b),

must be paid to the appropriate clerk of court on the date on which the notice under article 69(1)(b) is delivered to the person affected by it.

(3) Where there is a reclaiming motion under article 70 the duty to pay is delayed until the day on which the reclaiming motion is determined or withdrawn.

(4) If the person affected by an external order which has been registered shows that he needs time to pay the amount ordered to be paid, the court may make an order allowing payment to be made within a specified period.

(5) The specified period—

- (a) must start with the day on which the notice under article 69(1)(b) was delivered to the person affected by the order or the day referred to in paragraph (3) as the case may be; and
- (b) must not exceed six months.

(6) If within the specified period the person affected by an external order applies to the court for the period to be extended and the court believes that there are exceptional circumstances, it may make an order extending the period.

(7) The extended period—

- (a) must start with the day on which the notice under article 69(1)(b) was delivered to the person affected by it; and
- (b) must not exceed 12 months.
- (8) An order under paragraph (6)—
 - (a) may be made after the end of the specified period; but
 - (b) must not be made after the end of the extended period.
- (9) The court must not make an order under paragraph (4) or (6) unless it gives the Lord Advocate an opportunity to make representations.
- (10) The appropriate clerk of court is the sheriff clerk appointed under article 69(1).

Appointment of enforcement administrators

- 73.**—(1) This article applies if—
- (a) an external order is registered;
 - (b) it is not satisfied; and
 - (c) in the case of an external order for the recovery of a specified sum of money, any period specified by order under article 72 has expired.
- (2) On the application of the Lord Advocate the court may appoint an administrator in respect of—
- (a) where the external order is for the recovery of a specified sum of money, realisable property;
 - (b) where the external order is for the recovery of specified property, that property.

Powers of enforcement administrators in respect of monetary external orders

- 74.**—(1) If the court appoints an administrator under article 73, it may act under this article on the application of the Lord Advocate where the external order is for the recovery of a specified sum of money.
- (2) The court may confer on the administrator the following powers in relation to any realisable property—
- (a) power to take possession of the property;
 - (b) power to manage or otherwise deal with the property;
 - (c) power to realise the property in such manner as the court may specify.
- (3) The court may order any person who has possession of realisable property to give possession of it to the administrator.
- (4) The clerk of court must notify the offender and any person subject to an order under paragraph (3) of the making of that order.
- (5) Any dealing of the offender or any such persons in relation to property to which the order applies is of no effect in a question with the administrator unless the offender or, as the case may be, that person had no knowledge of the administrator’s appointment.
- (6) The court—
- (a) may order a person holding an interest in realisable property to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the offender or the recipient of a tainted gift;
 - (b) may (on payment being made) by order transfer, grant or extinguish any interest in the property.

- (7) The court must not—
- (a) confer the power mentioned in paragraph (2)(b) or (c) in respect of the property, or
 - (b) exercise the power conferred on it by paragraph (6) in respect of the property,
- unless it gives persons holding interests in the property a reasonable opportunity to make representations to it.
- (8) Managing or otherwise dealing with property includes—
- (a) selling the property or any part of it or interest in it;
 - (b) carrying on or arranging for another person to carry on any trade or business the assets of which are part of the property;
 - (c) incurring capital expenditure in respect of the property.
- (9) The court may order that a power conferred by an order under this article is subject to such conditions and exceptions as it specifies.
- (10) Paragraph (2) does not apply to property for the time being subject to a charge under—
- (a) section 9 of the Drug Trafficking Offences Act 1986;
 - (b) section 78 of the Criminal Justice Act 1988;
 - (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990;
 - (d) section 27 of the Drug Trafficking Act 1994;
 - (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996.

Powers of enforcement administrators in respect of external orders for the recovery of specified property

75.—(1) If the court appoints an administrator under article 73, it may act under this article on the application of the Lord Advocate where the external order is for the recovery of property specified in the order (“the specified property”).

(2) The court may confer on the administrator the following powers in relation to the specified property—

- (a) power to take possession of the property;
- (b) power to manage or otherwise deal with the property;
- (c) power to realise the property in such manner as the court may specify.

(3) The court may order any person who has possession of the specified property to give possession of it to the administrator.

(4) The clerk of court must notify the offender and any person subject to an order under paragraph (3) of the making of that order.

(5) Any dealing of the offender or any such person in relation to property to which the order applies is of no effect in a question with the administrator unless the person had no knowledge of the administrator’s appointment.

(6) The court—

- (a) may order a person holding an interest in the specified property to make to the administrator such payment as the court specifies in respect of a beneficial interest held by the offender or the recipient of a tainted gift;
- (b) may (on the payment being made) by order transfer, grant or extinguish any interest in the property.

(7) The court must not—

(a) confer the power mentioned in paragraph (2)(b) or (c) in respect of the property; or
(b) exercise the power conferred on it by paragraph (6) in respect of property,
unless it gives persons holding interests in the property a reasonable opportunity to make representations about it.

(8) The court may order that a power conferred by an order under this article is subject to such conditions and exceptions as it specifies.

(9) Managing or otherwise dealing with property includes—

- (a) selling the property or any part of it or interest in it;
- (b) carrying on or arranging for another person to carry on any trade or business the assets of which are or are part of the property;
- (c) incurring capital expenditure in respect of the property.

Disposal of family home

76.—(1) This article applies where the court confers power on the administrator under article 74(2) in respect of the offender’s family home.

(2) Where this article applies, then, before the administrator disposes of any right or interest in the offender’s family home he shall—

- (a) obtain the relevant consent; or
- (b) where he is unable to do so, apply to the court for authority to carry out the disposal.

(3) On an application being made to it under paragraph (2)(b), the court, after having regard to all the circumstances of the case including—

- (a) the needs and financial resources of the spouse of the offender;
- (b) the needs and financial resources of any child of the family;
- (c) the length of the period during which the family home has been used as a residence by any of the persons referred to in sub-paragraph (a) or (b),

may refuse to grant the application or may postpone the granting of the application for such period (not exceeding 12 months) as it may consider reasonable in the circumstances or may grant the application subject to such conditions as it may prescribe.

(4) Paragraph (3) shall apply—

- (a) to an action for division and sale of the family home of the person concerned; or
- (b) to an action for the purpose of obtaining vacant possession of that home,

brought by an administrator as it applies to an application under paragraph (2)(b) and, for the purposes of this paragraph, any reference in paragraph (3) to the granting of the application shall be construed as a reference to the granting of decree in the action.

(5) In this article—

“family home”, in relation to any offender means any property in which the offender has or had (whether alone or in common with any other person) a right or interest, being property which is occupied as a residence by the offender and his or her spouse or by the offender’s spouse or former spouse (in any case with or without a child of the family) or by the offender with a child of the family;

“child of the family” includes any child or grandchild of either the offender or his or her spouse or former spouse, and any person who has been treated by either the offender or his or her spouse or former spouse, whatever the age of such a child, grandchild or person may be; and

“relevant consent” means in relation to the disposal of any right or interest in a family home—

- (a) in a case where the family home is occupied by the spouse or former spouse of the offender, the consent of the spouse or, as the case may be, of the former spouse, whether or not the family home is also occupied by the offender;
- (b) where sub-paragraph (a) does not apply, in a case where the family home is occupied by the offender with a child of the family, the consent of the offender.

Application of sums by enforcement administrator

77.—(1) This article applies to sums which are in the hands of an administrator appointed under article 73 if they are—

- (a) the proceeds of the realisation of property under article 74 or 75;
- (b) where article 74 applies, sums (other than those mentioned in sub-paragraph (a)) in which the offender holds an interest.

(2) The sums must be applied as follows—

- (a) first, they must be applied in payment of such expenses incurred by a person acting as an insolvency practitioner as are payable under this paragraph by virtue of article 3;
- (b) second, they must be applied in making any payments as directed by the court;
- (c) third, they must be applied on the offender's behalf towards satisfaction of the external order.

(3) If the amount payable under the external order has been fully paid and any sums remain in the administrator's hands he must distribute them—

- (a) among such persons who held (or hold) interests in the property concerned as the court directs; and
- (b) in such proportions as it directs.

(4) Before making a direction under paragraph (3) the court must give persons who held (or hold) interests in the property concerned a reasonable opportunity to make representations to it.

(5) For the purposes mentioned in paragraphs (3) and (4) the property concerned is—

- (a) the property represented by the proceeds mentioned in paragraph (1)(a);
- (b) the sums mentioned in paragraph (1)(b).

(6) The administrator applies sums as mentioned in paragraph (2)(c) by paying them to the appropriate clerk of court on account of the amount payable under the order.

(7) The appropriate clerk of court is the sheriff clerk appointed article 69(1).

Sums received by clerk of court

78.—(1) This section applies if a clerk of court receives sums on account of the amount payable under a registered external order or the value of the property specified in the order.

(2) The clerk of court's receipt of the sums reduces the amount payable under the order, but he must apply the sums received as follows.

(3) First he must apply them in payment of such expenses incurred by a person acting as an insolvency practitioner as—

- (a) are payable under this paragraph by virtue of article 3; but
- (b) are not already paid under article 77(2)(a).

(4) If the Lord Advocate has reimbursed the administrator in respect of remuneration or expenses under article 80 the clerk of court must next apply the sums in reimbursing the Lord Advocate.

(5) If the clerk of court received the sums under article 77 he must next apply them in payment of the administrator's remuneration and expenses.

(6) If any amount remains after the clerk of court makes any payments required by the preceding paragraphs of this article, the amount must be disposed of in accordance with section 211(5) of the Criminal Procedure (Scotland) Act 1995(19) as if it were a fine imposed in the High Court.

Satisfaction of external order

79.—(1) A registered external order is satisfied when no amount is due under it.

(2) Where such an order authorises the recovery of property specified in it, no amount is due under the order when all of the specified property has been sold.

CHAPTER 3

ADMINISTRATORS AND PROCEDURE

Protection of administrator appointed under article 63 or 73

80.—(1) If an administrator appointed under article 63 or 73—

- (a) takes action in relation to property which is not realisable property, or as the case may be, the specified property;
- (b) would be entitled to take the action if it were realisable property or, as the case may be, the specified property; and
- (c) believes on reasonable grounds that he is entitled to take action,

he is not liable to any person in respect of any loss or damage resulting from the action, except so far as the loss or damage is caused by his negligence.

(2) Paragraph (3) applies if an administrator incurs expenses in the exercise of his functions at a time when—

- (a) an external order has not been registered; and
- (b) an external order has been registered but the administrator has recovered no money.

(3) As soon as practicable after they have been incurred the expenses must be reimbursed by the Lord Advocate.

(4) Paragraph (5) applies if—

- (a) an amount is due in respect of the administrator's remuneration and expenses; but
- (b) nothing (or not enough) is available to be applied in payment of them under article 78(4).

(5) The remuneration and expenses must be paid (to the extent of the shortfall) by the Lord Advocate.

Protection of persons affected

81.—(1) This paragraph applies where an administrator is appointed under article 63 or 73.

(2) The following persons may apply to the court—

- (a) any person affected by action taken by the administrator;
- (b) any person who may be affected by action the administrator proposes to take.

(3) On an application under this article the court may make such order as it thinks appropriate.

Recall and variation of order

82.—(1) The Lord Advocate, an administrator and any other person affected by an order made under article 63 or articles 73 to 75 may apply to the court to vary or recall the order.

(2) On an application under this article the court—

- (a) may vary the order;
- (b) may recall the order.

(3) But in the case of an order under article 63—

- (a) if the condition in article 57 which was satisfied was that proceedings were instituted, the court must recall the order if at the conclusion of the proceedings no external order (within the meaning of section 447(2) of the Act) has now been made;
- (b) if the condition which was satisfied was that an investigation was instituted the court must recall the order if within a reasonable period proceedings for the offence are not instituted.

Management administrators: discharge

83.—(1) This article applies if—

- (a) an administrator stands appointed under article 63 in respect of property which is identified in the restraint order (the management administrator); and
- (b) the court appoints an administrator under article 73.

(2) The Court must order the management administrator to transfer to the other administrator all property held by the management administrator by virtue of the powers conferred on him by article 63.

(3) If the management administrator complies with an order under paragraph (2) he is discharged—

- (a) from his appointment under article 63;
- (b) from any obligation under this Order arising from his appointment.

Appeals

84.—(1) If on an application for an order under article 63 or articles 73 to 75 the court decides not to make one, the Lord Advocate may reclaim in respect of the decision.

(2) If the court makes an order under article 63 or articles 73 to 75 the following persons may reclaim in respect of the court's decision—

- (a) the Lord Advocate;
- (b) any person affected by the Order.

(3) If on an application for an order under article 81 the court decides not to make one, the person who applied for the order may reclaim in respect of the decision.

(4) If the court makes an order under article 81, the following persons may reclaim in respect of the court's decision—

- (a) the person who applied for the order in respect of which the application was made;
- (b) any person affected by the court's decision;
- (c) the administrator.

(5) The following persons may reclaim in respect of a decision of the court on an application under article 82—

- (a) the person who applied for the order in respect of which the application was made;

- (b) any person affected by the court’s decision;
- (c) the administrator.
- (6) On a reclaiming motion under this article the court may—
 - (a) confirm the decision;
 - (b) make such order as it believes is appropriate.

Administrators: further provision

85. Schedule 1 which makes further provision about administrators appointed under articles 63 and 73 has effect.

Administrators: restrictions on proceedings and remedies

86.—(1) Where an administrator is appointed under article 73, the court may sist any action, execution or other legal process in respect of the property to which the order appointing the administrator relates.

(2) If a court (whether the Court of Session or any other court) in which proceedings are pending, in respect of any property is satisfied that an application has been made for the appointment of an administrator or that an administrator has been appointed in relation to that property, the court may either sist the proceedings or allow them to continue on any terms it thinks fit.

(3) Before exercising any power conferred by paragraph (2) the court must give an opportunity to be heard to—

- (a) the Lord Advocate;
- (b) if appointed, the administrator.

CHAPTER 4
INTERPRETATION

Property

87.—(1) In this Part, “realisable property” means in a case where an external order specifies a sum of money, any free property held by the accused or offender, as the case may be, or the recipient of a tainted gift.

(2) The rules in paragraphs (a) and (c) to (g) of section 150(2) of the Act (property: general provisions) apply in relation to property under this Order (in addition to section 447(4) to (6)) of the Act (interpretation) as they apply in relation to property under Part 3 of the Act.

Tainted gifts and their recipients

88.—(1) In this Part, a gift is tainted if it was made by the accused or offender, as the case may be, at any time after—

- (a) the date on which the offence to which the external order or external request relates was committed, or
- (b) if his criminal conduct consists of two or more such offences and they were committed on different dates, the date of the earliest.

(2) For the purposes of paragraph (1), an offence which is a continuing offence is committed on the first occasion when it is committed.

(3) A gift may be a tainted gift whether it was made before or after the coming into force of this Order.

(4) In this Part, an accused or offender, as the case may be, is to be treated as making a gift if he transfers property to another person for a consideration whose value is significantly less than the value of the property at the time of the transfer.

(5) If paragraph (4) applies, the property given is to be treated as such share in the property transferred as is represented by the fraction—

- (a) whose numerator is the difference between the two values mentioned in paragraph (4), and
- (b) whose denominator is the value of the property at the time of the transfer.

(6) In this Part, references to a recipient of a tainted gift are to a person to whom the accused or offender, as the case may be, has (whether directly or indirectly) made the gift.

Value: the basic rule

89.—(1) Subject to article 90, this article applies where it is necessary under this Part to decide the value at any time of property then held by that person.

(2) Its value is the market value of the property at that time.

(3) But if at that time another person holds an interest in the property its value, in relation to the person mentioned in paragraph (1) is the market value of his interest at that time ignoring any charging order under a provision listed in paragraph (4).

(4) Those provisions are—

- (a) section 9 of the Drug Trafficking Offences Act 1986⁽²⁰⁾;
- (b) section 78 of the Criminal Justice Act 1988⁽²¹⁾;
- (c) Article 14 of the Criminal Justice (Confiscation) (Northern Ireland) Order 1990⁽²²⁾;
- (d) Section 27 of the Drug Trafficking Act 1994⁽²³⁾;
- (e) Article 32 of the Proceeds of Crime (Northern Ireland) Order 1996⁽²⁴⁾.

Value of tainted gifts

90.—(1) The value at any time (the material time) of a tainted gift is the greater of the following—

- (a) the value (at the time of the gift) of the property given, adjusted to take account of later changes in the value of money;
- (b) the value (at the material time) of the property found under paragraph (2).

(2) The property found under this paragraph is as follows—

- (a) if the recipient holds the property given, that property;
- (b) if the recipient holds no part of the property given, any property which directly or indirectly represents it in his hands;
- (c) if the recipient holds part of the property given, that part and any property which directly or indirectly represents the other part in his hands.

(3) The references in paragraph (1)(a) and (b) to the value are to the value found in accordance with article 89.

(20) 1986 c. 32.

(21) 1988 c. 33.

(22) S.I. 1990/2588 (N.I. 17).

(23) 1994 c. 37.

(24) S.I. 1996/1299 (N.I. 9).

Meaning of “accused” and “offender”

91. In this Part—

“accused”, in relation to a restraint order means—

- (a) in a case in which the first condition in article 57 is satisfied, the alleged offender;
- (b) in a case in which the second condition in article 57 is satisfied, the person against whom proceedings for an offence have been instituted in a country outside the United Kingdom (whether or not he has been convicted);

“offender”, in relation to an external order means the person convicted of criminal conduct.

Other interpretation

92. In this Part—

“court” means the Court of Session;

“relevant property” means property which satisfies the test set out in section 447(7) of the Act;

“specified property” means that property specified in the external request (other than a request that specifies a sum of money).