

Landmark decision concerning expenses allowable in restraint proceedings

15 December 2020



Ben Douglas-Jones QC, leading William Douglas-Jones (St Ives Chambers), represented the appellant in *R v Luckhurst*, which considers the scope of permissible living expenses and legal expenditure under a Restraint Order pursuant to section 41 of the Proceeds of Crime Act 2002 (“the Act”).

1. It addresses fundamental points of principle in relation to:

- a. Factors for consideration in assessing the “reasonableness” of living expenses under a restraint order;
- b. The application of *SFO v Lexi Holdings Plc (In Administration)* [2008] EWCA Crim 1443 to living expenses paid under structured credit facilities, such as a Personal Contract Plan (“PCP”) for a vehicle;
- c. Whether the “other available assets principle” is applicable to the restraint regime; and
- d. Whether legal expenses arising from a parallel civil claim, founded on the same facts as the offence for which a defendant is under restraint, are “related to the offence” and precluded by virtue of section 41(4) of the Act.

Reasonableness

2. Section 41(3)(a) allows restrained funds to be made available for reasonable living expenses and reasonable legal expenses. The ‘legislative steer’ at section 69(2) requires the court to promote the preservation of assets so as to render them available to meet a Confiscation Order. The decision as to what is reasonable is fact sensitive, relating to a defendant’s particular circumstances.
3. At paragraph 33 of the judgment, the court provides a non-exhaustive list of potentially relevant factors to consider when deciding reasonableness. The factors will be of importance to all practitioners dealing with the issue of reasonableness or otherwise of living expenses. These include:
 - a. *Whether the payment is necessary or desirable to improve or maintain the value of the assets available to meet a Confiscation Order;*
 - b. *The defendant’s assets in relation to the size of any likely Confiscation Order;*
 - c. *The standard of living enjoyed by the defendant prior to the Restraint Order;*
 - d. *Affordability: the defendant’s means at the time of the Restraint Order or variation application;*
 - e. *The period of the restraint;*

f. Whether there is a prima facie case that the existing standard of living is the result of criminal activity; and if so, what standard of living would be enjoyed but for such criminal activity; and
g. The amount of the expenditure sought: an absolute level of unreasonableness.

4. In a significant departure from status quo, the judgment moves away from the previously test that a defendant under restraint can maintain pre-restraint expenditure provided he does not enjoy a “Rolls Royce lifestyle”. This trite term, which has commonly been used since *Re: D and D* (1992) (Unreported) is no longer of application. Instead, the court must address its mind to a more objective standard of reasonableness, taking account of the factors above, in accordance with the legislative steer

Lexi Holdings

5. The Court found that the fact that living expenses are incurred on unsecured credit does not of itself prevent them being permissible under a Restraint Order. Many ordinary and reasonable living expenses are incurred on unsecured credit (e.g., food and clothes purchased with a credit or debit card). Living expenses are not to be precluded merely because they are incurred by way of unsecured credit. Renting a car may constitute a reasonable living expense. A PCP is a common method of buying a car on financing terms. It is for the court to determine whether renting a car in the circumstances is a reasonable living expense permissible under the Act.

6. The judgment will have significant effect for those practitioners who deal with exceptions to restraint orders and the approach to prima facie third party debts which are in fact structured facilities for the payment of living expenses in arrears.

Other Available Assets Principle

7. It is well established that in civil Freezing Order cases, where a defendant has assets available to meet living or legal expenses which are not caught by the restraint, he is expected to resort to those funds as he will not be allowed to draw on the restrained assets. This is known as 'the other assets principle'. The court was of the view that this principle also applies to restrained funds under section 41 of the Act.

8. Where living expenses cannot be shown to be reasonable, or where there are other available assets (to whomsoever they may belong), funds will not be made available from the restrained assets.

Legal Expenses

9. Section 41(4) of the Act contains an absolute prohibition on permitting expenditure on "legal expenses related to the offence". However, the court held that the Act does not prohibit the use of restrained funds being used for reasonable legal expenditure in civil proceedings arising in whole, or in part, to the same factual enquiry which gives rise to the Restraint Order. The court made clear that this does not mean that such expenditure will always be allowed. The court should exercise its discretion in line with the legislative steer. The court should exercise a measure of control in relation to the nature and extent of permitted spending. Consideration should be given to countervailing factors, e.g., where a defendant's interest in civil proceedings can be adequately protected by his legally represented co-defendants.