Part XI

Asset Management

Drafting note: Effective proactive asset management is critical to the success of any forfeiture legislation, criminal or civil. If assets are allowed to dissipate or disappear, the forfeiture programme will be undermined. In jurisdictions that have provided for this role to be carried out by traditional court-appointed receivers, it has proven to be very costly in terms of net recoveries and has occasionally led to enforcement authorities having to pay monies to the receiver out of taxpayer funds, because the assets recovered have proven to be insufficient to cover the cost of the receiver. Accordingly, this part seeks to identify a role for an employee within the enforcement authority whose responsibility will be to manage, and if necessary realise, property subject to court orders. Drafters will wish to consider whether they can legislate for property managers in a discrete way as is suggested in these model legislative provisions so that the role of the property manager is not different whether the order appointing him or her is made in criminal, civil or cash forfeiture regimes.

Generally speaking, consideration should be given to assigning someone with overall responsibility for property management (in the draft that follows, a 'property manager' is suggested, but that is purely a suggestion). The property manager can then play a role with the law enforcement agency (assisting on pre-seizure planning for example), the court (as an appointee) and third parties, including the owner.

Four potential stages of asset management need to be taken into account:

(1) The initial freezing of the property – how can the property be secured pending the final outcome of the forfeiture case? Some types of property, such as cash or a vehicle, may need to be physically removed and detained; other types of property, for example real estate, might be secured by a notice on land title. Pre-seizure planning is a vital part of the asset recovery process.

(2) The on-going management of property, after restraint, but before the final outcome of the case – how can it be preserved pending the forfeiture hearing? Again, the type of property will define the technique needed. A bank account might be effectively frozen by an order binding on the financial institution; a vehicle may need to be securely stored; complex properties, such as an on-going business, will require complex management (paying employees and suppliers, collecting revenues and so on).

(3) The final disposition of property – in the event that forfeiture is ordered, how can the property be sold or disposed of? Some types of property,

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contraband or weapons for example, may need to be destroyed; most property will be sold. In the event that the court refuses forfeiture, the property must be returned and questions like the liability of public bodies need to be considered.

(4) Consideration should be given by drafting authorities to whether the powers of a property manager should apply to cash that has been seized. It may be thought that this is unduly bureaucratic given that cash can be readily accounted for and simply deposited in an escrow account.

Note: jurisdictions often produce detailed guidelines on asset management. There is a diverse array of assets that might be subject to seizure, ranging from vehicles and houses through to cash and precious metals. Long-term planning in this regard can have immense benefits; asset forfeiture cases often occur in compressed timelines.

Section 112 Application for a Property Manager

(1) The head of the relevant enforcement authority shall appoint a Property Manager to have responsibility for taking possession of, preserving, managing, disposing of or otherwise dealing with any property the subject of any proceedings under this Law.

(2) Where the enforcement authority applies for a restraint order under Part V, it may also apply for the Property Manager in the enforcement agency to be appointed in the case.

(3) Where the enforcement authority applies for a property freezing order under Part VI, it may also apply for the Property Manager in the enforcement agency to be appointed in the case.

(4) A Property Manager appointed under this Section may act notwithstanding the prior appointment of a trustee or receiver in respect of any property.

(5) The Property Manager may him- or herself appoint officials to assist him or her in the execution of his or her functions under this part of this Act.

Section 113 Powers of a Property Manager

Subject to any limits contained in any order of the court in relation to the property, the Property Manager may preserve, manage, modify, store, sell or otherwise dispose of or deal with any property in any manner that he or she thinks appropriate and proper and his or her powers shall include the powers of a receiver.

Section 114 Property Manager Costs and Expenditure

(1) In the event that the Property Manager incurs any cost or other expenditure in the execution of his or her powers under this Part, he or she shall be entitled to seek

payment from the assets under his or her control and which become available for realisation following a final order made under this Act, and in respect of which he or she incurred such costs or other expenditure.

Drafting note: Drafters will wish to ensure that under their legislation the property manager will have the widest possible powers. In particular, powers that have in the past been useful in other jurisdictions have included the following.

- The property manager should have the power to:
  - remove, take possession of and preserve, store or manage the property for the length of time and on the terms that he or she considers proper (particularly important for vehicles);
  - comply with the terms of any order to which the property is subject, including an order to comply with environmental, industrial, labour or property standards or to pay taxes, utility charges or other charges;
  - make improvements to the property to maintain its economic value.
- The property manager may need the authority to share information with, and receive information from, law enforcement authorities. Ideally, the property manager will be involved in cases prior to the courts being involved.
- The property manager should be able to make the following provisions:
  - provisions to arrange for the insurance of property;
  - provisions to destroy property that has little value, particularly in relation to the costs of storage;
  - provisions to allow for the destruction of contraband or of property that is inherently dangerous;
  - provisions to donate property for humanitarian purposes if it cannot be sold, despite reasonable efforts, after a year.

Drafters will want to ensure that consequential amendments are made. For example:

- The land registry and personal property security systems may need a clear legislative authority for the property manager to register notice of a potential forfeiture.
- Some jurisdictions have escheats laws (e.g. for those who die intestate or for the assets of corporations that cease to exist), which may need to be excluded.

The word forfeiture can be used in other contexts (e.g. landlord–tenant law).

(2) In the event that the property under the Property Manager's control does not become available for realisation following the final order made under this Act, or the realisation produces funds insufficient to meet the costs or other expenditure,

the Property Manager may seek to recover such costs or other expenditure or part thereof incurred from the Recovered Assets Fund established under Part XII.

> **Drafting note:** The financial aspects of the forfeiture programme need to be carefully considered. A forfeiture programme can run like any other government programme, with revenues going into a consolidated fund and appropriations supporting the programme. Alternatively, revenues (e.g. money realised from the disposition or income of forfeited property) can be segregated and used to cover expenses, including asset management expenses of the programme. Finally, if other jurisdictions are involved in cases (e.g. through a mutual legal assistance treaty request), consideration might be given to sharing funds realised with those jurisdictions.

Section 115 Duties of a Property Manager

(1) Where the Property Manager takes control of property pursuant to a court order, he or she shall, as soon as practicable after the order is issued, prepare and file with the court a report in the prescribed form identifying the location of the property.

(2) The Property Manager will initiate and maintain detailed records of all property restrained, seized and forfeited under any Part of this Act.

> **Drafting note:** It is essential that records are kept detailing the whereabouts and value of assets that are being managed. In particular, the property manager will maintain records detailing the value of any property under his or her management at the time of freezing/seizure, and thereafter as appropriate, keep records of its ultimate disposition, and, in the case of a sale, keep records of the value realised.
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> Further guidance on the information to be kept should be provided in Regulations and supporting guidance notes.

Section 116 Property Manager Liability

No action or other proceeding may be commenced against any party in respect of the actions of the Property Manager for any act done in good faith in the performance or intended performance of any duty under this part of this Act, or in the exercise or intended exercise of any power under this Act, or for any neglect or default in the performance or exercise in good faith of any such duty or power.

> **Drafting Note:** Drafters should consider what the process will be where the court refuses to grant forfeiture. The statute can leave the matter entirely to the courts or it can circumscribe the types of orders the court can make in respect of compensation for the return of property.