

# Restraint Orders: Varying Restraint Orders for Civil Proceedings – a Welcome Clarification

*R v Luckhurst* [2022] UKSC 23

The Journal of Criminal Law  
2022, Vol. 86(5) 364–367  
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DOI: 10.1177/00220183221128198  
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## Keywords

Restraint, variation, related proceedings, legal advice or representation

## Facts

Luckhurst, a former professional sportsman, set himself up as an independent financial adviser in the 1990s. The company through which he most recently operated his work was dissolved on 5th October 2021. In June 2014, along with two others, he incorporated Aspirations Europe Ltd, which continues to operate. This was a vehicle through which investors were introduced to a separate investment scheme operated by two other individuals. In 2016, the investors commenced civil proceedings against Luckhurst and others, alleging that it was a fraudulent scheme. To prevent dissipation or removal of assets, a freezing order was obtained against Luckhurst which allowed a sum for ordinary living expenses together with reasonable sums for legal advice and representation. A settlement, to which Luckhurst was not party, was agreed in December 2017, and the freezing order was discharged. The civil proceedings continued against Luckhurst. By this point, the police were investigating whether a crime had been committed in the investment scheme, and shortly after the freezing order was discharged, the Crown Prosecution Service ('CPS') applied for a restraint order (section 41, Proceeds of Crime Act 2002 ('PoCA')). This was granted on 15th December 2017 allowing Luckhurst £250 a week for ordinary living expenses, but with scope for variation with written agreement of the CPS. This duly occurred on a number of occasions following the original restraint order being made. An offer of settlement in respect of the outstanding civil claims involving Luckhurst was made in April 2019 on what the Court of Appeal described as, 'potentially attractive terms' ([2020] EWCA Crim 1579, at [13]). The estimated cost of legal advice in relation to the settlement was £3000. Luckhurst sought a variation of the restraint order to release sums to pay for the advice.

Under section 41(3), PoCA 2002, restraint order exemptions are permitted to make provision for 'reasonable legal expenses', but section 41(4), PoCA 2002 does not permit such provision for legal expenses which 'relate to an offence' for which the restraint order was obtained. In consequence, at first instance, the judge refused the variation on the basis that the civil proceedings on which the settlement was proposed had, 'its factual origins in the fraud which is the subject matter of the criminal prosecution'. Luckhurst appealed. The Court of Appeal (Popplewell, LJ, McGowan, J and Molyneux, HHJ; [2020] EWCA Crim 1579) unanimously allowed the appeal. The CPS appealed. The certified question for the Supreme Court was:

Does section 41(4) of POCA preclude an exception to a restraint order to make provision for reasonable legal expenses incurred by the defendant or the recipient of a tainted gift where those expenses incurred by the defendant or the recipient of a tainted gift are in respect of civil proceedings founded on the same or

similar allegations, alleged facts and/or evidence as those of the offence(s) (within the meaning of section 41(5)) which gave rise to the making of the restraint order?(2022] UKSC 23, at [2])

**Held, dismissing the appeal**, in a single judgment delivered by Lord Burrows, with whom the other Justices (Lord Hodge, Lord Kitchin, Lord Hamblen and Lord Stephens) agreed. The defendant is permitted a variation to the restraint order for reasonable legal expenses in civil proceedings, even where those civil proceedings arise from the same or similar facts as gave rise to the restraint order. In determining the reasonableness of the legal expenses, the court is provided a ‘legislative steer’ by section 69(2), PoCA 2002.

Stripped to its essentials, the answer to the certified question in the case could be found by a modern approach to statutory interpretation. This involved finding the *natural meaning of words when considered in their context* and against the *purpose of the provision* (para 23)(see, also, *R (O) v Secretary of State for the Home Department* [2022] UKSC 3). As aids to interpretation, courts can rely on Explanatory Notes to legislation, White Papers, Law Commission Reports and, where relevant, ministerial statements to the extent permitted by *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3 (at [23]).

The natural meaning of the words in their context is that civil proceedings do not *relate to* the criminal offence which the Supreme Court saw as an, ‘obvious answer’(at [24]). Legal expenses *relate to* a criminal offence where they are incurred in defending the criminal proceedings which follow the restraint order, or resisting a confiscation order following conviction in the same matter. It would also cover the restraint order proceedings, judicial review and ancillary proceedings, for example, bail orders. However, civil proceedings arising out of the same or similar facts do not *relate to* the offence (at [25]). It would be ‘artificial and problematic’ and ‘criticised as judicial legislation’ (at [26]) to interpret the provision as precluding payment of legal expenses where the civil proceedings arose from the same or similar allegations as those which gave rise to the restraint order.

Insofar as the purposive element is concerned, the purpose of restraint orders is more delicately balanced than the CPS might have represented it to be in argument. Far from restraint being about the preservation of funds in order to maximise those available where a confiscation order is made, it recognises that an absolute approach would not be reflective of the reality in which defendants find themselves. The exceptions to restraint orders permit expenses of certain kinds, for example, reasonable living or legal expenses (s41(3)(a), PoCA 2002), or provision to enable the carrying on of a trade, business, profession or occupation (s41(3)(b), PoCA 2002). ‘The general purpose or policy of the restraint order provisions is therefore one of balancing the goal of ensuring confiscation with the need to ensure that the (alleged) criminal can incur certain kinds of expense’. (at [30]).

Finally, there were ‘two specific indicators’ (at [31]) allowing the Supreme Court to conclude that the prohibition in s41(4) was limited to legal expenses relating to the offence allied to the restraint order. They were, first, the Cabinet Office, *Recovering the Proceeds of Crime Report* which noted that ‘excessive legal fees’ were being spent on defence ‘seriously depleting’ the restrained assets (paras 8.36–8.37, quoted at [31] of Luckhurst). Secondly, that the Access to Justice Act 1999 was amended to allow public funds to be made available to allow a defendant to resist restraint orders.

## Commentary

The preservation of the defendant’s assets is a valuable aspect of the due administration of justice, whether by restraint order in criminal proceedings, or by freezing order in civil. However, both forms of order recognise, and the decision of Luckhurst certainly provides welcome clarification in the criminal context, that the approach of such orders cannot, in every circumstance, be absolute. In that sense, therefore, the decision of Luckhurst is one which is to be welcomed. It provides clarity in two important respects. First, it asserts the narrow absolutism of there being no possible variation to a restraint order where the application relates to the criminal offence and proceedings to which the restraint order relates. Secondly, it recognises that such an approach should not apply either to other criminal offences,

unrelated to the restraint order, or to civil proceedings which arise from the same or similar facts as those which gave rise to the restraint order. This will certainly be welcomed, for the most part, by legal practitioners in providing guidance to their clients.

Beyond the immediate clarity provided by the Supreme Court, the decision is one which should be seen against the context of the practical challenges faced by the criminal courts. In October 2021, the National Audit Office published its report, 'Reducing the backlog in criminal courts'. This report identified that in the run-up to the Covid-19 pandemic, that is in the year from 31st March 2019 to 31st March 2020, just as the first nationwide lockdown started, the Crown Court backlog increased by 23%. This backlog was exacerbated by the onset of the pandemic with a further increase of 48%, such that by 30th June 2021, some 60,692 cases were in the system (page 6). Luckhurst is an exemplar of this backlog. Luckhurst was due to be tried after the trial of the two alleged originators of the 'investment scheme'. Their trial, which started in January 2020, was adjourned as the pandemic struck, and that impacted Luckhurst's trial which now has a start date of 31st October 2022. This is contextually significant because delays in the criminal process, and in particular where a restraint order ties up the defendant's assets, may generate delays in the allied civil proceedings if the defendant does not have funds available to meet legal expenses associated with those proceedings. The Supreme Court in Luckhurst, by interpreting section 41(4), PoCA as it has done, limits the prospects of civil proceedings being affected to a significant degree as a form of collateral damage of the restraint order. Indeed, as the Supreme Court itself identified (at [33]), allowing civil legal expenses is important, especially given that civil legal aid was very unlikely to be available to Luckhurst following the restrictions imposed by successive governments over the last two decades and more.

A final welcome note from the Supreme Court comes in the form of its reiteration of the modern approach which should be taken in the interpretation of statutes, a matter with which Lord Burrows was concerned in the 2017 Hamlyn lecture series (Burrows, *Thinking about Statutes: Interpretation, Interaction, Improvement* (2018, CUP)). The quest to find the natural meaning of words set against the context in which they are used, together with the purpose of the provision, provides as clear a set of guidance for lower courts as it is possible to achieve in the modern age.

However, notwithstanding the positive aspects of Luckhurst, some notes of caution should be made. In a sense, Luckhurst is an easy case. The applicant was asking for a variation to the restraint order to meet a fixed fee for legal advice in respect of a proposed settlement. One might almost regard the applicant, with a well-inclined court in front of it, to be pushing against an open door in such a circumstance. However, not all applications will be quite so straightforward and, certainly relatively speaking, non-contentious. As Popplewell LJ emphasises at paragraph [46] of the Court of Appeal judgment in Luckhurst, civil cases of fraud frequently involve causes of action which cut across traditional legal categories. They may involve, 'misrepresentation, unlawful means conspiracy, other economic torts, negligence, breaches of fiduciary duty, and constructive trust liability for dishonest assistance or knowing receipt'. Indeed, one might add to that list the complex evidential issues connected to the process of tracing, whether at common law or, as would be more likely, in equity. Such cases might also typically involve multiple hearings and subsequent appeals as the limits of the law are tested through litigation. Would such complex civil claims be regarded as reasonable legal expenses to warrant a variation of a restraint order?

The starting point in seeking an answer to that question is the 'legislative steer' provided by section 69(2), PoCA, since this will, 'strike the correct balance in the exercise of their discretion in determining whether the legal expenses are reasonable'.(at [34]) The provision states that the powers in section 41, PoCA, should be exercised with a view to the value for the time being of realisable property being made available (by the property's realisation) for satisfying any confiscation order that has been or may be made against the defendant (s69(2)(a)); where a confiscation order has not been made, with a view to securing that there is no diminution in the value of realisable property (s69(2)(b)); without taking account of any obligation of the defendant or a recipient of a tainted gift if the obligation conflicts with the object of satisfying any confiscation order that has been or may be made against the defendant (s69(2)(c)); and, may be exercised in respect of a debt owed by the Crown ((s69(2)(d)).

The steer is, regrettably, not power-assisted and offers little in the way of meaningful guidance. This is an aspect of the decision in Luckhurst which is disappointing. The Supreme Court does not seem to have been willing to provide much in the way of guidance, evidently leaving it to be, 'best hammered out on the anvil of concrete cases' (per Lord Steyn in *Attorney General v. Blake and Another* [2000] UKHL 45), something which the highest court has been known to do in the past. While this is understandable lest the courts prejudice future cases, sometimes a 'legislative steer' needs a clear 'judicial steer' in order to assist those affected by the provision to form a clear view of what is required. The fact that this has not been done must inevitably lead to some speculation, at least in the early stages of mapping out a practical response to Luckhurst.

While some succour might well be found in the guiding principles for what is a reasonable living expense, they cannot provide the whole answer since they are not sufficiently intricately connected to the assessment of reasonable legal expenses. A useful starting point might be to distinguish between non-contentious and contentious legal work. It may be that there is a compelling case for non-contentious legal expenses, such as those connected with completing a conveyance of a legal estate in land, to amount to reasonable legal expenses, but the question becomes more challenging when contentious legal work is at issue. There again, there are grades of contentious work. At one end, there may be relatively straightforward debt recovery against a solvent defendant, while at the other something akin to the allegations made in Luckhurst. Here, the court might well find itself concerned in an investigation into the merits of the defence, the prospects of the claimant's claim, on the civil standard of proof, the complexity of the legal questions and the attitudes of the claimant and the defendant in determining whether appeals are a possibility, all of which are likely to affect the reasonableness question.

Overall, however, the decision of Luckhurst is a welcome one, providing clarity in a practical way. That said, at least for the short-term, it will require its limits to be explored so that its full impact is understood.

**Christopher Kirkbride**