**EXTRA DIVISION, INNER HOUSE, COURT OF SESSION**

**[2026] CSIH 5**
**XA2/25**

Lord Doherty
Lord Tyre
Lady Wise

OPINION OF THE COURT

delivered by LORD DOHERTY

in the cause

by

THE ADVOCATE GENERAL FOR SCOTLAND

Pursuer and Respondent

against

ALEXANDER WATT MCCARTNEY

Defender and Appellant

and

THE SCOTTISH MINISTERS

Interveners

**Pursuer and Respondent: Reid KC, Iridag; Office of the Advocate General for Scotland**
**Defender and Appellant: A Mackenzie, Sol Adv; Harper MacLeod LLP**
**Interveners: Welsh; Scottish Ministers Civil Recovery Unit**

27 January 2026

**Introduction**

[1] This appeal from a decision of the sheriff (C J Bissett) at Kilmarnock dated 24 July 2024 was remitted by the Sheriff Appeal Court to this court. The principal issue concerns the

construction and application of section 303Z18 of the Proceeds of Crime Act 2002.

A secondary issue arises from an *obiter* observation made by the sheriff concerning the actings of the Scottish Ministers Civil Recovery Unit (CRU). The respondent has a cross-appeal in relation to that issue, and this court granted the Scottish Ministers leave to intervene to address it on the question of the relevance of acts of the Scottish Ministers to a claim for compensation under section 303Z18.

**Proceeds of Crime Act 1982**

[2] Part 5 of the Proceeds of Crime Act 2002 makes provision for the civil recovery of the proceeds etc of unlawful conduct. Chapter 1 of Part 5 contains introductory general provisions. Sections 240, 241 and 242 provide:

> "**240 General purpose of this Part**
> (1) This Part has effect for the purposes of—
> (a) enabling the enforcement authority to recover, in civil proceedings before the High Court or Court of Session, property which is, or represents, property obtained through unlawful conduct,
> (b) enabling property which is, or represents, property obtained through unlawful conduct, or which is intended to be used in unlawful conduct, to be forfeited in civil proceedings before a magistrates' court or (in Scotland) the sheriff and, in certain circumstances, to be forfeited by the giving of a notice
> …
>
> **241 'Unlawful conduct'**
> (1) Conduct occurring in any part of the United Kingdom is unlawful conduct if it is unlawful under the criminal law of that part.
> …
>
> **242 'Property obtained through unlawful conduct'**
> (1) A person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct.
> (2) In deciding whether any property was obtained through unlawful conduct—
> …
> (b) it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."

[3] Chapter 3B of Part 5 makes provision for the making of account freezing orders and the forfeiture of money held in certain accounts. Sections 303Z1, 303Z3, 303Z4, 303Z5, 303Z14 and 303Z18 provide:

> "**303Z1 Application for account freezing order**
> (1) This section applies if an enforcement officer has reasonable grounds for suspecting that money held in an account maintained with a relevant financial institution —
> (a) is recoverable property, or
> (b) is intended by any person for use in unlawful conduct.
> (2) Where this section applies … the enforcement officer may apply to the relevant court for an account freezing order in relation to the account in which the money is held.
> (3) For the purposes of this Chapter—
> (a) an account freezing order is an order that, subject to any exclusions (see section 303Z5), prohibits each person by or for whom the account to which the order applies is operated from making withdrawals or payments from the account;
> …
> (6) In this Chapter—
> …
> 'enforcement officer' means—
> (a) an officer of Revenue and Customs,
> (b) a constable,
> …
> 'relevant court' —
> …
> (b) in Scotland, means the sheriff;
> …
>
> **303Z3 Making of account freezing order**
> (1) This section applies where an application for an account freezing order is made under section 303Z1 in relation to an account.
> (2) The relevant court may make the order if satisfied that there are reasonable grounds for suspecting that money held in the account (whether all or part of the credit balance of the account)—
> (a) is recoverable property, or
> (b) is intended by any person for use in unlawful conduct.
> …
>
> **303Z4 Variation and setting aside of account freezing order**
> (1) The relevant court may at any time vary or set aside an account freezing order on an application made by—
> (a) an enforcement officer, or

(b) any person affected by the order.

…

(4) In relation to Scotland, the references in this section to setting aside an order are to be read as references to recalling it.

**303Z5 Exclusions**

(1) The power to vary an account freezing order includes (amongst other things) power to make exclusions from the prohibition on making withdrawals or payments from the account to which the order applies.

(2) Exclusions from the prohibition may also be made when the order is made.

(3) An exclusion may (amongst other things) make provision for the purpose of enabling a person by or for whom the account is operated—

(a) to meet the person's reasonable living expenses,

…

(8) The power to make exclusions must … be exercised with a view to ensuring, so far as practicable, that there is not undue prejudice to the taking of any steps under this Chapter to forfeit money that is recoverable property or intended by any person for use in unlawful conduct.

…

**303Z14 Forfeiture order**

(1) This section applies while an account freezing order has effect. In this section the account to which the account freezing order applies is 'the frozen account'.

(2) An application for the forfeiture of money held in the frozen account (whether all or part of the credit balance of the account) may be made—

…

(b) to the sheriff by the Scottish Ministers.

…

(4) The … sheriff may order the forfeiture of the money or any part of it if satisfied that the money or part—

(a) is recoverable property, or

(b) is intended by any person for use in unlawful conduct.

…

(8) Where, other than by the making of an order under subsection (4), an application under subsection (2) is determined or otherwise disposed of, the account freezing order ceases to have effect immediately after that determination or other disposal.

…

**303Z18 Compensation**

(1) This section applies if—

(a) an account freezing order is made, and

(b) none of the money held in the account to which the order applies is forfeited in pursuance of an account forfeiture notice or by an order under section 303Z14.

(2) Where this section applies a person by or for whom the account to which the account freezing order applies is operated may make an application to the relevant court for compensation.
(3) If the relevant court is satisfied that the applicant has suffered loss as a result of the making of the account freezing order and that the circumstances are exceptional, the relevant court may order compensation to be paid to the applicant.
(4) The amount of compensation to be paid is the amount the relevant court thinks reasonable, having regard to the loss suffered and any other relevant circumstances.
(5) If the account freezing order was applied for by an officer of Revenue and Customs, the compensation is to be paid by the Commissioners for Her Majesty's Revenue and Customs.
…"

[4] Chapter 4 of Part 5 deals with recoverable property. Section 304 provides:

"**304 Property obtained through unlawful conduct**
(1) Property obtained through unlawful conduct is recoverable property.
…"

[5] Part 8 of the Act makes provision in relation to investigations, including civil recovery investigations and frozen funds investigations. Chapter 3 relates to Scotland. In terms of section 412, the Scottish Ministers are the appropriate person in relation to such investigations.

**Background**

[6] The appellant had a current account with the Royal Bank of Scotland (RBS) and an account with StoneX Financial Services (StoneX). RBS and StoneX are each a "relevant financial institution" within the definition of that term in section 303Z1(6) of the 2002 Act. In about March 2023 a suspicious activity report was made to the National Crime Agency about certain cash deposits in the accounts.

[7] On 11 April 2023 the respondent, on behalf of the Commissioners of His Majesty's Revenue and Customs (HMRC), applied to the sheriff at Kilmarnock in terms of

section 303Z1 of the 2002 Act for an account freezing order (AFO) prohibiting the appellant and any other signatory or beneficiary from making withdrawals or payments from either account. At that time the credit balance on the RBS account was £1,012,391.69 and the credit balance on the StoneX account was £18,088.04. The respondent averred that HMRC had reasonable grounds to suspect that those credit balances were recoverable property and/or were the result of unlawful conduct. Substantial sums of cash, for which the appellant had had no obvious source, had been deposited. In particular, on 1 April 2022 a payment of £700,000, referenced "Pay Back Loan", was made by Arm Homes Limited to the RBS account. On 28 March 2023 that company began to go through the compulsory strike off process. On 3 August 2022 cash of £330,600 was deposited in the same account. On 31 August 2022 there was a further cash deposit of £20,000 to the account. Since 2018 there had been around £23,600 in credits to the StoneX account and debits of around £56,000. The appellant was in receipt of a state pension of £9,900 a year, which was his only declared income since March 2017. In the 5 years 2016/17 to 2021/2022 he had paid a total of £21,235.71 in income tax on total earnings of £178,734.72. He had formerly been a director of several companies, namely McCartney Homes Limited, which had been dissolved on 18 May 2022; McCartney Homes (Developments) Limited, which was dissolved on 20 April 2015; and A M Tiles (Irvine) Limited, which was dissolved on 10 April 2015. He was also a director of Stanecastle Homes Limited, but that company had had no income and had not paid any corporation tax. The respondent averred that HMRC had a reasonable suspicion that the appellant was attempting to conceal illicit activity. The accounts had received substantial sums for which there was no obvious source and in relation to which the appellant had made no tax declarations. The funds in the accounts were suspected to be recoverable property and/or property intended for use in unlawful conduct, namely tax

evasion or money laundering. The making of an AFO was said to be justified while the derivation of the credit balances and their intended use were investigated by the CRU.

[8] On 11 April 2023, on the basis of the information placed before him Sheriff Jamieson was satisfied in terms of section 303Z3(2) that an AFO should be made. The AFO prohibited the appellant and any other signatory or beneficiary from making withdrawals or payments from the accounts for a period of 6 months beginning with 6 April 2023. The appellant did not appeal the interlocutor of 11 April.

[9] A detailed chronology of events (the chronology) was prepared by the respondent. No material issue was taken with its contents. We refer to some of the events below.

[10] In June 2023 the appellant sought to vary the AFO to allow the release of £280,000 to be used to purchase a house for his daughter. On 13 and 14 June the CRU invited the appellant to provide it with material to support the averments in his minute for variation. On 14 June, at the request of the appellant's solicitors, the CRU provided the appellant with a non-exhaustive list of questions it wished answered and documents it wished to see. Nothing was received until 2241 hours on 4 July 2023, when the appellant emailed submissions and an inventory of productions for the hearing before the sheriff the following day. The productions were heavily redacted. On 5 July the sheriff (M Mactaggart) refused the application. He granted leave to appeal. The sheriff's note records that the argument for the appellant was that HMRC had not been candid with the court when the AFO was applied for and that the funding of all of the deposits could be explained. In particular, it was submitted that the cash deposit of £330,600 had been largely made up of a sum of £315,000 which the appellant had withdrawn from the RBS account in March 2019 and which he had kept in cash at his home between that date and 3 August 2022. It was also submitted that the £700,000 payment from Arm Homes Limited was repayment of a loan

which he had made to that company. The sheriff was not satisfied with those explanations, or with the heavily redacted bank statements which the appellant tendered to vouch them.

[11] On 17 July 2023 the CRU contacted the appellant's solicitors to advise that the appellant had not answered the questions posed on 14 June or provided the material which had been requested to vouch the averments in the minute for variation. On 23 August the appellant provided the CRU with certain unredacted bank statements for three of his accounts with the RBS. However, most of the answers to the questions asked on 14 June remained unanswered. The appellant's solicitors confirmed that the CRU could contact the appellant's accountants whom it was told were "McClay, McAllister & McGibbon". No information was provided in respect of the StoneX account. On 6 September the CRU emailed the appellant's solicitors to underline the explanations and material that were still required. The email stated that if they were not provided voluntarily the CRU would require to use its powers under Part 8 to recover documents. On 7 September the appellant's solicitors emailed saying that the appellant had instructed his accountants to respond to the outstanding queries. On 27 September, not having heard from the appellant's accountants, the CRU lodged a summary application at Glasgow Shriff Court seeking a production order for the outstanding material to be produced by McClay, McAllister & McGibbon LLP. On 3 October the sheriff (T Hughes) granted the application. On 11 October the CRU once again emailed the appellant's solicitors requesting the required material and attaching a copy of the production order. The email sought confirmation that the material would be provided and stressed that failure to provide it would delay the investigation.

[12] On 5 October 2023 the Sheriff Appeal Court (Sheriff Principal S Murphy KC) extended the AFO for a further period of 90 days. On 16 October the appellant's solicitors advised that the requested material would be with the CRU by close of business on

26 October. It was not provided by then. The CRU sent "chaser" emails to the appellant's solicitors on 30 and 31 October, and on Wednesday 8 November it advised that unless the material was provided that day the production order would be served on his accountants. The appellant's solicitors responded that it would be available "this week". On 10 November the production order was served on McClay, McAllister & McGibbon LLP, who responded that they did not act for the appellant. They indicated that McClay, McAllister & McGibbon (Ayr) Ltd, trading as Robert J Hart & Company ("the company"), acted for him. The company and the LLP had the same registered address. The same day a second production order was granted by the sheriff and served on the company, who acknowledged receipt of it; but on 17 November the company maintained that service had not been properly effected. As a result, the order was re-served on 20 November. On 27 November the company produced 250 documents relating to individuals and companies connected with the investigation, including tax computations, tax returns, and annual accounts. On 5 December the appellant's solicitors advised that further material would be provided by close of business the following day. On 5 December the CRU indicated that the documents produced were being reviewed but that there remained unanswered queries, a list of which was provided. On 7 December the appellant's solicitors supplied information about the appellant's RBS share dealing account and certain other information, which the CRU began to review.

[13] On 19 December 2023 the Sheriff Appeal Court (Sheriff Principal S Murphy KC) refused the appellant's appeal against Sheriff MacTaggart's interlocutor of 5 July 2023. The arguments for the appellant were essentially the same as the arguments advanced on his behalf to the sheriff. The appellant had withdrawn £315,000 on 22 March 2019, which sum was said to have been proceeds of the sale of RBS shares which he had held for many years.

That cash was held in a safe in his house from that date until it was deposited in the RBS account with some other cash on 3 August 2022. In relation to that deposit, Sheriff Principal Murphy observed:

> "[15] … However, the sheriff was satisfied that there were reasonable grounds for suspecting that these sums were related to unlawful conduct because the additional sum of over £15,000 was not explained, because redacted accounts were presented to the court by the appellant which did not show credits to the account, and which therefore did not disclose the immediate source of funds paid into the account, and because he considered the appellant's explanation to be unconvincing. In my view the sheriff's reasoning was sound. It would seem extraordinary that a person who had been sufficiently careful over the years to acquire such a large sum would remove it from his bank and store it at home for a period of over three years for no apparent reason whereby no interest could be earned. The sheriff was correct to conclude that HMRC could be expected to take an interest in establishing the source of the funds and would have concerns regarding the possible evasion of tax liability."

In relation to the £700,000 he reasoned:

> "[17] Arm Homes Ltd made a payment of £700,000 to the appellant on 1 April 2022. His position was that this was the repayment of a loan which had had made to the company via his wife. The sheriff analysed carefully the material presented to him which showed payments from the appellant's bank account to his wife in March 2017 which totalled £46,600 and payments from the appellant's wife to the company in January and February of 2017 which amounted to £150,000; in June and July of 2017 which amounted to £90,000; and another of £50,000 apparently made in August 2017. He found no apparent correlation between the sums advanced to his wife by the appellant and her payments to the company. Redaction of the copy accounts from Arm Homes Ltd restricted a full analysis of the position but the sheriff noted that two payments of £20,000 each were made to the Arm Homes Ltd account by 'Mr ALEXANDER W MCC STANECASTLE HOMES' in August 2021 and that payments were made by the company to the appellant's wife in September and November of 2017 in the total sum of £480,000. No copy of any loan agreement was produced to the court. Having considered this evidence from the appellant, the sheriff concluded that nothing in the copy accounts supported the contention that he had lent Arm Homes Ltd £700,000 or that the receipt by him of that sum was a repayment. He was not satisfied that the true reason for the payment made by the company to the appellant had been provided. In the circumstances these were reasonable conclusions for the sheriff to reach."

He concluded:

> "[18] … In view of the circumstances described above and the absence of any satisfactory explanation from the appellant the sheriff was entitled to reach the conclusion that there was a reasonable suspicion that the appellant was attempting to

> conceal illegal activity and that he may have been engaged in tax evasion. These conclusions are provisional, pending further investigation by the authorities or explanation by the appellant. Until the position is clearer it is not possible to determine whether the appellant has engaged in any illegal activity or its extent; and in advance of that stage of proceedings the sheriff was correct to hold that all of the sums identified should remain the subject of an AFO."

[14] On 3 January 2024 Sheriff Bissett extended the duration of the AFO for a period of 2 months from that date. On 31 January the CRU indicated that analysis of the material produced had generated further queries relating to the tracing of historic transfers which appeared to fund the frozen RBS account balance. In that regard it sought information about the sale of four plots of land in March 2022 and about a £4,000,000 transaction in July 2007 which might be related to an investment in RBS shares in 2009. On the same date it emailed the appellant's accountants with further queries. By email of 31 January the appellant's solicitors advised that a transaction in September 2009 "appeared" to be an investment in RBS shares but that bank statements would be needed to confirm this. On 7 February the CRU emailed copies of the appellant's RBS bank statements to the appellant's solicitors. On 23 February the solicitors provided missives and ledgers for the four plots of land. They advised that the £4,000,000 related to a property sale and that the solicitors who dealt with the sale were retrieving their file from storage. The same day the CRU indicated that the material in relation to the four plots would be reviewed and investigated. It also indicated that it still required to trace how the £499,999 share purchase was funded, which was why the material requested in relation to the £4,000,000 payment in 2007 was needed.

[15] In light of the outstanding queries, on 29 February 2024 Sheriff Bissett extended the AFO for a further period of 6 weeks from 2 March 2024.

[16] On 6 March 2024 the appellant's solicitors sent the CRU papers relating to the £4,000,000 transaction. On 15 March, having reviewed all of the material, the CRU

advised the respondent that it did not intend to seek forfeiture of any of the monies in the frozen accounts and that they were closing the frozen funds investigation. On 19 March Sheriff Bissett recalled the AFO.

**The compensation claim**

***The pleadings***

[17] The appellant lodged a minute seeking compensation of £102,438.73 in terms of section 303Z18. He avers that he suffered loss as a result of the making of the AFO and that the circumstances are exceptional. The loss is said to have been that he "had been wrongfully kept out of his lawful funds by [the respondent] since 11 April 2023." (Condescendence 8). He further averred:

> "CONDESCENDENCE 9. … The AFO did not preserve the status quo, rather it interfered with the defender's right to receive payment of the sums due to him by RBS and StoneX. In April 2023, the defender advised (sic) to take independent financial advice in connection with the balanced (sic) held on those accounts to generate a greater return to him. The defender desired to follow that advice, but was prevented from investing the balances due to the AFO.
>
> CONDESCENDENCE 10. The defender respectfully submits that it is appropriate and reasonable that the pursuer compensate the defender for keeping him out of his funds and freezing those funds in accounts bearing no (StoneX Account)/negligible interest (RBS Account). The defender respectfully submits that this element of a compensatory award is appropriately measured by reference to the judicial rate of interest, which is designed as a matter of policy to compensate parties from being kept out of funds to which they are lawfully entitled. The funds have been subject to the AFO for almost one year, interest at the judicial rate on the sums subject to the AFO for one year is £82,438.73…
>
> CONDESCENDENCE 11. Separatim, the defender has suffered considerable stress, inconvenience, distress and upset due to being deprived of his lawful funds. It has repeatedly and wrongly been suggested that the defender has engaged in criminal behaviour. The defender has been deprived of the use of his life savings and, as hereinbefore condescended upon, has had to rely on the support of family during the period of the AFO. This has caused the defender considerable upset and embarrassment. Further, as a reasonably foreseeable consequence of the AFO (and implication of criminal behaviour) the defender's bankers have required that he

> re-bank. This will cause the defender further cost and inconvenience. The pursuer has engaged in a historic detailed investigation in relation to the defender's financial affairs dating back almost twenty years – with which he has co-operated notwithstanding a complete lack of averment or any responsible basis for alleging any impropriety in his historic conduct. The defender has incurred extra-judicial professional fees in endeavouring to provide historic information to the pursuer. The pursuer has been constrained to concede before this Court that its deeply historic investigations (which represent a significant interference in the defender's affairs) were entirely speculative. It is therefore submitted that it is appropriate the Court make an award of compensation in this respect of £20,000, which is a reasonable estimate of the defender's loss and damage in respect of solatium, stress and inconvenience."

[18] The matters said to be exceptional circumstances are averred in Condescendence 7. It is said that HMRC acted in an uncandid way throughout the investigation; that they "acted in a dilatory manner in conducting its (sic) investigations"; that HMRC and the CRU were able to access all of the appellant's historic bank statements and tax returns which vouched his substantial historic means and contradicted the respondent's averment that there was no obvious source for the deposits which were made; that no specific criminal offence other than tax evasion had been specified; that the respondent refused to release any sums from the AFO; that the CRU repeatedly relied on the need to get expert forensic accountancy and/or tax advice but it was unclear whether any was ever obtained; that the appellant was a 71 year old retired man, the balances were his life savings, and lack of access to them caused him hardship, stress and to be dependent upon family for financial support; and that it was a complex exercise to respond to the CRU inquiries and vouch his position.

***The sheriff's decision***

[19] On 24 July 2024 Sheriff Bissett sustained the respondent's plea to the relevancy of the appellant's minute and refused the minute. He held that the averments of loss were irrelevant and lacking in specification. The appellant had chosen to put his funds in

non/negligible-interest bearing accounts. The effect of the AFO was to leave the funds where they were. There was no averment of any specific, quantifiable loss arising from the loss of opportunity to invest the funds elsewhere. In relation to the distress/solatium/inconvenience aspect of the claim, it had been open to the appellant to apply to the court to permit limited intromission with the funds if he experienced hardship. In any case, the appellant's averments did not disclose exceptional circumstances within the meaning of section 303Z18. There was nothing exceptional about the genesis of the AFO, or the way in which it was obtained and extended, which indicated that the respondent and the court had not been entitled to be satisfied that the AFO should be granted and extended. The exceptional circumstances test was a high one. Public authorities ought to be able to make and stand by honest, reasonable and apparently sound decisions in the public interest without fear of exposure to undue financial prejudice otherwise there would be a chilling effect upon the performance of their public duties (*R (Perinpanathan)* v *City of Westminster Magistrates Court* [2010] EWCA Civ 40, [2010] 1 WLR 1508).

[20] Sheriff Bisset added:

> "In passing, I shall observe that I did not accept the [respondent's] subsidiary argument that they could not be held accountable for the actions of the Crown [sic] Recovery Unit as the investigating body, it being a separate department of government which is overseen by the Scottish Ministers. That proposition, if correct, makes a nonsense of the terms of subsection (5) of section 303Z18, as it could result in the pursuer being relieved of the obligation to fully compensate an applicant for the loss suffered as a result of their seeking the asset [sic] freezing order."

***The appeal and cross-appeal***

*Submissions for the appellant*

[21] Mr Mackenzie submitted that the court should allow the appeal, recall the interlocutor of 24 July 2024 and remit the case to the sheriff to hear a proof before answer. A

case should not be dismissed as irrelevant unless it is bound to fail even if a pursuer proves all that he offers to prove (*Finlayson* v *Alban Wine Ltd* [2024] CSIH 32). That was not the case here.

[22] The appellant's averments of loss were relevant. They described loss suffered as a result of the making of the AFO. The AFO had injuriously affected the creditor/debtor relationships between the appellant and the financial institutions. It had interfered with the appellant's ability to demand payment of his credit balances. He had been deprived of profit-generating assets. The sums in each account had been wrongfully withheld. Reliance was placed upon *Carmichael* v *Caledonian Railway Co (No 2)* (1870) 8 M (HL) 119 and *Farstad Supply AS* v *Envirico Ltd* [2011] CSOH 153, 2012 SLT 348 (upheld on appeal, [2013] CSIH 9, 2013 SC 302). The measure of compensation ought to be interest at the judicial rate from the date of the AFO until its recall, a period of almost a year. The fact that the appellant had not applied to have the AFO varied to release funds for living expenses etc or to move them to an interest-bearing account raised issues of mitigation of loss which would require to be explored at proof, but they did not make the averments of loss irrelevant. Mr Mackenzie clarified that the "advice" referred to in the appellant's averments had in fact been advice which he himself had given the appellant on the day the AFO was made (but before the appellant was made aware of the order). He had advised the appellant to consider obtaining financial advice. The appellant ought also to be compensated for the distress and inconvenience which he had suffered. His averments in relation to that aspect of the claim were also suitable for inquiry.

[23] As for the requirement "that the circumstances are exceptional", the word "exceptional" ought to be given its ordinary meaning of "unusual" or "something which is likely to happen very infrequently". It was acknowledged that the test was a high one, and

that where a regulatory authority acted honestly, reasonably, properly and on grounds which appear to be sound in the exercise of public duty the court should start from a presumption that no compensation should be awarded (cf *R (Perinpanathan)* v *City of Westminster Magistrates Court* (above), a case involving costs where similar principles applied). However, the appellant averred that HMRC had not acted in such a way. In particular, HMRC ought to have investigated historic tax returns and historic bank statements. Had they done so the AFO ought not to have been applied for or made or extended. The "circumstances" which the appellant averred were all relevant circumstances, including the history of the forfeiture investigation by the CRU. The same and similar expressions used elsewhere in the 2002 Act should be construed consistently. Confiscation proceedings under the Act may be postponed, but the general rule is that any postponement must not end after the end of the permitted period (generally 2 years after conviction) (section 14(3)). However, section 14(4) provides that section 14(3) does not apply if there are "exceptional circumstances". The courts have held that in that context a broad view should be taken of "exceptional circumstances" (*R* v *Haden* [2024] EWCA Crim 344; *R* v *Soneji* [2006] 1 AC 340). A similar approach should be taken with the words "and that the circumstances are exceptional" in section 303Z18(3). Parliament must have intended that section 303Z18 should have some practical effect. The analogy of private litigants who sought orders which interfered with the legal rights of others (eg by obtaining diligence upon the dependence of an action or interim interdict) but did so *periculo petentis* was apt.

[24] So far as the cross-appeal was concerned, it was doubtful whether it was competent to appeal against something which was no more than an *obiter* remark. In any case, the sheriff was correct to treat the history of the CRU's investigations as being one of the relevant circumstances he was entitled to have regard to when considering whether the

circumstances were exceptional. Parliament had identified the person who applied for the AFO as the person who would be liable to compensate a claimant who had suffered loss as a result of the making of the order where the circumstances were exceptional.

*Submissions for the respondent*

[25] Senior counsel for the respondent moved the court to refuse the appeal. The sheriff had not erred in refusing the application. While in terms of Rule 3.19.5(1)(c) of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999 (SSI 1999/929) the claim required to be made by minute in the AFO process, it was nonetheless a summary application which the sheriff had required to dispose of summarily (Sheriff Courts (Scotland) Act 1907, section 50). He had been entitled to consider not just the pleadings but also the other material before him, including the chronology.

[26] The appellant's averments of loss were irrelevant and wholly lacking in specification. He had chosen to have his funds in non/negligible-interest bearing accounts. There were no relevant or specific averments as to how he would have profited from the use of the funds had the accounts not been frozen. Had the appellant needed to access some of the funds for living expenses or the like or had he wished to have them invested elsewhere, he could have applied to vary the AFO. However, he did not seek to vary it on any such grounds. There was no proper basis for saying that he ought to be paid compensation equivalent to the judicial rate of interest. This was not a case where there had been wrongful withholding. Were the appellant to be awarded the equivalent of judicial interest he would be better off than he would have been had the AFO not been made. The averments anent distress, inconvenience etc were suggestive of the appellant having suffered nothing more than the ordinary inconvenience and consequences associated with the making of an AFO.

[27] Enforcement officers were not akin to private litigants who sought orders which interfered with the legal rights of others. The suggested analogy with such litigants was not apt. Enforcement officers acted in the public interest (cf *F Hoffmann-La Roche & Co AG* v *Secretary of State for Trade and Industry* [1975] AC 295, Lord Diplock at p 364E-F, Lord Cross of Chelsea at p 371B-G, Lord Reid at p 341D-F). In order for circumstances to be exceptional in terms of section 303Z18 they required to be "unusual" or "something which is likely to happen very infrequently". The test was a high one. Much more was required than the mere fact that an AFO was not followed by a forfeiture order. The context of *R* v *Haden* (where a broad view was taken of what constitutes "exceptional circumstances" for the purposes of section 14 of the 2002 Act) was entirely different and was of no assistance in interpreting section 313Z18. On the other hand, guidance could be obtained from the Court of Appeal's approach to applications for costs where cash had been seized and detained but an application for forfeiture was subsequently dismissed (*R (Perinpanathan)* v *City of Westminster Magistrates Court*). It would be wrong to invoke the wisdom of hindsight or set too exacting a standard. It was important and in the public interest that enforcement officers were not deterred from applying for an AFO where there was a reasonable basis for doing so by fear of liability for compensation. There should be no liability for compensation where they had acted honestly, reasonably, properly and on grounds that reasonably appeared to be sound. The appellant's averments of lack of candour/improper conduct/dilatoriness on HMRC's part were irrelevant and wholly lacking in specification. Moreover, they did not withstand scrutiny when the chronology was examined. Such delays as had occurred had been largely caused by repeated failures and delays by the appellant and his agents to co-operate with the CRU investigation. The credits to the appellant's accounts justified HMRC's reasonable suspicions given his apparent lack of significant income or other means.

As the investigation progressed the appellant provided explanations as to the sources of funds, but it took a great deal longer for matters to be satisfactorily vouched. It was not incumbent upon HMRC to trawl through historic tax returns and assessments to explore whether possible sources of the funds could be traced before application was made for an AFO.

[28] Once the AFO had been obtained it was the CRU who was responsible for investigating whether a forfeiture order ought to be applied for. In their note of argument counsel for the respondent submitted that because the respondent was not responsible or accountable for the conduct of the CRU that conduct could not be relevant to any assessment of whether the circumstances were exceptional. The sheriff had been wrong to suggest otherwise. Hence the cross-appeal. However, in his oral submissions senior counsel accepted that the conduct of the CRU was capable of being a relevant circumstance which the sheriff could have regard to when determining whether the circumstances were exceptional. Nevertheless, it was clear from the chronology that the CRU had acted appropriately.

*Submissions for the interveners*

[29] It would only be in the rarest of cases, if at all, that acts of the Scottish Ministers could give rise to an application for compensation under section 30Z18 (or any of the equivalent provisions in sections 302(4), 303W, 303Z52 or 302Z64).

[30] Five features of section 303Z18 distinguish it from a common law right to damages. First, it permits a court to award "compensation", not damages. Second, compensation is payable only in respect of loss that is suffered "as a result of the making of the account freezing order". Third, an award may only be made where "the circumstances are

exceptional". Fourth, there is no entitlement to compensation - the court has a discretion whether to make an award. Fifth, any compensation awarded is to be paid by the person specified in the section; if the AFO was applied for by an officer of HMRC compensation is to be paid by HMRC.

[31] The prerequisite in section 303Z18 that the circumstances are exceptional is consistent with the rule in other parts of the United Kingdom that a public body which seeks a freezing injunction or other interim injunction in the exercise of law enforcement functions will not be required to compensate a defendant for loss caused by the injunction save in exceptional circumstances (*F Hoffmann-La Roche & Co AG* v *Secretary of State for Trade and Industry* (above), Lord Cross at p 371; cf Lord Reid at p 341 and Lord Diplock at p 364).

[32] The Scottish Ministers are the enforcement authority for Part 5 of the Act. They are also the only persons authorised to seek forfeiture of assets that have been frozen or detained under Part 5 by other public authorities. Acts of the Scottish Ministers follow and are distinct from the acts of those obtaining an AFO. Those other public authorities act independently of the Scottish Ministers.

[33] It was accepted that actings of the CRU might possibly be relevant in some cases to the question whether "the circumstances are exceptional". However, acts of the Scottish Ministers did not cause loss which was suffered as a result of the making of an AFO because those acts did not cause the AFO to be applied for or made. It was only loss that was caused by the making of the AFO (which it was accepted would include the making of extensions and variations) and which was not too remote that was compensable (cf in relation to cross-undertakings as to damages where a freezing order is made, *Abbey Forwarding Ltd (in liquidation)* v *Hone (No 3)* [2014] EWCA Civ 711, [2015] Ch 309, McCombe LJ at paragraph 63). Any loss caused by acts of a third party that was outside the control of the

applicant for the AFO would generally be too remote to be compensated. The respondent and HMRC had no control over the manner in which the CRU carried out its investigation. None of the potential applicant entities specified in section 303Z18 were responsible for acts of the Scottish Ministers. Nor were the Scottish Ministers answerable to any of those entities.

**Decision and reasons**

[34] The appellant's application to the sheriff for compensation was in the nature of a summary application. As such, it could be disposed of summarily (Sheriff Courts (Scotland) Act 1907, section 50). The sheriff was not constrained to ask himself only whether the appellant's averments were relevant. He was entitled to consider all of the material before him, including the chronology, as is this court.

[35] The first of the requirements in section 303Z18(3) is that the court is satisfied that the applicant has suffered loss as a result of the making of the AFO. The appellant avers that he has suffered such loss, by way of patrimonial loss and by way of distress and inconvenience. The patrimonial loss arose, he avers, because he was "advised to take independent financial advice in connection the balanced (sic) held on those accounts to generate a greater return to him." He avers that he "desired to follow that advice, but was prevented from investing the balances due to the AFO." No further specification is given as to what the advice would be likely to have been or the investment return which would have been likely to have been obtained. Had the absence of these details been the appellant's only difficulty, we would have been inclined to give him the opportunity to amend to provide appropriate specification of them. The appellant further avers that interest at the judicial rate of 8% per year would be appropriate compensation for the patrimonial loss element of the claim. Like the sheriff, we doubt if that would have been so. The Bank of England base rate when the

AFO was made was 4.25%. It increased to 4.5% on 11 May 2023, to 5% on 22 June 2023 and to 5.25% on 3 August 2023. A return of 8% is likely to have been very much higher than the return which could have been obtained from banks or other financial institutions on interest-bearing accounts at the time. The appellant avers that interest at the judicial rate is appropriate because he was "wrongfully" kept out of his funds. However, if there were proper grounds for the AFO being granted there can be no question of the funds having been "wrongfully" withheld. On the other hand, differing from the sheriff, we consider that the appellant's averments claiming solatium for distress and inconvenience would have been suitable for inquiry. It follows that we would not have dismissed the application on the ground that the appellant had no relevant averments that he had suffered loss as a result of the making of the AFO. In our opinion the sheriff erred in reaching a different view on that matter.

[36] We turn to the second of the requirements in section 303Z18(3), "that the circumstances are exceptional". The word "exceptional" ought to be given its ordinary meaning, which according to the Oxford English Dictionary (2nd ed, 1989, reprinted (with corrections) 1991) is "Of the nature of or forming an exception; out of the ordinary course, unusual, special". In *R* v *Kelly (Edward)* [2000] QB 198, where the context was section 2 of the Crime (Sentences) Act 1997 (exceptional circumstances which justify not imposing a sentence of life imprisonment)), the Court of Appeal gave the word "exceptional" its ordinary meaning. Lord Bingham of Cornhill CJ said (at p 208):

> "We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."

We respectfully agree. The word "exceptional" is also often used to denote a departure from a general rule or norm (*R* v *Offen* [2001] 1 WLR 253, Lord Woolf CJ at paragraph 72; *R(O)* v *Crown Court at Harrow* [2003] EWHC 868 (Admin), [2003] 1 WLR 2756, Kennedy LJ at paragraph 32; *MF (Nigeria)* v *Secretary of State for the Home Department* [2013] EWCA Civ 1192, [2014] 1 WLR 544, Lord Dyson MR at paragraph 43).

[37] The broad view the courts have taken when considering whether there are "exceptional circumstances" justifying an extension of the permitted period beyond 2 years from conviction for the purposes of section 14(4) of the 2002 Act is not one which should be taken with the words "the circumstances are exceptional" in section 303Z18(3). The statutory contexts of the phrases - confiscation in the case of section 14(4) and compensation in the case of section 303Z18(3) - are very different. In *R* v *Haden,* a case involving section 14(4), the court referred to the judgments in *R* v *Soneji* [2005] UKHL 49, [2006] 1 AC 340, and *R* v *Guraj* [2016] UKSC 65, [2017] 1 Cr App R(S) 32. At paragraph 25 of *Haden* Edis LJ opined:

> "25 The fundamental principle is that the 2002 Act regime for confiscation imposes a duty to act upon the court. The purpose is to ensure that crime does not pay. This is achieved by requiring the court to proceed in a certain way to compel those who have been convicted of an offence to disgorge any benefit they have gained from the offence or from a criminal lifestyle. Any procedural provisions are to be construed in this context and with this statutory purpose at the forefront of the analysis. That is the clear ratio of Soneji about which all members of the House were agreed."

Edis LJ went on to observe (paragraph 27) that the permitted period in section 14 is a procedural device of a highly unusual kind; that it is not a limitation provision; and that it would be very odd if a court were under a statutory duty to act in the public interest on one day, and suddenly and merely because of the passage of time unable to act at all on the next. The purpose of the permitted period is not to protect the interests of the offender but to

ensure that the court gives appropriate priority to the fulfilment of its duty to act in accordance with section 6 (paragraph 28). Finality for the offender is not a dominant feature of the confiscation regime (paragraph 29). Lord Justice Edis highlighted (paragraph 32) that in *Soneji* their Lordships had emphasised (Lord Steyn at [28], Lord Rodger at [33] and Lord Carsewell at [66]) that it was because of the context of section 14(4) that they did not adopt a very strict approach to the meaning of "exceptional circumstances". That fundamental principle and those considerations do not form any part of the statutory context of section 303Z18. Section 303Z18 envisages that the usual outcome – the norm or general rule - where an AFO has been made which has caused loss to the person affected by it, and none of the money held in an account is forfeited, is that there is to be no power to award compensation.

[38] Enforcement officers are not akin to private litigants who seek orders which interfere with the legal rights of others. They act in the public interest (cf *F Hoffmann-La Roche & Co AG* v *Secretary of State for Trade and Industry*, Lord Diplock at p 364E-F, Lord Cross of Chelsea at p 371B-G, Lord Reid at p 341D-F). Unlike such private litigants, when exercising their public duties enforcement officers do not act *periculo petentis*. It is in the public interest that enforcement officers are not deterred from applying for an AFO where there is a reasonable basis for doing so by fear of liability for compensation. Generally, there should be no liability for compensation where an enforcement officer has acted honestly, reasonably, properly and on grounds that reasonably appeared to be sound (cf *R (Perinpanathan)* v *City of Westminster Magistrates Court* and the cases there discussed). That compensation is only exceptionally, and not usually, to be awarded serves to prevent enforcement officers being unduly deterred from making appropriate AFO applications.

[39] The word "exceptional" in section 303Z18 ought to be given its ordinary meaning. Adopting that approach, are the circumstances here exceptional?

[40] Large credits to the appellant's accounts were unexplained. His income and other means for several years before the credits had been extremely modest and could not have been their source. There were reasonable grounds for suspecting that the monies in the accounts were recoverable property or intended for use in unlawful conduct. In applying for an AFO HMRC appear to us to have acted honestly, reasonably, and properly in the exercise of their public duty and on grounds which appeared to be sound. It was not necessary that the commission of a specific crime be alleged. It was not incumbent upon HMRC to recover and/or examine records going back further than they did in order to see if they could trace some very historic source of funding which might possibly be linked with the credits. Such matters were for the appellant to explain so that they could be explored and vouched during the course of the CRU forfeiture investigation. It is clear from the chronology that each time the AFO was extended it was because the CRU's investigation was continuing and there remained reasonable grounds for suspicion. In our view it is also evident from the chronology that the criticisms which the appellant makes of the conduct of HMRC and the CRU are unjustified, and that in fact many delays were caused by failures by the appellant or his agents to respond promptly and appropriately to reasonable CRU requests.

[41] The pursuer avers that he was retired; that the frozen funds were his life savings; that he suffered hardship by not having access to them and had to rely on family for financial support; and that he lost a significant sum which could have been obtained had he been able to invest the funds to obtain a greater return. These are circumstances to which regard may be had. In considering the weight to be attached to them it is relevant to

consider the fact that it was open to the appellant to seek to vary the AFO but that he did not do so (other than the application to release funds for a house purchase by his daughter). If the appellant required additional income over and above his pension he could have sought to vary the AFO to enable him to make withdrawals or payments from the frozen accounts to meet his reasonable living expenses (sections 303Z4 and 303Z5(1), (3)(a)).

[42] Ultimately (if somewhat reluctantly on the part of counsel for the interveners), all parties accepted that the conduct of the forfeiture investigation by the CRU was one of the circumstances to which regard could be had when determining whether "the circumstances are exceptional". If the CRU's conduct of an investigation had been improper or

[43] inappropriate, that could be a circumstance which might favour the conclusion that the circumstances were exceptional. Whether that conclusion ought to be drawn would depend on the whole circumstances of the case. Here however, as already noted, the criticisms made of the CRU are not justified. The conduct of the investigation by the CRU is not a circumstance which suggests that "the circumstances are exceptional".

[44] In our opinion, for these reasons, this is not a case where the requirement that the circumstances are exceptional is met. The sheriff was right to reach that conclusion.

[45] That brings us to the cross-appeal. Nothing of substance now turns on it. Since we accept (subject to the specification point which we have made) that the appellant's averments of loss would have been suitable for inquiry, it is unnecessary to discuss the interveners' causation submissions. The respondent and the interveners accept that the conduct of a forfeiture investigation by the CRU is capable of being a circumstance to which regard may be had when deciding whether "the circumstances are exceptional" in terms of section 303Z18(3). In our opinion those concessions were rightly made. The cross-appeal does not seek review of any part of the sheriff's interlocutor of 24 July 2024; the respondent

and the interveners merely take issue with the sheriff's *obiter* suggestion that the respondent could be "accountable" for the actions of the CRU. We can see that it was not helpful for the sheriff to put the matter that way. The Scottish Ministers, not the respondent, are responsible for the conduct of the CRU. Nevertheless, that does not prevent the CRU's conduct of a forfeiture investigation being a circumstance to which regard may be had when deciding whether the circumstances of a compensation application are exceptional. Having provided that clarification, we consider that the appropriate course is to refuse the cross-appeal.

**Disposal**

[46] For the foregoing reasons we refuse the appeal and the cross-appeal.