



OUTER HOUSE, COURT OF SESSION

[2026] CSOH 31

A37/26

OPINION OF LORD BRAID

In the cause

MOHAMMED AMEEN MIRZA

Pursuer

against

(FIRST) THE RT HON DOROTHY BAIN KC, THE LORD ADVOCATE;  
(SECOND) THE RT HON CATHERINE SMITH KC, THE ADVOCATE GENERAL FOR  
SCOTLAND

Defenders

**Pursuer: Deans; Levy + McRae Solicitors LLP**  
**First Defender: Blair; Civil Recovery Unit**  
**Second Defender: Massaro; Office of the Advocate General**

27 March 2026

**Introduction**

[1] In this action the pursuer seeks: (i) declarator that various sums seized from his premises as long ago as 22 October 2015 have been, and continue to be, unlawfully retained by the defenders and that a proportion of that money (amounting to £534,545 and €3,295) is his property; (ii) an order of specific performance requiring the defenders to transfer those sums to him; and (iii) an interim order under section 47(2) of the Court of Session Act 1988 for the pursuer's possession *ad interim* of those sums. The pursuer's motion for that interim order called before me. It was opposed by the defenders who are, respectively, the

Lord Advocate, who is averred by the pursuer to be sued in her capacity as representing both the Crown Office and Procurator Fiscal Service (COPFS), and the Civil Recovery Unit (CRU); and the Advocate General, as representing His Majesty's Revenue and Customs (HMRC). Counsel who appeared for the Lord Advocate stressed that the CRU was operationally independent of COPFS, and that the Lord Advocate was correctly a party only in respect of the former.

### **The statutory provisions**

[2] Central to the dispute before the court are the provisions of Chapter 3 of Part 5 of the Proceeds of Crime Act 2002. Section 294 of that Act provides that an officer of HMRC may seize any cash if he has reasonable grounds for suspecting that it is "recoverable property", which by virtue of section 304 is property obtained through unlawful conduct. Section 316 provides that in Part 5, "cash" has the meaning given by section 289(6) or (7): for present purposes, it is sufficient to note that that definition includes cheques of any kind, but does not include money in a bank account. Section 295(1) provides that while such officer continues to have reasonable grounds for his suspicion, cash seized under section 294 may be detained initially for a period of 48 hours, which may be extended by the court for up to 6 months: section 295(2). Section 298 then provides that while cash is detained under section 295, an application for forfeiture of the whole or any part of it may be made (in Scotland) to the sheriff by the Scottish Ministers (in practice, the CRU). By virtue of section 298(4), where any application for the forfeiture of cash is made, the cash is to be detained (and may not be released under any power conferred by that Chapter of the Act) until any proceedings in pursuance of the application (including any appeal) are concluded.

[3] Note should also be taken at this stage of section 47 of the Court of Session Act 1988. Section 47(2) provides that in any cause in dependence before the court, the court may make such order as it thinks fit regarding the interim possession of any property to which the cause relates, while section 47(2A) provides that that power includes, in particular, the power to make an order *ad factum praestandum* (including an interim order).

### **Factual background**

[4] The following factual background is broadly agreed. The sums of £903,370 and €3,295 were lawfully seized from the pursuer by HMRC officers on 22 October 2015 in relation to an alleged VAT fraud. The parties proceeded before me on the basis that those sums were lawfully retained in relation to subsequent criminal proceedings against the pursuer, lest they were required as productions. However, it transpired that, at the pursuer's request that the money be held in an interest-bearing account, the Lord Advocate passed the bulk of the sums in question to HMRC, with a request that it hold the money, whereupon the money was duly banked by it. The legal basis upon which all of that was done, or how the money could have been a production after it had been banked, is somewhat unclear, but in any event the pursuer does not challenge the lawfulness of that procedure, nor the retention of the money during the currency of the criminal proceedings, which came to an end on 9 December 2025. On that date, a fine was imposed upon the pursuer following his plea of guilty to a reduced charge. In the course of the criminal proceedings, the Crown made a motion for confiscation of the sum of £725,059.38, being the extent to which it averred the pursuer had benefited from his criminal conduct, but, after sundry procedure - which included, according to the pursuer, an agreement that the confiscation proceedings would be settled upon payment by the pursuer of the sum

of £95,000 - the motion for confiscation was dropped, the court being informed of that position by the Crown on 4 November 2025. In the event, no payment was made by the pursuer to the Crown.

[5] Although, on expiry of the days of appeal, a production release note was issued on 23 December 2025, instead of returning the cash to the pursuer the Crown referred the matter to the CRU. Thereafter, on or about 6 February 2026, the summons in the present action was lodged, along with a motion seeking interim orders, which did not proceed at that time. On 12 February 2026, the second defender made a request of the bank that the funds be withdrawn, with a view to their seizure. A cheque was available for uplift by Monday 16 February 2026, on which date two officers of HMRC flew to London to collect the cheque, which they seized later that day on their return to Scotland, utilising the power under section 294 of the 2002 Act, and the cheque being "cash" by virtue of section 289(6). The pursuer expressly concedes, in the summons, that those officers had reasonable grounds for suspecting the cash seized to be recoverable property.

[6] Following the seizure, the cheque was detained by the second defender under section 295 of the 2002 Act. Subsequently, on 17 February 2026, and within 48 hours of the seizure, forfeiture proceedings under section 298 of the Act were commenced by the first defender at Glasgow Sheriff Court. Accordingly, whatever the position was before, the cash is now being retained by virtue of section 298(4). A hearing has been fixed for 9 April 2026, although I am told that the proceedings may take some time to be finally resolved.

## Submissions

### *Pursuer*

[7] Counsel for the pursuer submitted that the second defender's seizure of the cash was not only not valid, but an abuse of process, and that the application for forfeiture had not been competently made. The Crown had no legal or coherent basis for retention of the funds after 23 December 2025, its common law power to hold productions for use in criminal proceedings having been relinquished on the issuing of a production release note. Either the second defender had no entitlement to seize funds which it had retained unlawfully, or by retaining the funds when it had no right to do so it must be deemed to have seized them before 16 February 2026: on either analysis, the seizure on 16 February was unlawful, in the latter event because no extension of the statutory 48-hour period had been applied for, and the forfeiture application was out of time. It could not be the case, where statute had provided an exceptionally short period of only 48 hours for funds to be detained without judicial intervention following a seizure, that unlimited time in possession of cash before then was allowed to consider whether or not to formally seize it. Even if the second defender was entitled to retain the funds for a short period while deciding whether grounds existed for their seizure, a delay of 6 weeks was not short but was unreasonable. Exercise of the power after that short period (whatever it was: a few days, at most) was an abuse of process. The possibility of the re-seizure of funds being an abuse of process (or at any rate, an abuse of power such that proceedings for forfeiture in pursuance of it would be an abuse of process) was recognised in *R (on the application of Kingdom Corporate Ltd) v Revenue and Customs Commissioners* [2024] 1 WLR 2157 at para 36 and *Chief Constable of Merseyside Police v Hickman* [2006] EWHC 451 (Admin) at 29. None of the cases relied upon by the defenders was in point. In *Iqbal v South Bedfordshire Magistrates Court* [2011]

EWHC 705 (Admin), the court had held that the section 294 power could be lawfully exercised in relation to money which had previously been detained under a different statutory power, section 22 of the Police and Criminal Evidence Act 1984 (PACE) (which did not extend to Scotland), if that was done within a short period of the section 22 right having come to an end. However, in that case section 22 permitted retention of the property for a short period, whereas the Crown had no corresponding right in Scotland upon termination of the criminal proceedings. Further, the appellant in *Iqbal* had made no request for the money to be returned to him, whereas the pursuer had. Although *The Scottish Ministers v Wrigley* 2006 SLT (Sh Ct) 42 was in point to an extent (albeit the money in that case had originally been seized under the Misuse of Drugs Act 1971, which was similar to section 22 of PACE), the reasoning in it was suspect and should not be followed.

[8] The balance of convenience favoured the pursuer. He needed the money in order to pay his legal fees and his fine. Additionally, the second defender had petitioned for his sequestration in respect of a debt larger than the cash involved in this action. The first defender would retain the right to apply to the court for a recovery order under section 244 of the 2002 Act. An order that the pursuer should have interim possession of £534,545 of the sum seized should be made.

#### *First defender*

[9] Counsel for the first defender submitted that the seizure of the cash was *ex facie* valid, and competent forfeiture proceedings had been raised in the sheriff court. That was the appropriate forum in which to challenge the competency of the seizure. Having accepted that there were reasonable grounds for suspecting that the cash was recoverable property, the pursuer now sought to usurp the functions of the sheriff. For that reason alone, the

motion should be refused. In any event, the pursuer had not pled a *prima facie* case, for three reasons. First, his case was predicated on his argument that there was no lawful basis for continued detention of the cash, but that was misconceived. Case law on both sides of the border was to the effect that the authorities were afforded a reasonable grace period after an original power to detain cash had lapsed, to determine whether the cash was recoverable property and could be seized: *Chief Constable of Merseyside Police v Hickman*, and *The Scottish Ministers v Wrigley*, both above. The 6 weeks in the present case between the production release note and the seizure fell within that grace period (by way of comparison, in *Hickman* the period after which the section 294 power was exercised was 6 months, and in *Wrigley*, 3 months). The reasoning in those cases applied *mutatis mutandis* in the present proceedings. It followed that, second, there was no time limit for the exercise of the power under section 294, and consequently there was no defect or illegality in the seizure. In particular, the lapse of time between the conviction and the seizure did not vitiate the seizure, and could not be sufficient to found the conclusion that the second defender had committed an abuse of process, which required an element of bad faith, which the pursuer had not averred. Moreover, it would be hard to hold that the first defender had acted in bad faith, when the procedure followed had the imprimatur of the court in *Wrigley*, a decision which had stood unchallenged for 20 years, even if it was now held to have been wrongly decided. As for the pursuer's argument that there had been a deemed seizure, it foundered on the definition of cash in section 289(6), from which it followed that funds in a bank account could not be seized. Third, even if there had been an error in the seizure process, that could not invalidate the forfeiture proceedings. Parliament could not have intended that the consequence of a technical failure in complying with a deadline was that the proceeds of crime should be returned to the possessor: *cf R v Soneji* [2006] 1 AC 340 at paragraph 23; *The*

*Secretary of State for the Home Department v Tuncel & Basbaydar* [2012] EWHC 402 (Admin) at paragraph 18.

[10] As regards balance of convenience, it favoured the defenders. There was a strong public interest in the proper administration of the POCA regime and in securing that those who had obtained cash through, or used cash for, criminal purposes should not have the benefit of that cash. If the cash were returned to the pursuer he would be able to spend it, transfer it or divest himself of it. The prejudice to him, were it not returned, was minimal. He had the opportunity to engage in the forfeiture proceedings, which was a summary process.

[11] Finally, the order sought was not competent. An order *ad factum praestandum* could not be made to enforce the payment of money: MacPhail's *Sheriff Court Practice* (4<sup>th</sup> Edition) (2023), paragraph 21.41. The approach of the court in respect of interim orders for consignment was instructive: see *Scottish Power Generation Ltd v British Energy Generation (UK) Ltd* 2002 SC 517, Lord Reed at 24: the court would make such an order only in relation to sums admittedly or certainly due. That could not be said of the sums in the present case where there was a clear dispute as to the right to possess the cash. It would be inappropriate for this court to innovate upon the *status quo* by granting the order sought, even if competent.

### ***Second defender***

[12] Counsel for the second defender submitted that the short answer to the pursuer's motion was that the 2002 Act was clear; the funds were to be detained until the forfeiture proceedings were concluded. The pursuer was not seeking, in this action, an order that the forfeiture proceedings be discontinued, but an order that the money be returned to him

while they were still ongoing, which was incompetent by virtue of section 298(4), whether or not the forfeiture proceedings were themselves competent. In any event, those proceedings were competent. Any irregularity in the seizure did not invalidate the forfeiture proceedings: *Secretary of State for the Home Department v Tuncel & Basbaydar*, above. Any challenge to the seizure had to be made by way of judicial review: *Ho, Ho, Hong and Chin v Lord Advocate* 2004 SC 1. That said, the seizure was neither incompetent nor an abuse of process. On no account could the second defender have done anything with the funds before 23 December 2025 when the possibility of any appeal was exhausted and the production release note was issued. It would have been open to the pursuer to challenge the retention of the money between 23 December 2025 and 16 February 2026, which he would have required to do by way of judicial review. The second defender's actions were at all times lawful: *Wrigley*, above. The time taken to consider whether to seize the funds was not unreasonable. The balance of convenience favoured the defenders for the reasons submitted by the first defender.

## Decision

[13] Three preliminary questions arise for consideration:

- (i) Was the second defender's continued retention of the cash from 23 December 2025 until 16 February 2026 lawful (and if so, on what basis)?
- (ii) When was the cash seized by the second defender – on 16 February 2026 or on some earlier date (and if so, when)?
- (iii) Was the second defender disqualified from utilising the section 294 power solely by virtue of the fact that it already held the cash in a bank account?

I will deal with each in turn.

*Was the second defender's continued retention of the cash from 23 December 2025 until 16 February 2026 lawful (and if so, on what basis)?*

[14] The pursuer does not argue that the money was not lawfully held by the second defender up to 23 December 2025, although as I have already highlighted, the precise legal basis for it being held by the Advocate General (as representing HMRC) as opposed to being held by the Lord Advocate in her capacity as head of the system of public prosecution in Scotland for potential use in the prosecution against the pursuer, remains unclear. I raise this not because I consider that the cash was detained from the pursuer unlawfully while the prosecution was ongoing, but because the legal basis for holding it in the first place may have a bearing on the second defender's entitlement to continue to withhold it from the pursuer after 23 December 2025, when the production release note was issued. Certainly, nothing in the 2002 Act itself authorised the second defender to retain the funds prior to 16 February 2026, when the section 294 power was utilised. If not the Act, then from where did the power or entitlement emanate? Where the issue has arisen in England, the courts have been able to identify a specific source from which the power to detain can be said to arise. So, in *Iqbal*, the power was found in section 22 of PACE, which conferred the power to detain money seized under section 19 of that Act for "so long as is necessary in all the circumstances". It is noteworthy that it was said in that case that the decision to exercise the section 294 power must be taken within a short time in the context of the section 22 power (which tends to confirm that any grace period which is allowed must be assessed by reference to how the original entitlement to detain the cash arose). I further observe that in *Gough v The Chief Constable of the West Midlands Police*, [2004] EWCA Civ 206, a decision of the Court of Appeal referred to in *Iqbal*, the general thrust of the court's decision was that in

general the police do *not* have a common law power to retain property after a statutory power to retain it has lapsed, save only perhaps for a short time with a view to making a fresh application to detain it. In *Hickman*, above, the court observed, at para [3], that the police had no power at common law to retain possession of any property, including cash, against a claim by the owner even if they reasonably believed, or could prove, that it represented the proceeds of crime. Although we are not in this case concerned with the powers of the police, it is difficult to see why officers of HMRC should have any greater entitlement than the police to withhold money from its rightful owner. Insofar as the defenders rely upon English law, it seems to me that tends to weaken, rather than reinforce, the argument that there was any entitlement to retain the cash following 23 December 2025, certainly for as long as 6 weeks. Viewed from the standpoint of principle, it is hard to see that there was any defence to this action at the point when it was raised in early February 2026. I do not read anything in the one Scottish case referred to, *The Scottish Ministers v Wrigley*, above, as contradicting this conclusion. The facts in that case were very similar to those of the present case, in that the police had seized cash in executing a search warrant which had been retained throughout subsequent criminal proceedings which concluded with the acquittal of the accused. Thereafter, the cash was not returned to the accused but was retained for a further 3 months before being seized under section 294. At para [52] of the sheriff's note, he recorded that counsel for the Scottish Ministers in that case had made no concession that the police should have returned the cash to the accused following his acquittal, but had hypothesised that if that were correct, there might be a right of relief against the police, for example for loss of interest, which at least acknowledged the possibility that the police had no right to have withheld the cash. At para [30] the sheriff said that on the eventual acquittal of the accused, whatever legal right he had to request or

require the release of the money, it was not under the 2002 Act. That is as may be, but it does not follow that the police in that case, or the second defender in this, had any right to retain the money following the cessation of the criminal proceedings. Although, as the sheriff said, the section 294 power may be exercised at any time, that takes one no further forward in determining whether, while deciding whether to exercise the power or not, the defenders had any entitlement to retain the money. For all these reasons, I remain unpersuaded on the arguments presented to me that either defender had any entitlement to retain the pursuer's money between 23 December 2025 and 16 February 2026.

*When was the cash seized by the second defender – on 16 February 2026 or on some earlier date (and if so, when)?*

[15] This question is more straightforward. Despite the submission of counsel for the pursuer that the definition of cash in section 289 applies only in the context of a search, section 316 applies that definition across the whole of Part 5. The section 289 definition does not include sums at credit of a bank account. It follows that there could have been no deemed seizure of cash as so defined at any point between 23 December 2025 and 16 February 2026. In any event, following *Iqbal* at para [29], point 10 therein, I agree that “seizure” denotes a formal act, requiring a conscious decision as to whether the criteria are satisfied.

*Was the second defender disqualified from utilising the section 294 power solely by virtue of the fact that it already held the cash in a bank account?*

[16] This question may also be briefly answered, and is not disputed by the pursuer. The authorities make clear that a sum may be seized, even though it might previously have been

seized, or detained, under a separate statutory power. Indeed, they do not preclude the notion that the section 294 power itself may be exercised more than once, although that is not the case here.

*The core issues*

[17] This brings us to the core issues raised by this case, which are, first, what effect the foregoing conclusions have on the legality of the seizure and the subsequent forfeiture proceedings; and, second, whether this action is in any event the appropriate forum for deciding that. It would have been open to the pursuer to challenge the legality of the seizure and/or to attempt to suspend the sheriff court action by means of judicial review (*Ho, Ho, Hong and Chin v Lord Advocate*, above) but he has not done so. Counsel for the pursuer invited me to utilise the power contained in RCS 58.15, which allows the Lord Ordinary to order that a cause raised as an action should proceed as a petition for judicial review, if I considered that appropriate. However, I do not consider it appropriate to do so where the pursuer is not presently seeking any order challenging the legality of either the seizure or the forfeiture proceedings. The rule is not intended to allow the court to fashion a case for a litigant which has not been pled. In any event, where an action is ordered to proceed as a judicial review petition, RCS 58.15(2) provides that it must thereafter proceed as if permission had been granted; and it is far from obvious to me, to put it no higher at present, that permission would be granted to the pursuer, on his present pleadings, allowing him to challenge the seizure on 16 February 2026, or the forfeiture proceedings, as unlawful (which is a factor militating against making an order under RCS 58.15(2)). I accept that the defenders' reliance on *Wrigley* is not a complete answer to the pursuer's case, even though the period for which the money was retained in that case was longer than here, because in

that case, as I have observed, the sheriff did not hold that the money was being held unlawfully and so the question was not considered by him. However, as the pursuer appears to accept by relying upon abuse of process, even if the funds were wrongfully retained between 23 December 2025 and 16 February 2026, it does not follow that the seizure on that latter date was unlawful. Granting that the English authorities do pave the way for an abuse of process/power challenge in appropriate circumstances, the pursuer's averments in that regard are presently insufficient to make such a case, particularly against the background that he expressly concedes that the officers who effected the seizure had reasonable grounds for doing so. The averments of abuse of process, at their highest, are that the Lord Advocate, acting in a different capacity, through a procurator fiscal depute, agreed to return of most of the cash to him, but as counsel for the first defender pointed out, that is of no relevance in deciding whether either the second defender, or the Lord Advocate in her capacity as representing the CRU, is guilty of any abuse of process. One can perhaps test the matter by contrasting what actually happened with a counterfactual world in which the second defender had returned the cheque to the pursuer, then immediately seized it back under section 294. Would that have been an abuse of power? If so, why? If not, why should what actually happened be so categorised? I need not answer these questions at this stage, but they may require to be grappled with should the pursuer maintain his abuse of process challenge.

[18] Finally, even if the seizure was a breach of power, what effect, if any, did that have on the forfeiture application? Again, absent a challenge by way of judicial review, it is unnecessary for me to answer that question in this action. In deference to the submissions made, I will however make a couple of observations. First, on the hypothesis that the seizure was invalid because it was an abuse of process, I am not persuaded that was the sort

of failure the House of Lords had in mind in *R v Soneji*, above, in holding that a *bona fide* error did not invalidate the confiscation proceedings in that case. On the other hand, the following observation of Keith J in *Tuncel*, above, at para [18], is apposite:

“If the original seizure and detention of the cash had been unlawful, why should the UKBA be allowed to benefit from that? Should not the original illegality be regarded as infecting everything which happened thereafter and disabling the court from subsequently ordering its forfeiture, even if the court was satisfied that the provenance of the cash or its intended use was in truth unlawful conduct? An argument along those lines was considered in *R (on the application of Hoverspeed Ltd) v Commissioners of Customs and Excise* [2003] QB 1041. The relevant statutory regime in that case related to the power to seize goods liable for forfeiture under the Customs and Excise Management Act 1979, even if the stopping and search of the car in which the goods were found and which resulted in their subsequent seizure had been unlawful. The Court of Appeal concluded that the issue was one of statutory construction, and a proper construction of the relevant statutory regime was that the power to seize the goods was not dependent on the exercise of any power to stop and search the car, with the result that there was no unfairness in the seizure of the goods, even though their presence had been discovered in the course of an unlawful examination of the car. Applying that reasoning to the present case, there is no doctrine in cases concerning the forfeiture of cash denying the authorities the ‘fruits of the forbidden tree’, unless the relevant statutory regime made the forfeiture of the cash dependent on the cash having been lawfully seized and detained in the first place. For the reasons I have already given, I do not think that the relevant statutory regime did that.”

[19] Having posed these questions, it is appropriate to turn now to consider what is the appropriate forum for them to be resolved. Absent a successful judicial review challenge, I agree with the defenders that the appropriate forum for determining whether the cash should be returned to the pursuer is Glasgow Sheriff Court in the current forfeiture proceedings, which are *ex facie* valid and which provide a statutory basis for continued retention of the money, particularly where it is conceded that there were grounds for the suspicion that it constitutes recoverable property. The pursuer will be entitled to advance an argument in those proceedings that the forfeiture action is incompetent.

[20] Returning to the pursuer’s motion for an interim order to be made for the return of just over half of the seized money to the pursuer, for the reasons stated my view is that the

pursuer has not pled a *prima facie* case that there was any defect in the seizure of the cash or that either it or the forfeiture proceedings amounted to an abuse of process. Further, to the extent that he does wish to challenge the seizure, he would require to do so by means of judicial review. Consequently, there is no basis for this court interfering with the forfeiture proceedings and ordering that the money which has been seized and which is the subject of those proceedings should be returned to him at this time. Even if that is wrong, the pursuer's case is at best very weak, a factor to be weighed in the balance of convenience. Insofar as that balance is concerned, the public interest in securing that those who have obtained money from, or have it for the use of, criminal purposes do not have the benefit of that money, and are unable to dissipate it in advance of a judicial determination as to whether it should be forfeited or not, outweighs the prejudice to the pursuer in being deprived of it for a further period, notwithstanding the long period for which he has already been deprived of it.

[21] For completeness, as regards the competency and appropriateness of an order under section 47 of the 1988 Act, while there may be a dispute as to the ultimate destination of the pursuer's money, there is no dispute that the money being retained is his and that, but for the seizure and forfeiture proceedings, he would be entitled to it. In that sense, it would have been open to the court to regulate its possession by means of a section 47 order had it been appropriate to do so. Section 298(4) does not of itself prevent the court from making an order, since it merely prevents money from being returned to the pursuer under the provisions of that Act, pending resolution of the forfeiture proceedings. However, it is not appropriate to make an order, partly because the mechanism for determining what is ultimately to happen to the money is contained within the 2002 Act; and partly because section 47(2) allows the court to regulate possession of any property while a court action is

ongoing: implicit in the concept of “possession” being the preservation of the property, whereas the pursuer’s avowed intention is not to preserve it but to spend it. Further still, to the extent that section 47(2A) provides that the power under section 47(2) includes the power to make an order *ad factum praestandum*, such an order is not competent so as to order the payment of money. It follows that even if I had taken a rosier view of the pursuer’s prospects, I would not have been prepared to make the order sought.

[22] For all of the foregoing reasons, the pursuer’s motion for an interim order is refused.