



OECD International Academy for Tax Crime Investigation

Asset Recovery: Freezing and Seizing Assets



INTERNATIONAL CRIMINAL CONFISCATION AND NON-CONVICTION BASED CONFISCATION

International Asset Recovery

Diana Cottrell
UK Liaison Prosecutor



Confiscation of Assets

Three types of confiscation:

1. Criminal confiscation
2. Non-conviction based confiscation
3. Administrative confiscation/forfeiture



Jurisdictions may have a mix of one or more of these types of confiscation. In addition, victims may bring a civil claim for loss or damage suffered.



CRIMINAL CONFISCATION



Criminal Confiscation

- Available in most jurisdictions as a result of Articles 31 and 54 of the United Nations Convention Against Corruption
- Generally preferable to other forms of confiscation owing to the powers available and the reduced costs as an addition to criminal conviction
- Greater variation of confiscation regimes between different jurisdiction





Criminal Confiscation: Categories

There are three broad categories of criminal confiscation regime:

1. Value based
2. Property based
3. Mixture of both



In each, the proceeds of the criminal offending is targeted for confiscation but the definition of the proceeds may be different



Criminal Confiscation: Burdens of Proof

- Burden of proof at confiscation may be different to the prosecution for the offence
- May impose a secondary requirement to be proved by the prosecutor to a lower standard of proof
- May impose a burden on the defendant (“a reverse burden”) usually to a lower standard



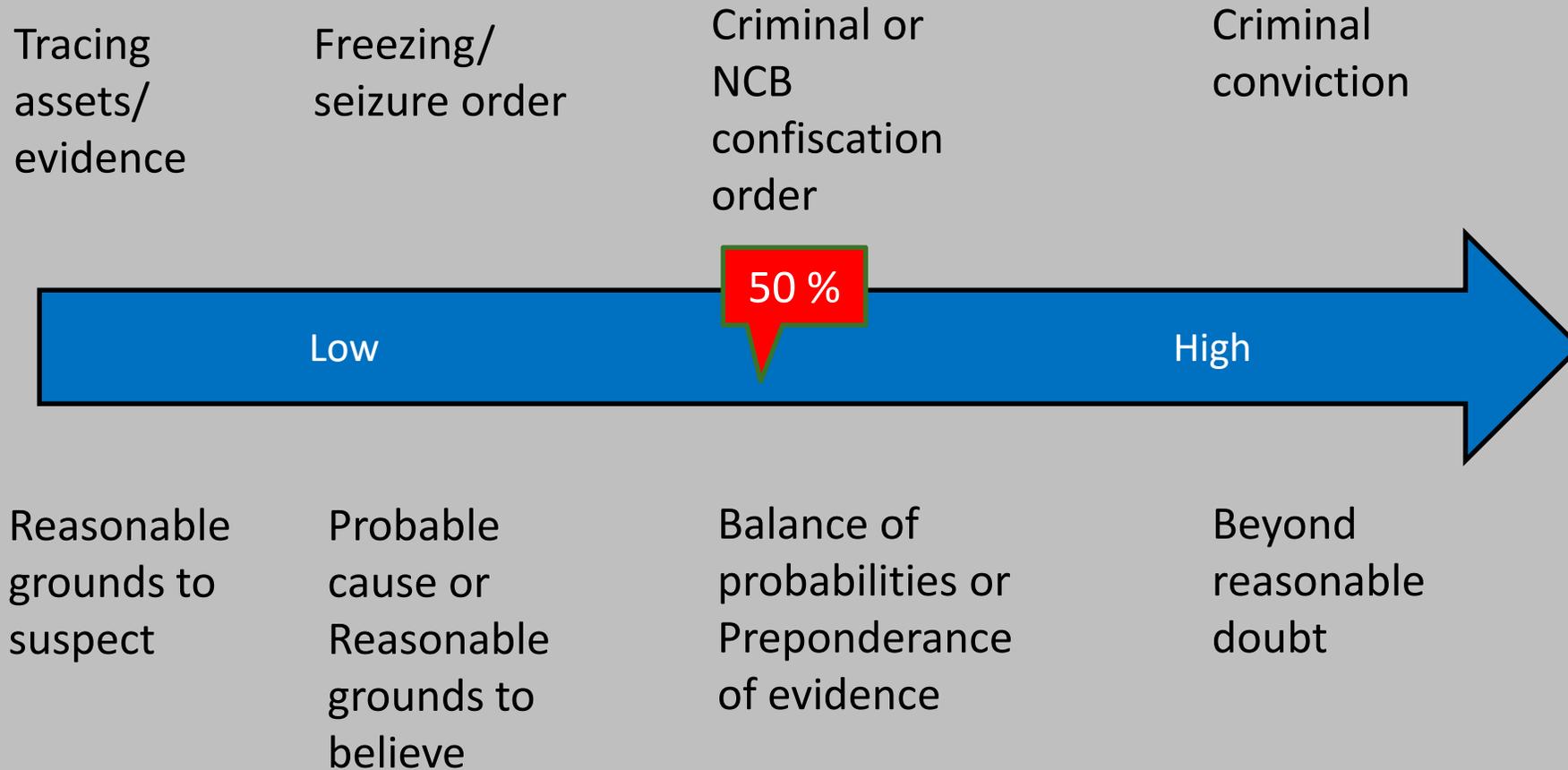


A quick poll...

What standard of proof would be required
for criminal confiscation proceedings?



Standards of Proof





Criminal Confiscation: Property Based

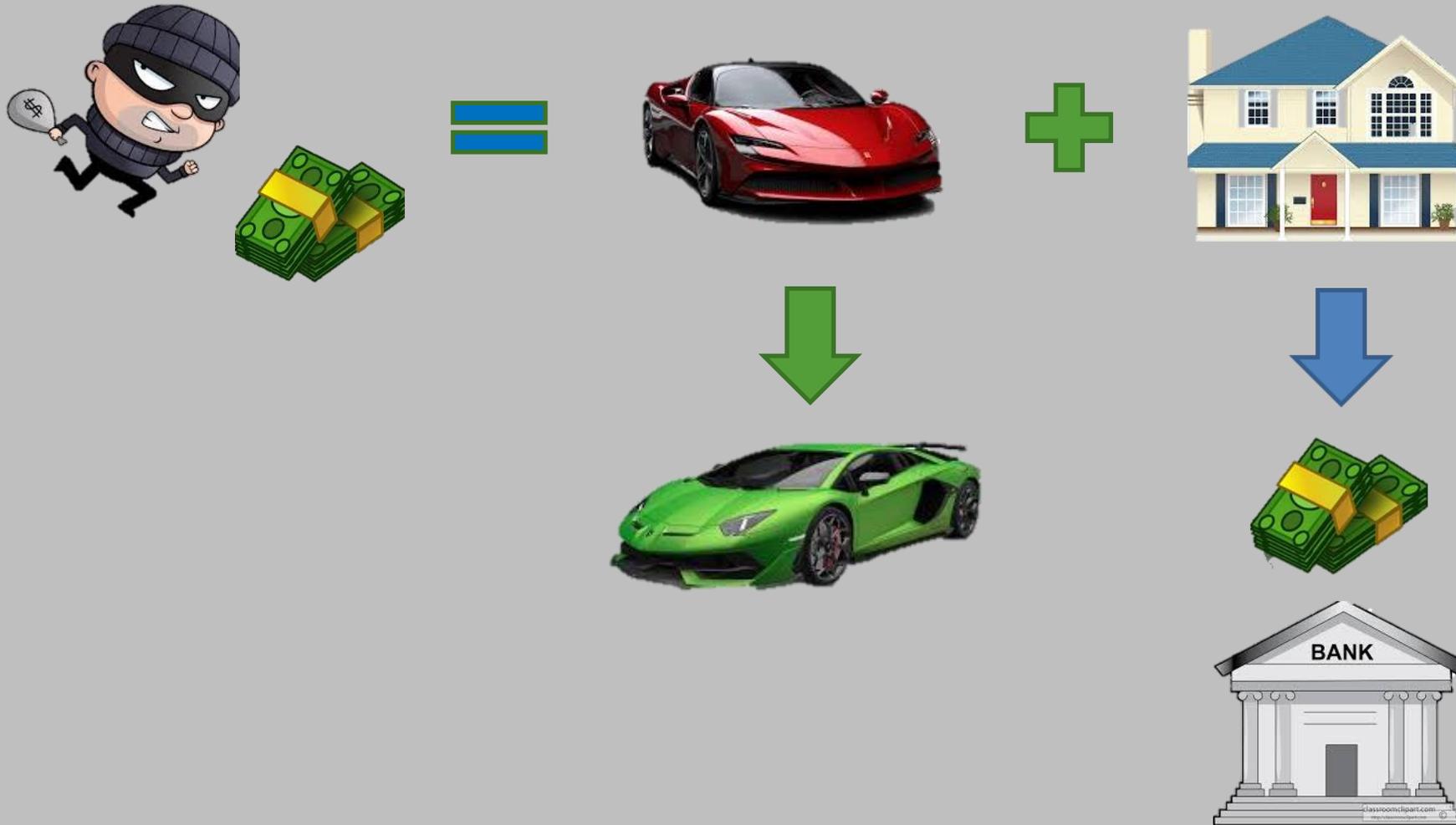
Confiscates

- Anything of value obtained directly or indirectly as a result of the offence
- Requires a link between the identified asset and the offence
- Indirect proceeds usually includes the increase in value of an asset and a benefit which would not have accrued but for the offence



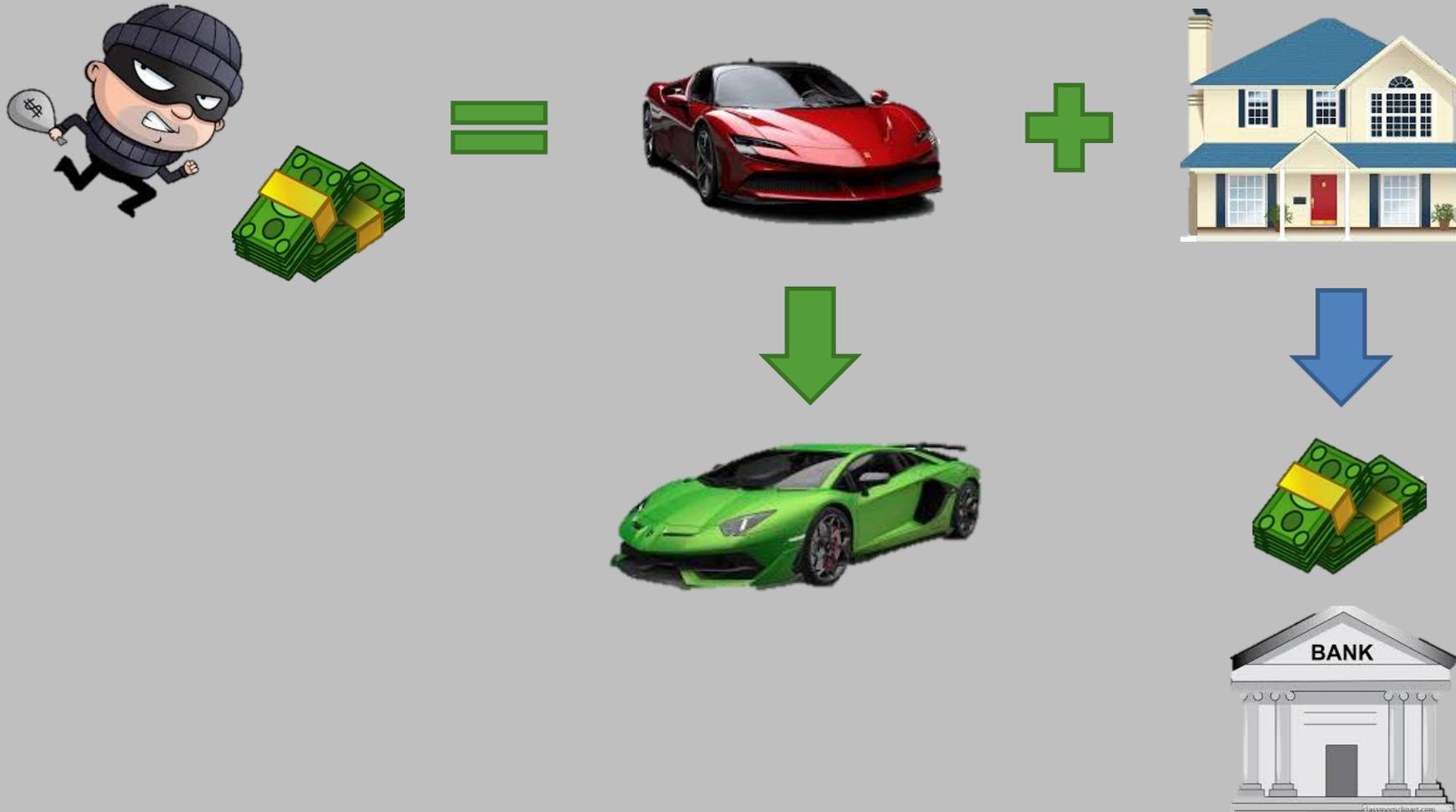


Criminal Confiscation: Property Based





Is the cash at bank direct or indirect proceeds of crime?





Criminal Confiscation: Property Based

Problems with this type of regime include:

- Money laundering has obscured the property obtained by mixing with or converting into other assets
- No direct participation by the recipient in the offence
- Conviction for an offence which has no direct or obvious monetary benefit
- Restricted to property which resulted from the crime (not instrumentalities)





Criminal Confiscation: Property Based

Additional measures to increase effectiveness:

- Broad definition of property
- Substitute asset provisions
- Extended confiscation
- Extra jurisdictional definition of criminal proceeds
- Confiscation of instrumentalities used or intended for use in any manner or part to commit or facilitate the commission of an offence





Criminal Confiscation: Value Based

Confiscates

- Determine the value of the benefit derived from criminal conduct and imposes an equal monetary penalty

Other features

- Often discretionary
- May consider hardship, the ordinary use of the asset or require proportionality





What is the amount of the benefit obtained?



\$1,000,000.00

What is the amount of the benefit?



Criminal Confiscation: Value Based

Problems with this type of regime include:

- Expert evidence may be required to determine the benefit and the prosecutors case may rest upon the credibility of its expert
- Prosecutors do not continue with proceedings for an offence resulting in no benefit being determined
- Definition of ownership may limit the assessed ability to pay





Criminal Confiscation: Value Based

Additional measures to increase effectiveness:

- Rebuttable presumptions which reverse the burden of proof in relation to possession, associations, lifestyle, transfer of assets and the nature of offending
- Extended confiscation
- Mechanisms to void the transfer of assets or recover their value
- Automatic confiscation on conviction in set circumstances





Breakout

Groups 1 and 3: For each country in your group find out which type of system everyone has? Property based or value based?

Groups 2 and 4: Why is the difference between systems important?



NON-CONVICTION BASED CONFISCATION



Non-Conviction based Confiscation

Confiscates

- Proceeds of or instruments of crime
- Property based



Common uses

- Offender dead, fled jurisdiction or is immune from prosecution
- Owner of the asset is unknown
- Acquittal or lack of prosecution
- Civil law jurisdictions may use it to confiscate assets in large or complex cases where criminal investigation is ongoing.



Non-Conviction based Confiscation

Procedural differences

- Within the context of criminal proceedings but without the need to determine guilt
- Independent or parallel civil proceedings which apply the civil burden of proof

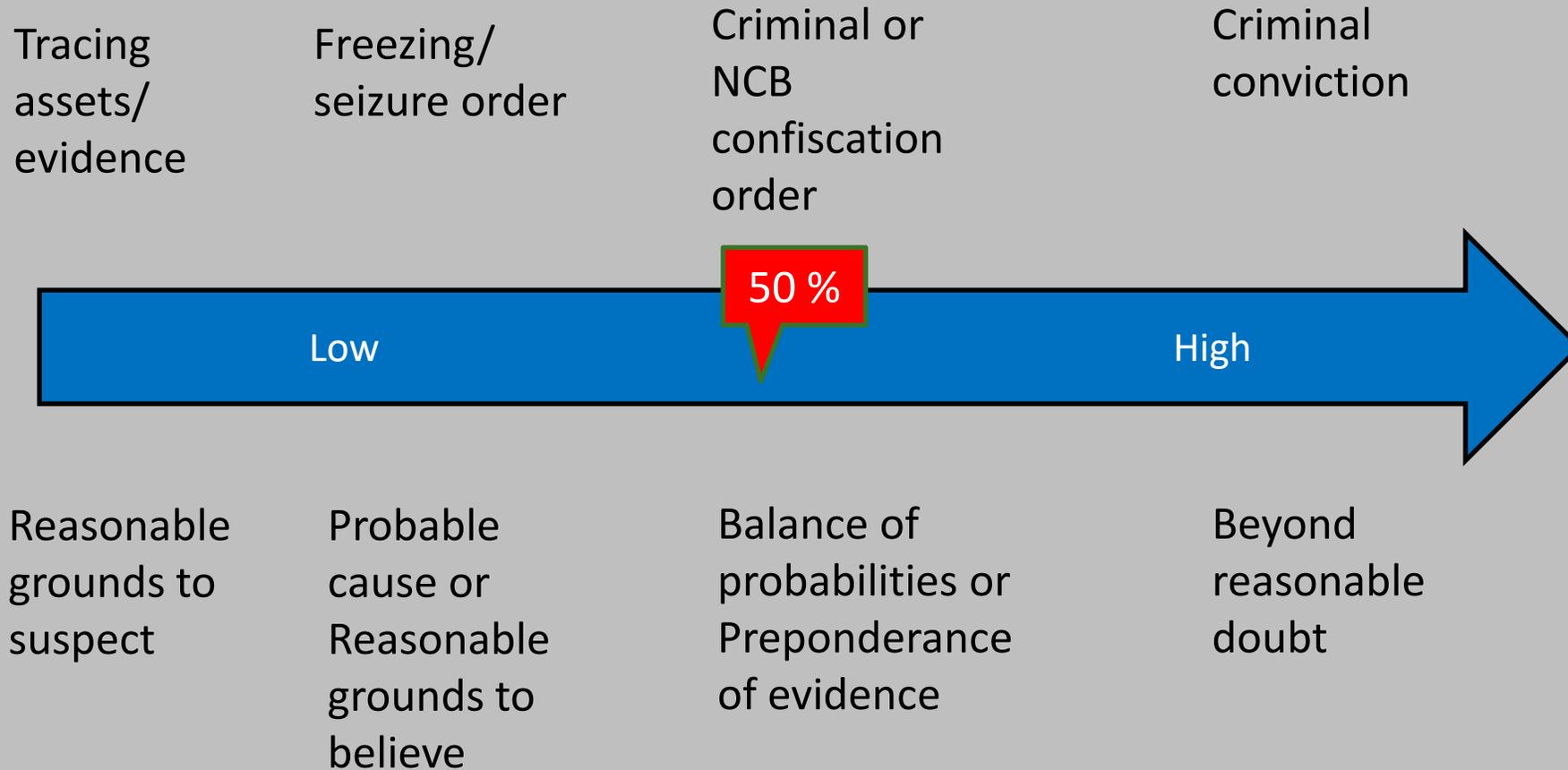


Common restrictions

- Only pursued once criminal proceedings have been concluded



Standards Of Proof





Non-Conviction based Confiscation

Problems

- Money laundering has resulted in the origins of the asset being obscured or mixed with legitimate assets
- Ability to trace asset beyond direct proceeds





Non-Conviction based Confiscation

Ancillary orders

- Property freezing orders
- Disclosure orders
- Unexplained wealth orders



Unexplained wealth order

The Telegraph

Evening Standard. WEBSITE OF THE YEAR

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News > UK

Wife of jailed banker loses legal challenge over UK's first 'McMafia' wealth order

HARRIET BREWIS | 8 minutes ago | 0 comments

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Banker's wife loses £11m challenge

Zamira Hajiyeva has lost her challenge over the UK's first unexplained wealth order (PA)

Zamira Hajiyeva is attempting to overturn an Unexplained Wealth Order against the property in central London



ADMINISTRATIVE CONFISCATION



Administrative confiscation or forfeiture

Less common, but types of power include:

- Forfeiture of property or money which represents criminal proceeds or is intended for use in crime on application by investigators
- Freezing of bank accounts subject of suspicious transaction (or activity) reports

Usually involves an exercise of judicial power or an opportunity to appeal to a court in cases of dispute





Breakout: Case Study 2

Mr Pink is alleged to have obtained \$1,000,000 as a result of tax fraud. His assets include a large house with considerable mortgage payments, an investment property which he bought with the proceeds of the fraud, a bank account containing the rental income from the investment property and some artwork. You have just been informed by the prosecutors that there is insufficient evidence to prosecute.

What's your plan B?



ANY QUESTIONS?