GUILDHALL CHAMBERS

Crime News

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Team News

The Guildhall Chambers Crime team is delighted to welcome three new members, Kerry Barker, Rupert Lowe and Mary Cowe.

Kerry Barker and Rupert Lowe both join Guildhall Chambers from St.John's Chambers. As

well as being an efficient criminal practitioner Kerry is also regarded as the West's leading junior in licensing and an expert in judicial review work. Rupert's criminal

practice not only incorporates both prosecution and defence, he also prosecutes regulatory offences and fraud on behalf of local and national government departments, and Courts Martial for the RAF. Mary has joined

Chambers after the successful completion of her pupillage, under the guidance of Anna Vigars. Mary specialises in criminal work and is instructed to prosecute and defend in Magistrates, Youth and Crown Courts throughout the Western Circuit.

We would also like to welcome our new criminal clerk, Steve Lewis-Norman. Steve joins us from Nile Arnall solicitors in Bristol and has already proved a popular addition.

Welcome to the Spring 2008 Crime Team newsletter.

While the subject of confiscation is hardly a 'new' area of the law, there have been a number of important developments to merit another visit to this sometimes complicated province of criminal law.

It is unfortunate that the promised ruling by the House of Lords conjoined appeals of *R v Green, May and Jennings*, in which the Court is considering the proper definition of benefit with regard to the application of the assumptions under Proceeds of Crime Act 2002 will, I am told, be with us until the summer and not in time for this newsletter as originally hoped.

All practitioners in this area of the law should keep a weather eye for the judgement which is likely to provide courts with clearer guidance on the application of phrases contained within Section 10(6) POCA – namely when the assumptions should not be applied because they are shown to be incorrect or where there is a 'serious risk of injustice' if the assumption is made. It is likely to have particular relevance to the issue of 'benefit' as between co-defendants and the issue of 'double recovery'.

At the same time the newsletter carries an article by Rob Davies covering the increasingly prosecuted area of 'money laundering' offences covered by Sections 327-329 Proceeds of Crime Act together with an article by James Townsend on an area of growing significance as more enforcement cases are being brought – the role of the third party intervener.

Modern criminal litigation increasingly involves building successful teams to deal with specialist aspects of cases. Will Davies from the Forensic and Investigation Services Department of Grant Thornton UK LLP has kindly contributed an article giving a Forensic Accountant's perspective of confiscation proceedings. Will has worked on many cases – both civil and criminal – together with members of Guildhall Chambers for many years and hopefully his experience and alternative point of view will be useful.

As you will have noticed in the news column and as a sign of our quiet confidence in these difficult times for everyone involved in Criminal Law, Mary Cowe has joined our Crime Team following a successful pupillage with Anna Vigars. We have also had the very welcome addition to the team of Rupert Lowe and Kerry Barker, both of whom will be well known to most readers.

Similarly we would like to belatedly welcome Steve Lewis-Norman to our clerking team. Steve joins us from Nile Arnall solicitors in Bristol and, in the months that he has been here, has already proved an efficient and approachable addition to Chambers. As ever, our clerking team aim to provide a friendly and professional first point of contact.

Brendon Moorhouse, Editor.

The POCA 2002

Happy anniversary! The operational period of POCA 2002, Part 2, is five years old this year (applying to offences committed on or after 24th March 2003). Part 2 – making of confiscation orders – is now a Court's main vehicle for depriving an offender of any financial gain he may have received from his crimes (the DTA 1994 and CJA 1988 provisions now rarely used, only applying to those offences committed before 24th March 2003).

Perhaps surprisingly, Part 2 remains almost unchanged since the Act was passed six years ago. Likewise, the aim of defence practitioners is obvious and remains the same – stay clear of confiscation proceedings entirely. This is not always possible and the process is now a familiar one:

Upon conviction or at sentence:

1 The Prosecutor informs the court there will be a FIU investigation (s.6).

2 The Defendant is asked to produce an affidavit/statement detailing his assets (s.18).

3 A Prosecutor's statement arrives (penned by a FIU officer) – usually attempting to justify why everything the Defendant has touched within the last six years should be confiscated (s.16).

4 The defence respond (s.17).

5 The prosecutor (FIU) responds to the defence response with terms such as, 'the legislation is draconian in nature' and 'mere assertions by a defendant are not enough to discharge his burden'

6 The court makes a confiscation order (s.6(5)(c)) (within 2 years of conviction, unless exceptional circumstances exist – s.14).

In simple terms, a confiscation order is broken down into decisions on two figures – the benefit figure and amount to confiscate.

Decision 1

A court decides the value of the Defendant's *"benefit"* from his crime (s.6(4) and s.8). This is given a wide definition. A Defendant benefits from his crimes if he *"obtains property as a result of, or in connection with, the conduct."* (s.76(4)).

If proceedings cannot be avoided, life will be significantly easier if a client avoids being characterised as having a *"criminal lifestyle"*. This is an initial and mandatory question for a court (s.6(4)(a)). Avoiding this label restricts the benefit figure to benefit particular to the offence – *"particular criminal conduct"* (s.6(4)(c). In contrast, having a *"criminal lifestyle"* inevitably inflates the benefit figure placing a greater chunk, if not all, of the Defendant's assets at risk. It is damning because a Court starts from the point of making four (rebuttable) assumptions. These assume anything the Defendant has got now, has had within the last six years, and anything spent in the last six years, is benefit (*"general criminal conduct"* – a court is not restricted to benefit simply related to the particular offending 10(1) – (8)).

There are three ways to gain a *"criminal lifestyle"*:

Route 1 is automatic. Simply, a Defendant is convicted of a Schedule 2 *"lifestyle offence"* (s.75(2)(a)). These are unpredictable, but exhaustive – drugs, money laundering, terrorism, people/arms trafficking, fake money, intellectual property, pimping, and blackmail. Six years ago, what stood out was the absence of day-to-day offences including theft, handling, obtaining property and services by deception. These two latter offences have now been replaced, together with the creation of new offences, by the Fraud Act 2006. Again, there is no obvious intention to bring offences under this Act into Schedule 2. However, **routes 2 and 3** can catch any offence(s):

Route 2: the offence will qualify if it is seen to be *"conduct forming part of a course of criminal activity"*, because either (a) in the same proceedings, there was at least three other offences (i.e. four offences in total – TICs do not count), or (b) there have been two previous convictions on separate occasions in the last six years (s.75(2)(b) and (3)).

Route 3: the offence is one committed over a period of *"more than 6 months"* (s.75(2)(c)).

Further, with **routes 2 and 3**, it is necessary for (a) the offending to amount to conduct from which the Defendant has benefited and (b) the value of benefit is at least £5,000 (TICs do count here) (s.75(4)).

Decision 2

The court decides the amount to be confiscated.

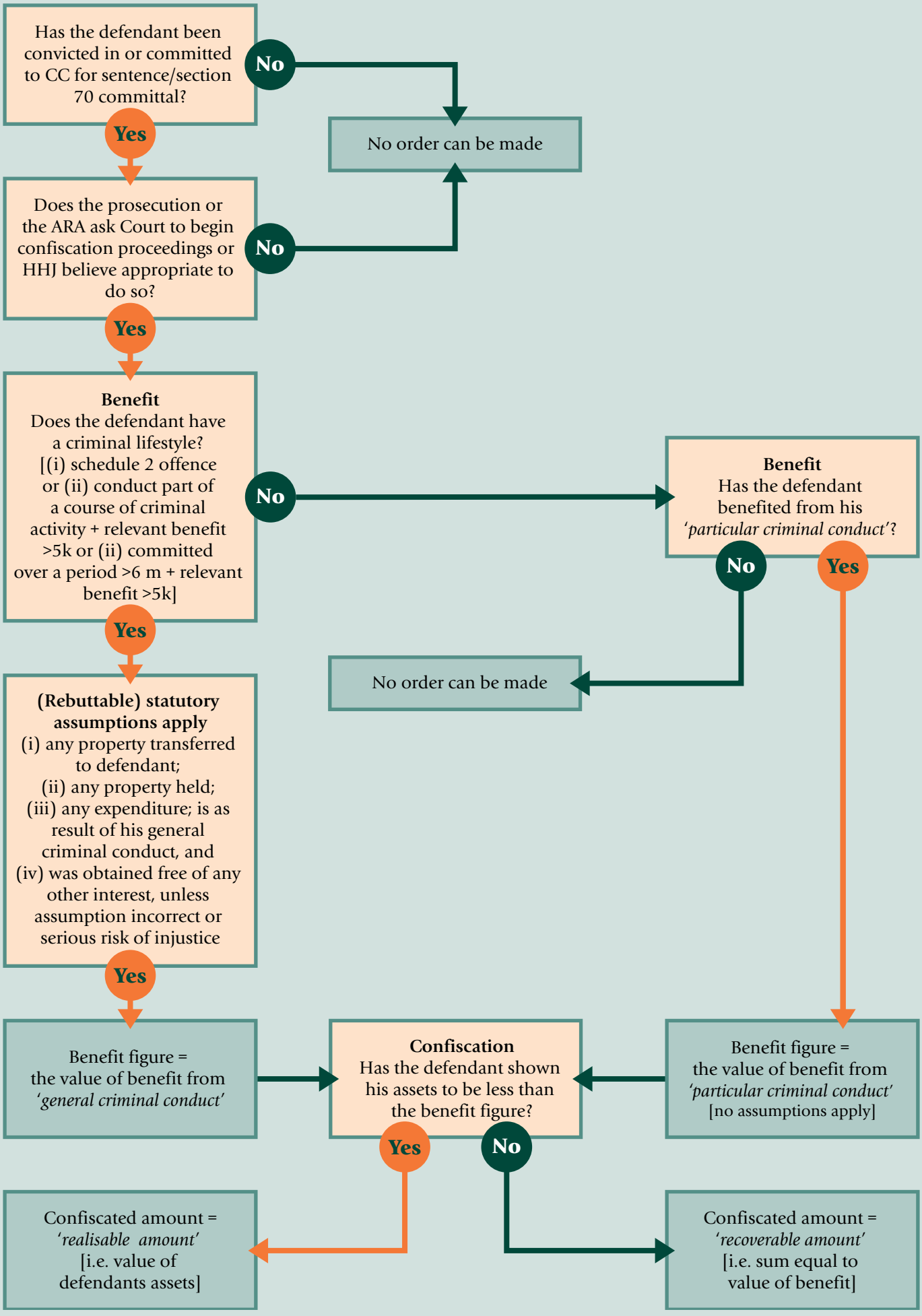
A court will confiscate the *"recoverable amount"*, a sum equal to the benefit figure (s.7), save where the Defendant has discharged his burden in showing his assets to be less. Here, it is referred to as his *"available amount"* (s.7(2) and s.9). It is this second amount routinely, and sometimes presumptively, confiscated. This is especially so in *"criminal lifestyle"* cases where the benefit figure can be so (disproportionally) high. However, the more draconian starting point should not be forgotten. However, courts still seem reluctant to recover anything above those assets identified by the FIU (notwithstanding the burden is on the Defendant), save where a Defendant clearly has hidden assets.

It is trite to say the legislation is draconian. A skilled magician would struggle to defend a client caught within the assumptions and wide definitions. It is not magic that is required. Rather, proper evidence capable of explaining why a client with no legitimate income has a £2000 bank credit and BMW (proper evidence = more than the client's mere assertion he benefited under Aunty Jean's inheritance. Aunty Jean leaving no written will, and unluckily, was not known to a single independent person capable of confirming she was a real person). However, there does remain some scope for creativity in avoiding the *"criminal lifestyle"* label:

- if charged with a Schedule 2 lifestyle offence, will the Prosecution accept a plea to a non-Schedule 2 offence (but do not fall foul of **route 2 or 3**).
- the flipside – offering four or more substantives in place of a conspiracy count may bring the client within **route 2 or 3**.
- TICs do not count towards the four offences required to trigger route 2.
- avoid **route 2 and 3**, by restricting number of offences and length of offending, by pleading to something as a sample of a course of conduct (useful when dealing with theft/deception/fraud offences).
- basis of plea – again, can dates be limited to less than six months? Be precise as to value of benefit (but do not forget TICs count towards the 5k figure in **route 2 and 3**). Can criminality be limited to that pleaded to?

James Bennett

The POCA 2002



The disclosure regime and money laundering regulations 2007

From 2003 the money laundering regulations have been in place, imposing a new duty on those dealing with clients' money to report any suspicious dealings. Those regulations are now to be replaced by the Money Laundering Regulations 2007 which came into force on December 15th 2007.

Under the old regulations applicability was defined by reference to the professional activity in which one was engaged. The new regulations make reference instead to professions and include *"independent legal professionals"* which definition includes solicitors working in firms or as sole traders but not those employed by a public authority or working in-house. However, the 2007 regulations only apply where solicitors participate in financial or real property transactions concerning the buying and selling of property or business, managing (which is drawn less widely than "handling") client money or assets including bank accounts, and assisting with the creation or management of companies, trusts and the like.

The Treasury has indicated that the provision of legal advice is not generally to be regarded as participation in a financial transaction.

These new regulations place the emphasis far more on a risk-based approach to business. In other words, rather than blanket applicability, the Regulations require that the risk posed by the client is assessed on an individual basis. If a client is deemed to be low risk (once the assessment has been carried out) then the burden of compliance with the obligations under the Regulations is much lower than if the client is deemed to be a high risk. That said, even a client who appears to pose a low risk should be reassessed frequently enough to pick up on any potential change to that status. Similarly it maybe that a client appears to be low risk but the professional work in which they wish to engage the firm is high risk or vice versa. Either of those situations would determine where the emphasis should fall in the risk-assessing process.

Regulation 20 sets out the obligations imposed upon those deemed to be *relevant persons* (including independent legal professionals) although it does not expressly set out what is looked for by way of systems and procedures, simply that policies and practices must be in place designed to catch activities relating to money laundering or terrorist financing. For those within the regulated sector failure to have such policies in place could be met with a two year stretch of imprisonment. Firms also need to have in place a system which deals with how and when disclosures under POCA and the Terrorism Act should take place.

Regulation 7 requires that customer due diligence must be carried out when a business relationship is established or a one-off transaction is carried out, when money laundering or terrorist offences are suspected or when there is some doubt over the authenticity of documents produced by the client in order to satisfy a previous part of the due diligence process. In order to satisfy due diligence as set out in Regulation 5 the client must be identified and that identification verified from independent and reliable sources; any beneficiary must be identified similarly and the purpose and nature of the business relationship must be ascertained.

There are obviously different levels of identification and verification which are required depending upon the original risk assessment performed. Whatever the level required the client's identity must be established before a business relationship is founded or a one-off piece of work carried out unless the due diligence work is to be on-going through the establishment of a business relationship and there is, in reality, little risk of there being either money laundering or terrorism financing. Once the initial work has been done there is an obligation to monitor the risk as each new stage in the business relationship is reached or each new transaction undertaken.

So far as offences under the Regulations are concerned there is a specific defence for anybody who took all reasonable steps and exercised due diligence to avoid committing the offence (Regulation 45 (4)).

In addition to the specific offences set out under the Regulations, there are, of course, the offences under POCA 2002 in relation to the disclosure regime. The two sit together because the POCA offences contain a defence if an authorised disclosure is made or an authorised disclosure was intended but was not actually made because of reasonable excuse and in order to be in a position to make any such disclosure the due diligence work would have had to be carried out.

There is an obligation to disclose on those in the regulated sector who have knowledge, suspicion or reasonable grounds for suspicion that the property involved is criminal property. For those in the non-regulated sector there is an obligation to disclose only where there is knowledge or suspicion.

The Courts have now dealt with a number of defendants convicted of offences under POCA, recently dealing with both offences of becoming involved in an arrangement which the defendant knows or suspects facilitates the acquisition, retention, use or control of criminal property (s.328) and of failing to disclose that another is engaged in money laundering (s.330) in the case of *R v Griffiths and Pattison* [2007] 1 Cr App R (S) 95. Mr Pattison was an estate agent who had bought a house from a convicted drug dealer who was awaiting confiscation proceedings at a very significant undervalue of about £100,000. Mr Griffiths was a local conveyancing solicitor who dealt with the sale. He received only his usual fee for the work but his knowledge of the local market was such that the transaction should have caused loud warning bells to sound.

Both men were convicted by the jury, the Court of Appeal commenting that credit for a guilty plea was significant in cases of this sort. The Court went on to indicate that a custodial sentence was almost invariably to be imposed despite the good character and dramatic consequences for nearly any professional convicted of such an offence. Mr Pattison was sentenced to 27 months and Mr Griffiths to six months. The Court acknowledged that one-off offending of this sort fell to be dealt with in a different way from an organised course of money laundering but nonetheless it was to be regarded as very serious.

The message which the Court was seeking to send was one which perhaps emphasises the need for due diligence work to be conducted assiduously!

Anna Vigars

Practical assistance

Both the Bar Council and Law Society have endeavoured to recognise the practical concerns of their members. Each offers on-line guidance and support. Each body is of course seeking to cater for practitioners in a multitude of different areas. The latest Law Society guidance runs to 130 pages. Much of this is aimed at those operating in the commercial sector.

The relevant links for those seeking further details are;

www.lawsociety.org.uk/productsandservices/practicenotes/aml.page

www.barcouncil.org.uk/guidance/moneylaunderingregulations-guidanceforthebar/

It is probable that most readers of this Newsletter will not fall within the ambit of the Regulations.

So where are the pitfalls for the typical practitioner likely to be reading this Newsletter?

It is notable that the primary examples of solicitor's who have found themselves on the wrong end of a prosecution are those involved in conveyancing, such as in *R v Griffiths & Pattison* [2006] EWCA 2155, a case involving a solicitor and an estate agent.

A further example arose recently within my own practice. I found myself prosecuting amongst others an experienced conveyancer as part of a seven handed £50m money laundering case centred on a bureau de change in London. In that case the conveyencer acted on behalf of a long-standing business client. A failure to ask some fairly obvious questions resulted in his being drawn into an extensive web of events and sharing the dock with his client for five months (though he did manage to avoid sharing a cell with him).

It seems clear therefore that those who continue to act as conveyencors are particularly at risk.

The aforementioned case threw up one other example of an area requiring careful consideration.

A number of the defendants appeared to have access to substantial means. Each defendant enjoyed representation by publicly funded counsel and solicitors. Someway into the trial the judge called for sight of the legal aid application forms held at the court. He formed a dim view of the fact that various defence solicitors had submitted applications on behalf of clients with what appeared to be scant regard as to the accuracy of the information contained therein. He has referred the matter on for further investigation.

Overall it would have to be said that the day to day affects of the legislation upon those conducting publicly funded work has not been as onerous as many initially feared.

However the cost of liberty is eternal vigilance!

Ray Tully

The development of forensic accounting

'Forensic' means 'pertaining to, connected with, or used in a Court of law'

Oxford English Dictionary

Origins

The origins of forensic accounting, as it is known now today, can be traced to the early 1980's. The work was then known as 'secret squirrel', 'special investigation' or litigation support. The work was typically done by enthusiastic non-specialists who fitted it around their other day-to-day work. The work was mainly "expert witness" covering white collar crime, loss of earnings claims and commercial disputes. Much of the civil work was funded by legal aid.

Much like the character DCI Gene Hunt in the BBC's *Ashes to Ashes* series, also set in the 1980's, the work was done and results achieved, however with a little less finesse than we see today.

Momentum

The landscape has gradually evolved, especially as the larger firms of accountants (including this firm) set up specialist dedicated teams. Furthermore, momentum was supported by:

- Globalisation and the increased complexity of business
- A large number of high profile frauds and corporate failures
- Proliferation of it and technology (eg development of scanners and surveillance equipment) (forgery and eavesdropping became much easier and cheaper)
- Growth of organised crime and terrorism
- Increased regulation eg POCA 2002

Today

It is rare to open a newspaper today and not read a case involving fraud, corruption, financial black holes or market abuse. For example, the papers are currently covering the enormous Society Generale loss, the FA bung enquiry and monopol/price fixing regulations to name but a few.

Today, there are over 1,000 dedicated forensic accountants in the UK, and the larger forensic firms will employ IT specialists, loss adjusters, former police officers and other professionals to complement their accountants. The numbers are steadily rising.

The provision is now more sophisticated. The work has also broadened to include, amongst others:

- Asset tracing and confiscations (often on a global basis)
- Fraud risk reviews
- Intelligence gathering and profiling
- Competition and regulation (again, often on a global/ european basis; often led by the SEC in the US)
- Forensic IT, including data imaging, data mining and information recovery
- Loss adjusting and loss assessing

Buyers are more sophisticated and as such work has polarised towards specialist providers be they the large accounting brands or new niche boutique practices. The day of the part time forensic accountant have largely gone.

The core skills remain

Whilst the services and numbers have grown, the core skills of a good forensic accountant remain. These include the ability to see the big picture whilst at the same time maintaining a close attention to detail. Also fundamental is the ability to distil large amounts of complicated data and present it in a clear and simple way.

The future

Historically forensic accounting has seen an upturn in work when the economy heads downwards. Whilst many observers predict a "perfect economic storm" this remains to be seen. There are, however, clearly a number ailing segments for example the sub-prime lending sector and the credit crunch generally. These are fertile for forensic involvement.

Furthermore all the factors which have fanned the growth of forensic accounting to date remain. The UK in particular is seeing a worrying growth in organised crime gangs (for example covering insurance and mortgage fraud, people trafficking, narcotics and terrorism).

Role in criminal investigation

Many of the largest and landmark forensic accounting cases have been rooted in the criminal investigation sector, for example Maxwell, Barings and BCCI. These absorbed many man years of investigation time. Forensic accountants will now routinely get involved with cases including: serious fraud, drug trafficking, money laundering, vat and tax fraud, theft, false accounting, fraudulent and wrongful trading.

Furthermore, the Proceeds of Crime Act 2002 and the establishment of the Asset Recovery Agency have created opportunity for forensic accountants to get involved with both the quantification of benefit and the quantification of available assets. For example, in calculating the alleged criminal benefit, the prosecution will normally need to make a number of assumptions (eg. quantity of drugs sold in narcotics cases, or number of hours worked/or room utilisation in the case of prostitution). It is important that these assumptions are unravelled and challenged. Lifestyle needs to be reviewed and double counting eliminated.

Maximising the benefit from forensic accountants

Cost remains a fundamental tenet, especially in legally aided work, so it is more important than ever that the work of a forensic accountant is properly considered and maximised.

Early instruction

I readily accept that one of the challenges of the new legal aid regime is securing funding for early forensic accounting involvement. However, in my opinion, most cases will benefit from the *early* review of a forensic accountant. Delay can often hugely damage a client's case.

Confiscation cases will typically require a review of financial documents for a period of six years prior to the date of charge, the period that many banks and accountants are required to keep certain documents. I recently assisted in a confiscation case where many of the early documents had been burned by the bank before they were secured by the defence. The lost documents included original cheques and paying-in-books. The Defendant's case was significantly fettered by this lack of evidence.

Team work

My most satisfying cases have always involved early conferences with counsel and solicitors. These have allowed brainstorming, early planning and work allocation. Importantly, early access also assists clear understanding of the key aspects of law and evidence.

We were recently retained on behalf of an accountant charged with theft of monies from a charity. An early conference allowed us to isolate the key areas. In this case we were concerned that the IT (password and access) and accounting controls were so poor that anyone in the finance department (not just our lay client) could have stolen the money. We were also concerned that the quantum was incorrect in any event. By making an early request for supporting document eg. Internal auditors' files, external auditors' files and board papers, it quickly became clear that the prosecution had not fully considered all the key documents and their case quickly unravelled.

Communication

Finally I have found regular communication through a case to reap enormous benefits for the lay client. Such communication, be it, telephone conferences or short meetings help ensure goal congruence and focus. Findings can be promptly reported thereby ensuring a "no surprise" approach. The forensic accountant can give early advice on case merits and statement drafting and provide ammunition for settlement negotiations.

Naturally the forensic accounting expert's duty to the Court is different to that of the solicitor or Counsel and as such conferences need careful management and control.

Where next?

Forensic accountants can confidently look forward to steady business growth. All the necessary ingredients are in place. This is especially so in the case of criminal investigations where POCA 2002 continues to create opportunities. However, to maximise the benefit forensic accountants need to work on their **partnerships** with instructing lawyers and counsel. To this end, early instruction, effective communication and teamwork will be essential to successful outcomes.

Will Davies

Will Davies is a partner in the forensic accounting unit of Grant Thornton UK LLP. He specialises in fraud investigation and asset recovery. He has acted in some of the largest fraud cases in the UK, involving sums of up to £200m. He has given evidence in court on 24 separate occasions.

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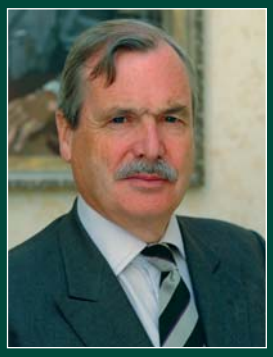

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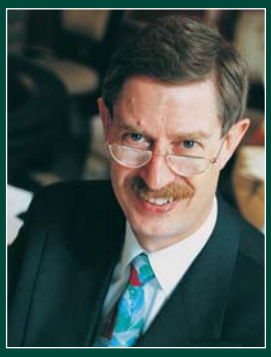

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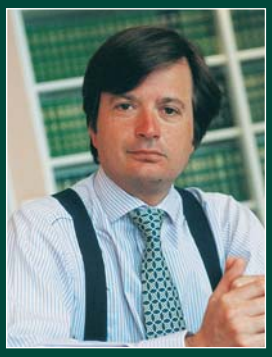

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A spanner in the works

"Your Honour, I am delighted to say that I have reached agreement with my learned friend on the figures for the Confiscation Order": not half as delighted as the Judge who, suppressing tears of gratitude, endorses with alacrity as 'very sensible' the figures put forward. And yet the delight and relief of all concerned may prove all too short-lived. Lurking in the background there is a fly in the ointment, giving rise to a ghastly possibility that a contested hearing will be necessary: the spectre of the third party intervener.

The problem arises from the draconian provisions of POCA, and in particular the way in which assessment and enforcement are treated as two separate aspects. It is important, in this respect, to grasp the basic scheme of the Act. Where POCA is engaged, the first rule is that the Court must assess whether the Defendant has benefited from criminal conduct (s.6(4)). The second rule is that, prima facie, the recoverable amount is equal to the Defendant's benefit (s.7(1)). The third rule is that the recoverable amount will be reduced if the Defendant shows that the "available amount" is less than the benefit: s.7(2).

The operation of the third rule will, of course, involve the Crown Court making an assessment of the Defendant's assets. However, it is frequently overlooked that whatever ruling the Court may make at this stage, it does not amount to an order that those assets should be liquidated or seized in order to satisfy the confiscation order: it is simply a declaration that such assets are available to the Defendant, so that, on the face of it, he is in a position to satisfy the confiscation order. He is, however, at liberty to raise the funds in any other way (the lottery, inheritance, mortgages, etc) and thereby satisfy the order, thus avoiding sale of his assets. The enforced realisation of any particular asset only arises if an enforcement receiver is subsequently appointed (s.50) which is likely to be some considerable time after the original order has been made.

At this stage, the Court can give the receiver power to realise property (s.51(2)(c)), and may order a person holding an interest in realisable property in which the Defendant also has an interest to pay to the receiver the value of the Defendant's interest (s.51(6)). However, it is also provided that the Court must not exercise any of those powers "*unless it gives persons holding interests in the property reasonable opportunity to make representations to it*" (s.51(8)).

The important point to note is that it is only at this stage (the appointment by the Court of an enforcement receiver) that a third party has any statutory right to be heard. This is a consequence of the separation of the assessment and enforcement functions (referred to above), which means that a third party's rights are only, strictly speaking, prejudiced at the enforcement stage.

The effect of the above provisions may have significant adverse costs consequences on any of the parties involved: the Crown, the Defendant or the third party intervener.

The Crown's prejudice is caused by the potential for the expense of appointing a receiver with an inadequate outcome thereafter. The CPS is (justifiably) reluctant to appoint receivers unless strictly necessary, because of the expense. If a receiver is appointed and, at that stage, a third party pops up out of the woodwork claiming some (or all) of property previously identified as part of the Defendant's assets, then the Crown risks expensive proceedings and the possibility of a declaration that the assets were not, in fact, available. It may, therefore, be advantageous to the Crown to try to identify any likely third party claims at the outset, and to concede any strong ones in the statement of information, thereby avoiding problems further down the line.

The Defendant risks adverse costs orders, although in practice a Defendant in this position is likely to have little to lose, given that all of his assets may be taken, one way or another, in the confiscation proceedings. The costs of the receivership proceedings can be ordered against him, and if the third party's intervention has been caused by his failure accurately to put forward details of his assets, then the court can order that the additional costs should be borne by him: see rule 61.19 Criminal Procedure Rules 2005.

The third party intervener is also at risk. He or she will have the legal costs of intervening, assuming that he or she is represented. In practice, civil legal aid may be available, but it is frequently forgotten that under the civil public funding scheme any "property preserved" in the proceedings is charged with any unrecovered legal aid costs. The third party intervener may, therefore, lose some or all of the value of his or her property unless the Court can be persuaded to make a costs order against one of the other parties involved.

For the above reasons, it is normally in the interests of all concerned that any third party with an interest in property also held by the Defendant should flag up that interest at any early stage. It is important to appreciate that although such a party has no statutory right to be heard at the stage when the confiscation order is made, they can, of course, be called as a witness in the course of the proceedings, and the Judge may take their evidence into account in deciding the value of the Defendant's available assets. In the typical case of a matrimonial home where the wife or husband of the Defendant claims an interest, it will normally be advantageous for the Defendant to call his or her spouse in order to establish that spouse's interest. This avoids the spouse having to incur legal costs at this stage. Furthermore, even if a finding adverse to the spouse is made by the Crown Court at the assessment stage, there would not appear to be anything to prevent the spouse subsequently intervening at the enforcement stage, given that he or she is not a party to the original confiscation proceedings, and therefore not strictly bound by the result, although any statement made by the spouse during the course of the confiscation proceedings could, of course, be used against him or her at a subsequent stage.

In summary, the risks of third party claims are often overlooked: a little thought at the outset can avoid much misery later on.

James Townsend

Money laundering offences made easy

Introduction

It may be, during a slow afternoon in Court - Quick Crossword attempted, but embarrassingly only half completed, and Soduku abandoned – that circumstances compel you to flick through a legal tome, let us say Archbold. Idly you scan-read chapters on 'genocide', 'torture' and 'terrorism': exotic subjects certainly, but unlikely to trouble you at any stage with a real case. You keep going. Eventually you come across the money laundering offences under POCA 2002, namely s.327-329. The legislation appears technical and complex. Each section is a long way from succinct. There is more than a hint of repetition. Unlike perhaps genocide, torture or terrorism however every criminal practitioner needs at least a basic knowledge of the money laundering offences. That limited goal is the aim of this article.

Essential offences

There are three principle money laundering offences, unsurprisingly put into three sections of POCA, s.327-329 respectively. Each offence is then qualified by common 'get out' clauses, discussed below. There are 'fiddly bits' which I will leave out as not being relevant to the usual type of case, for example to do with 'deposit taking bodies'.

So, without reference to the 'get out' clauses etc, these are the offences;

Concealing etc

s.327(1) A person commits an offence if he –

a conceals criminal property;

b disguises criminal property;

c converts criminal property;

d transfers criminal property;

e removes criminal property from England and Wales or from Scotland or from Northern Ireland.

Arrangements

s.328(1) A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.

Acquisition, use and possession

s.329(1) A person commits an offence if he –

a acquires criminal property;

b uses criminal property;

c has possession of criminal property.

The Prosecution should be able in most cases to narrow their case down to one mode of participation in a given offence, for example, 'disguising criminal property'. However there would seem to be nothing to stop alternative modes of participation being alleged in a count under a particular section, if necessary, eg. 'disguised or converted...'. An analogy would be with the child cruelty offences.

What is 'criminal property'?

The offences beg the question 'what is criminal property'? POCA has a definition section, s.340, and criminal property is defined therein. In essence criminal property is linked to 'criminal conduct' by the Defendant or relevant other person, whether before or after POCA being in force. Reproducing the whole of section 340 here would be dreary. It is in Archbold at 33-29. The core sub-sections are as follows;

s.340(2) Criminal conduct is conduct which:

a constitutes an offence in any part of the United Kingdom, or

b would constitute an offence in any part of the United Kingdom if it occurred there.

s.340(3) property is criminal property if:

a it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly), and

b the alleged offender knows or suspects that it constitutes or represents such a benefit.

Other subsections in s.340 clarify to an extent what is intended by these core definitions. The bottom line is that the legislation is designed to cover anything and everything that might conceivably help snare a suspect. For example, in defining 'property', 340(9) starts 'property is all property wherever situated and includes...'.

Mental Element

The legislation is interesting in one key way, namely linking the identification of property as 'criminal' to a Defendant's knowledge or suspicion. Property which undoubtedly is the benefit of a criminal's conduct will not be criminal property unless the Defendant knew or suspected this to be the case. If he is not proved to have this knowledge or suspicion the property is not 'criminal' in his hands. Put more simply s.340(3)(b) sets out the required mental element for the offence, albeit as part of a definition.

This will be the central battle ground in many money laundering prosecutions, with issues arising over 'knowledge' and (more difficult for the Defendant) 'suspicion'. In *R v Da Silva* [2006] 2 Cr. App. R. 35 CA the Court supported the approach of letting the jury simply use their own understanding of the entirely ordinary word 'suspects'. However, if a direction is given, the mental requirement is that the Defendant has to have thought there was a possibility, which was more than fanciful that the relevant fact existed (i.e. that the property represents the benefit of another's criminal conduct); and whilst a vague feeling of unease would not suffice, there was no requirement for the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts' or 'based upon 'reasonable grounds''.

'Knowingly' and 'suspects' are discussed in Archbold at 17-49 and 49a.

Common 'Get out' clauses for sections 327-329

Each offence under s.327-329 has common 'get outs', reproduced identically under each section. Their first appearance is under s.327(2); (2A) and (2B) as set out below. The use of the wording 'a person does not commit such an offence' is curious and perhaps makes these subsections more of a 'get out' than a defence.

The basic 'get outs' therefore are these;

s.327(2) But a person does not commit such an offence if –

a he makes an authorised disclosure under s.338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent;

b he intended to make such disclosure but had a reasonable excuse for not doing so

c [...law enforcement exclusion]

(2A) Nor does a person commit an offence under subsection (1) if –

a he knows, or believes on reasonable grounds, that the relevant criminal conduct occurred in a particular country or territory outside the United Kingdom, and

b the relevant criminal conduct

i was not, at the time it occurred, unlawful under the criminal law then applying in that country or territory, and

ii is not of a description prescribed by an order made by the Secretary of State.

(2B) In subsection (2A) "the relevant criminal conduct" is the criminal conduct by reference to which the property concerned is criminal property'.

In short therefore under s.327(2)(a) or (b) if a Defendant has done what he should have done by way of letting the relevant authorities know what is, or has been going on, or has a reasonable excuse for failing to do so, he will have a 'get out' under the 'disclosure' regime, see sections s.338-339A.

It seems most likely Defendants will usually be bringing themselves under the 'reasonable excuse' for non-disclosure regime under this 'get out', on the basis if full disclosure was made by them within the rules a Prosecution would be odd, whereas non-disclosure (absent a reasonable excuse) would generate suspicion by investigators.

The other 'get out' subsection 2A, as read with 2B, is less likely to crop up in standard cases but is included for information.

Additional 'get out' for section 329 offence

There is an additional 'get out' clause for the 'acquisition, use and possession' offence, as follows;

s.329(2) But a person does not commit such an offence if

c he acquired or used or had possession of the property for adequate consideration.

There is then a statutory definition not of adequate consideration, but inadequate, as follows;

s.329(3) For the purposes of this section –

a a person acquires property for inadequate consideration if the value of the consideration is significantly less than the value of the property;

b a person uses or has possession of property for inadequate consideration if the value of the consideration is significantly less than the value of the use or the consideration;

c the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.

A Defendant has an evidential burden only concerning this section, thereafter it is for the Prosecution to make the jury sure the consideration was nil or inadequate as defined. (The same evidential burden point applies to the other 'get outs' too. These will not be relevant to any trial unless and until the Defence raise them as issues. See *Hogan v DPP* [2007] EWHC 978 Admin).

This particular 'get out' perhaps surprisingly does mean that a Defendant has an escape route where, even if acquiring, using or possessing property he knows or suspects to be criminal property, he raises evidentially the fact of his having so acquired, used or possessed it for adequate consideration, and the Prosecution then fail to the criminal standard to prove the consideration was inadequate. The Defendant may be guilty of other offences, but not under this section.

In *Hogan*, the Appellant scaffolder was found with a rival's scaffolding poles, identifying paint markings having been obliterated with his own. He said he had bought the relevant poles from a third party for about £1100, which he regarded as adequate consideration, in other words a fair price. Evidence in the trial pointed to a more realistic price being nearer £6000. The position however was that even if the Appellant had known the poles were stolen (so criminal property) when he acquired and thereafter possessed them, he would be acquitted of this money laundering offence unless the Prosecution could establish the sum he claimed to have paid was inadequate as defined above, if the evidential finding was that such a transaction had actually occurred.

Clearly where the Prosecution consider a Defendant may deploy this curious 'get out' to his advantage they would possibly instead proceed under a handling allegation. In many cases in this area however the contested issues will be evidential (did the Defendant really buy the property for that sum in those circumstances?) rather than legalistic.

Sentence

For each of the money laundering offences, six months maximum on summary conviction, and 14 years on indictment.

There are a series of authorities which can be reduced to the following propositions.

- There should be some proportionality to the criminal conduct that generated the criminal property in the first place.
- The Defendant's knowledge of the criminal conduct will be relevant.
- The sums involved are clearly of importance, but without direct arithmetical calculations being necessarily appropriate.
- Sentences close to the maximum should be reserved for large scale laundering.
- A one-off attempt to conceal assets of a person subject to confiscation proceedings is in a different category to other money laundering offences.

In effect the range of sentence for money laundering under sections s.327-329 will be as broad as say for theft or fraud, with similar sentencing considerations. However, the term 'money laundering' appears to have the same status as 'conspiracy' for many Defendants, who would rather avoid either on their record, if a more mundane-sounding offence is potentially negotiable.

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