

THE PROCEEDS OF CRIME: PAST PRESENT AND FUTURE IN ENGLAND & WALES

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I. INTRODUCTION

When studying anything from an individual case to the development of an entire field of law, in order to understand the present we have to know something about the past and how the law has developed.

Before the development of a national system of criminal courts in the 14th century in England and Wales the court system - if it can be described as a system at all - was within the control of the citizen who wished to bring a case and the local lord who tried it or appointed someone or a jury of citizens to do so. There was no distinction between civil and criminal wrongs and of course no coherent, let alone national, system of sentencing. It was therefore possible for a citizen who had been wronged to obtain redress both in the form of compensation or restitution and in the form of some punishment *pour encourager les autres*.

It is ironic that the separation of civil from criminal law and procedure which developed over the following centuries is now seen as having created huge problems in the field with which we are concerned - and in others such as family law in which, to this day, criminal and civil proceedings concerning some of the same facts are separated.

Although the creation of Justices of the Peace, Quarter Sessions and Assize Courts did not lead at once to the separation of civil law with its powers of recovery restitution, etc. from criminal law, over the centuries which followed it became increasingly the case that the criminal law and procedure - within statutory national sanctions of death or imprisonment or fine imposed by the King's judges who travelled the country to impose the King's justice - focused increasingly on the crime itself, the *actus reus*, to the exclusion of the rights of the citizen who had been wronged or of the need to remove the profits of crime. There were of course exceptions. Those convicted of treason or similar crimes had all their property forfeited to the Crown. This was not so much an attempt to remove the proceeds of crime as to mark the seriousness of the crime and - incidentally - to raise revenue for the Crown. Increasingly the citizen who wished to recover money or property or damages for injury, whether civil or criminal, had to go through the civil process in order to obtain it.

Of course taxation, as I have hinted above, was never far from the minds of the King and Parliament and so from the earliest times His/Her Majesty's Customs and Excise have had the power to penalise those who attempt to evade the duty payable on imported goods and more recently the power to bring such persons before the criminal courts. This function, important in all countries but particularly so perhaps in an island trading state like the UK, has had an important influence on the development of the law on proceeds of crime. One of the biggest issues in this field today is the vast illegal profit made from the trafficking of illegal drugs. Most of the illegal drugs consumed in England and Wales are imported from abroad and Customs and Excise assumed the lead role in investigating and prosecuting such crimes since they are the service with the most experience of policing frontiers and liaising with foreign counterparts, etc. Because their focus has been historically upon the collection of revenue on goods, which are dutiable but not prohibited rather than simply upon the punishment of individual crimes and criminals, they have been proactive in recent years when successive governments have tried to pass laws which, if properly and firmly enforced, will help to take the profit motive away from crime and to focus more on the money or property than the punishment or rehabilitation of the individual offender.

In the thirty five years in which I have practised in criminal law I have seen enormous changes.

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The Second Half of the Twentieth Century

In the 1950's and 60's there were few ways in which the criminal courts of England and Wales were able to go beyond the process of trying and sentencing the offender for the individual criminal act he had committed. Of course it is right to say that one attack had been made on the proceeds of crime in that in the 18th century the crime of handling stolen goods - punishable by death if the property was of more than trivial value - had been devised to try to combat the proliferation of those familiar to readers of Charles Dickens' *Oliver Twist* - thereby enabling the criminal law to punish not just the thief but the handler. To this day the maximum punishment in England and Wales for handling stolen goods is higher than that for theft. In addition the crime of "living off immoral earnings" was created to discourage pimps exploiting prostitutes. There were also some ways in which the sentencer could act beyond immediate punishment for the crime.

Here are some of them

- Confiscation/forfeiture of the means by which the crime was committed - e.g. the knife, gun, counterfeiting equipment, etc.
- Restitution of the actual property - though not proceeds from its sale - stolen from the victim.
- Destruction of certain criminal equipment - drugs in particular.
- Restrictions on the future behaviour of the accused by disqualification from driving, etc.

In the 1970's four potentially important steps were taken

The updating of the law concerning illegal drugs, which, among many other measures, criminalised the possession of drugs with intent to supply. However it was still difficult to prise the proceeds of such crimes from the grasp of the criminal.¹

The introduction of the "criminal bankruptcy" order. If an offender (economic crime only) was shown to have benefited to a particular amount - £10,000 in those days - he could be made "criminally bankrupt" and sufficient of his assets realised to repay those he had defrauded. I had limited direct experience of such orders but I believe that they were cumbersome and time-consuming to enforce and often failed to produce the assets sought.

The introduction of "compensation orders". These were orders to compensate the victim of crime in order to save him from having to pursue a separate claim in the civil courts. However they were only made in the clearest cases in which the amount could not realistically be disputed. They were intended to cover physical as well as financial injury. In addition many criminal judges, then under enormous pressure of work with a rapid increase in crime which was not matched by a corresponding increase in resources, disliked them and found it easy to decide that the issues were too complicated for a criminal court. This meant that the legislation did not have the hoped for effect. They also had in mind the ability of victims to use the third new invention of the decade. This was the setting up of a Criminal Injuries Compensation Board which provided a cheap and reasonably quick way for a victim to obtain compensation from the state for the crime committed against him/her. It was (and still is) limited to compensation for physical/mental injury rather than financial. It did/does not require that an offender be convicted of the crime - merely proof that the crime has been committed and the injury suffered as a result.

In the 1980's further measures were introduced. Sentencing courts were required to consider compensation in all "victim" cases and to give reasons why, if they did not order compensation, they had not done so. Frequently the reason given was that the sentence was one of imprisonment and therefore the accused could not be expected to earn the money necessary to compensate the victim of the crime. As will be seen the present government is not attracted by that argument.

The Drug Trafficking Offenders Act - confined, as its name suggests, to drug offences. This revolutionised the theory and practice of the criminal law and its relationship with the proceeds of crime. For the first time the burden shifted to the convicted person to prove on the balance of probabilities that his assets - or any gifts he had made - were not from the proceeds of his drug trafficking. Briefly the court was required to work out how much profit the accused had made from the offences for which he had been

¹ I well remember a case in which I was involved in which the offender was fined some £150,000 in an attempt to relieve him of the profit he had made from drug dealing. In the alternative he was to serve twelve months in prison, then the maximum default sentence. When he learned that the fine reduced according to the days he spent in prison he chose to surrender to custody so that he could lose a few kilos in weight and save the money necessary for his daughters' dowries.

convicted, to decide what assets were available, and to order that the lower of the two sums be paid to the state. The default terms of imprisonment for non-payment were greatly increased. The legislation was once again unpopular with criminal judges.

Many were unfamiliar with the tracing exercises normally performed by civil judges. Many felt that they were wasting time and causing delay to other "proper" criminal work such as murders, robberies, etc. Many felt that the shift in the burden of proof was somehow "unfair" - "not cricket" is the English expression - and looked for ways of avoiding the issue. Others thought that the weight of this sanction fell more upon the innocent wives and children, etc. than upon the accused who was usually spending a long time behind bars. However, gradually the courts got used the idea. Further legislation was passed requiring the drug trafficking matter to be dealt with in advance of the substantive sentence.

A real difficulty lay with the diversity of criminal endeavour. If the money or property had in fact been the proceeds of some crime other than that for which the accused had been convicted, then it fell outside the remit of the Act. This difficulty persisted when the first attempts were made later to criminalise money-laundering.

In the late 80's and 90's the struggle continued

- A new Drug Trafficking Act was passed and
- A new Act in similar but not identical terms was introduced to deal with financial crime at the point of sentence.
- An offence of money-laundering was created. It still required proof that a particular predicate criminal offence or offences had been committed so that if the offender could show that actually he was simply a tax-fiddler or had amassed the wealth by committing crimes which were not within the statute he could escape. If the court (jury) could not decide whether the illegal profit stemmed from drugs or financial crime they could not convict of either. Likewise the sentencing judge when considering confiscation.

II. THE 21ST CENTURY

Fed up with the mixed success of the preceding thirty years or more the new government in 1997 announced early that it was taking two important but closely related steps.

First we were at last to incorporate into English law the European Convention on Human Rights (ECHR) - a Convention largely drafted by English lawyers! The Human Rights Act 1998 came into force in 2000.

Second a new a far-reaching law would be passed to enable the profits of all crime from the most serious to the most humble, including tax evasion, to be made the subject of criminal sanction either as a discrete crime - of money-laundering - or as a tough weapon in the hands of the sentencer. In the absence of criminal proceedings for lack of sufficient evidence to satisfy the high standard of proof, a structure whereby a new agency, the Assets Recovery Agency (ARA), can institute civil proceedings or refer the case to the Inland Revenue for it to recover tax upon suspiciously derived income was to be introduced. The scale of the problem was huge. The proceeds of crime were estimated in 2000 to amount to £18 billion or 2% of Gross Domestic Product. Before the passing of the Act the average funds recovered amounted to less than 1/1000th of this - £17 million. As Director of Public Prosecutions for England and Wales from 1998 to 2003 I was involved in the consultations which led to the enactment of the legislation and the setting up of the ARA. By now a number of jurisdictions closely related to our own had enacted tough laws of their own with the aim of removing dirty profits and deterring future offenders. We had excellent examples from common law jurisdictions such as the US, Ireland and Hong Kong. The Act was finally passed as the Proceeds of Crime Act 2002 (The Act) and came into full force in April of 2003.

Why do I juxtapose the Human Rights Act 1998 (HRA) with the Act? As the years passed the law on this topic had become, as I have described, gradually more severe and weighted against the launderer of suspect money. Grave concerns had been expressed about the fairness of the law and its potential to trap the innocent as well as the guilty. The government saw the enactment of the HRA as an opportunity to create an independent scrutiny of legislation on this and other fronts - e.g. anti-terrorist legislation - by giving the High Court, Court of Appeal and House of Lords sitting in its judicial capacity, the ability to declare that a

law or a particular aspect of it was either incompatible with the ECHR or needed to be interpreted in a particular way in order for it to be compatible. It therefore felt more comfortable devising legislation which undoubtedly shifts the balance away from the accused and in favour of the prosecutor secure in the knowledge that if it went too far the courts would intervene. Many of the still unanswered questions arising from the passing of the new Act are directly related to the compatibility or otherwise of particular Sections of the Act with the ECHR.

III. THE PROCEEDS OF CRIME ACT 2002

The General Scheme of the Act

The first thing to say is that it is very long. Twelve Parts and 462 Sections. Even discounting the fact that it has to deal with criminal and civil procedure in Scotland and Northern Ireland there is still a great deal for the police officer, investigator, prosecutor, judge and defence lawyer to grasp.

Part One (ss1-5) deals with the setting up of the ARA and the powers and functions of its Director.

Part Two (ss 6-91) deals with confiscation orders to be made following conviction of a defendant and the enforcement of such orders. It also deals with restraint orders to be made during an investigation or at any time up to conviction and sets out the possible appeal routes for a defendant or prosecutor in connexion with these orders. I shall deal with this Part in more detail later.

Part Three and Part Four (ss 92-239) deal with criminal jurisdiction in Scotland and Northern Ireland respectively and do not concern me.

Part Five (ss 240-316) deals with Civil Recovery in both England and Scotland.

Part Six (ss 317-326) deals with the ARA Director's Revenue (Tax) functions.

Part Seven (ss 327-340) deals with the creation of new money-laundering offences. Again I shall deal with these in more detail later.

Part Eight (ss 341-416) deals with investigations and the orders - production of documents, search and seizure, disclosure, customer information, account monitoring, and overseas evidence, etc. - which may be obtained in pursuance of investigations. I shall deal with aspects of this later.

Part Nine (ss 417-434) deals with such property of a bankrupt person as may be subject to the provisions of the Act.

Part Ten (ss 435-442) deals with the degree to which information which comes to the knowledge of the ARA may be shared with other bodies such as the Police, the Director of Public Prosecutions, etc. This is an important Part because too often in England and Wales, and, I believe, other jurisdictions information held by one agency is not shared with others who need it.

Part Eleven (ss 443-447) deals with "internal" jurisdictional matters - England & Wales, Scotland, Northern Ireland, etc.

Part 12 (ss 448-462) deals with miscellaneous matters.

It will be clear from the scheme that I have outlined that so far as the criminal law is concerned the Act works backwards from conviction through investigation to the creation of new offences. I shall deal with the topics in chronological order. I do so in the hope that this latest attempt of a leading Western economy to combat economic crime without unduly injuring the private rights of individuals may be of interest to you.

I do not present the legislation as the perfect solution. Indeed there are parts of it against which I argued before the legislation was finalised and there is often a substantial gap between the intention of legislation and its implementation by those responsible for so doing. I am, however, certain that on the one hand, the publicity given to it and the fear of leading firms and companies that they may fall foul of the money-laundering provisions, and on the other, the huge effort which has gone into training prosecutors and

investigators has already had a salutary effect on the behaviours of those who may have allowed their respectable businesses to be used as the washing machine for dirty money.

IV. THE NEW OFFENCES.

Four weapons have been deployed to combat money laundering:

- The creation of new criminal offences of money laundering.
- Regulation of financial institutions and others to put systems in place to detect and prevent money laundering.
- Legislation to require reporting of known or suspected instances of money laundering to the authorities.
- Criminalising the disclosure of information which might undermine a money laundering investigation.

Five types of offence are created. The mental element required is similar though not identical for each group of offences. It is sufficient for the prosecution to prove that the defendant *suspected*, or, in the case of some offences, *had reasonable grounds for suspicion*.

Concealing, etc. (Section 327)

A person commits an offence if he conceals, disguises, converts, or transfers “criminal property”, or removes it from England & Wales. Concealment and disguise are widely defined and may concern any aspect of the property. The only defence surrounds the possibility that the accused has made an authorised disclosure to an appropriate authority and has been allowed to perform the act which would otherwise have amounted to an offence. “Criminal property” is defined as property of all kinds and wherever situated which constitutes or represents in whole or in part a person’s benefit from “criminal conduct” and which the defendant knows or suspects to be such a benefit. “Criminal conduct” is any conduct which if committed in England and Wales would constitute a crime. The Act is retrospective so far as the criminal conduct is concerned so that it does not matter if the crime which generated the property occurred before the Act was passed.

Acquiring, etc. (Section 329)

This section penalises the acquisition, use or possession of “criminal property”. To this offence there is an additional defence that the defendant acquired, used or possessed the property for “adequate consideration”.

Arrangements, etc. (Section 328)

This Section penalises those who make arrangements they know or suspect may facilitate the acquisition, use or possession of “criminal property”. The only defence available is the one under Section 327 above. The maximum penalties for offences under these three sections are tough. 14 years imprisonment. This is twice the maximum sentence for theft and four years longer than the maximum for receiving/handling stolen goods. Of course many of the offences described above would in fact amount to offences of handling stolen goods.

Disclosure Offences

Regulated Sector. Section 330. Failure by a person in the “regulated sector” to disclose to a “nominated officer” knowledge, suspicion, or reasonable grounds for suspicion, that another person is engaging in money-laundering. The regulated sector is defined in considerable detail in a Schedule to the Act but roughly speaking it covers banking, money lending and investment businesses. “Nominated officers” are persons nominated by the company or business concerned.

Regulated Sector. Section 331. Failure by a “nominated officer” to disclose to an “authorised person” - within the National Criminal Intelligence Service or someone nominated by it to receive disclosures - knowledge, suspicion, or reasonable grounds for suspicion, that another person is engaging in money-laundering based upon a disclosure to him by a person within his company’s or business’ employment. The only defence is if the defendant has a “reasonable excuse “ for not having made the disclosure.

Non-regulated sector. Section 332. Failure by a “nominated officer” to disclose to an “authorised person”

knowledge or suspicion (NB not reasonable grounds for suspicion as in the two earlier sections) that another person is engaging in money-laundering based upon a disclosure to him by a person within his company's or business' employment. The only defence is if the defendant has a "reasonable excuse" for not having made the disclosure.

Tipping off (Section 333)

A person who knows or suspects that a disclosure has been made to a nominated officer or direct to the authorities and makes a disclosure which *is likely to prejudice* any investigation which might be conducted following the original disclosure commits an offence. Here the defences include

- not knowing or suspecting that his disclosure was likely to be prejudicial
- being done by a legal adviser in the course of giving legal advice or conducting legal proceedings.

The maximum penalty for offences under these Sections is five years imprisonment.

It should perhaps be noted that many countries have underpinned their preventative anti-money laundering regimes with purely administrative sanctions. The UK government has chosen to underpin them with criminal sanctions in order to emphasise the seriousness with which it views the importance of proper systems of control. Even failure to comply with some of the procedural requirements can be prosecuted in the criminal courts.

Comments

The scheme seems to be admirable in theory. In particular the doing away with the distinction between different crimes as the sources of criminal property.²

My one serious reservation is that in setting the standard of "guilty mind" so low - mere *suspicion* - there is a risk that most offenders will be able to plead that they should be sentenced on the basis of suspicion rather than knowledge or even belief and sentences at the top end of the range will be rare. In contrast the mental element for the closely related offences of handling or dealing in stolen goods is "knowledge or *belief*" that the goods in question were stolen.

All the "defences" to which I have referred require proof by the accused on the balance of probabilities in order for them to succeed. Since the old legislation had similar provisions, which survived challenges on ECHR grounds, it is unlikely that this feature will cause problems.

In short I believe that the prosecutor now has some formidable weapons in the shape of Sections 327-329 and the supporting Sections and those enterprises which are likely to be used as washing machines for dirty money have a strong incentive to be vigilant in the way in which they deal with customers and clients.

V. INVESTIGATIONS

Once again some brief history to illustrate how the process of investigation has developed over the years. Historically criminal proceedings were brought upon "information" being laid before the local magistrates by a citizen that so-and-so had committed a particular crime. The magistrates were the investigators and summoned witnesses and the accused before them to hear the evidence. If they believed that there was sufficient evidence to place the accused before a court he was committed to trial before the local quarter sessions (now Crown Court), or in more serious cases the assize (now Crown Court) presided over by one of the King's judges. Over the years the magistrates were given powers to order witnesses to bring documents or other exhibits to court. All prosecutions started as private prosecutions and only if committed for trial did they become public prosecutions. Even then it was up to the wronged victim to instruct and pay for a lawyer to prosecute the case if he wished. In the late 18th century in London and more particularly in the early nineteenth century police forces began to be created - the most famous being the Metropolitan Police - "Scotland Yard". This was in response to the poverty and lawlessness which accompanied the beginning of the industrial revolution, together with the return from many years of soldiering in the wars

² Another personal experience. I am currently engaged in the prosecution of a number of defendants for money laundering offences. We allege that during the material time the principal accused were engaging in three different forms of criminal activity all of which generated criminal property. We cannot however trace a particular car or house purchase or deposit of cash at a bank to any particular offence or type of offence. Prior to the enactment we would have been unable to prosecute.

against France of thousands of men with no skills and no money.

Gradually the police began to wear the shoes of the private citizen informant. Although the criminal process was still started by the information of a citizen that citizen was more and more often a police officer.

Of course the police soon started to press for ways in which they could better investigate and secure evidence. Interestingly, and it has coloured the development of the English system to this day, the police came on the scene long before any form of local or national prosecutor. The police themselves were - and still are - not under national but local control. It was not until the late 19th century that the office of Director of Public Prosecutions was established. Even then his office was responsible only for the prosecution of a tiny fraction of the most important cases and crimes. The vast majority - until 1986 - were dealt with by the police, who gradually began to employ lawyers of their own to prepare and present cases to court.

This has meant that in England and Wales the driving force for change in the way in which cases are investigated and prosecuted has been the police service, rather than the prosecutor who in most countries has the power to direct the police and - even as close to us as Scotland - has been around a lot longer than the police. The Home Office, which has responsibility for overseeing the police, but not the Crown Prosecution Service, is responsible for promoting new criminal justice legislation. Hardly surprising then that much of it has been designed to make the police's rather than anyone else's job easier.

Over the years powers, of search of the person and premises, to require intimate samples with an adverse inference to be drawn from refusal, to question suspects under caution, to allow an adverse inference from silence when questioned, to allow pre-charge detention for longer than 24 hours, etc. have been introduced. They have been balanced by increased safeguards for the suspect such as the automatic right to a lawyer from the moment of arrest, tape-recording of interviews of suspects, the right to disclosure of all relevant material gathered in the course of an investigation. The most recent legislation and in one sense that which provides the framework for the changes introduced by the Act was the Police and Criminal Evidence Act 1984. This effectively introduced the principle into English law that the defendant/suspect has a duty to assist like all citizens in the investigation of crime and that if he fails to do so a court may hold that fact against him if he is later brought to trial. Without these reforms I doubt whether the changes, which I am about to describe both in the investigation process and later when we come to deal with sentence, could have been effected.

Two further developments since 1984 are worth recording. In 1986 the Crown Prosecution Service was created. For the first time there was a national prosecution agency independent of the police and responsible for the prosecution of all offences investigated by the police. This has led to a healthier relationship between prosecutor and investigator and has allowed the prosecutor's voice to be heard independently when government policy is being worked out.

And in 1987 the Criminal Justice Act created the Serious Fraud Office (SFO). This is an independent free-standing agency set up to investigate and prosecute - as its name suggests - the most serious cases of fraud. For the first time police officers and lawyers work together to investigate and prosecute such cases. They have unique powers to *require* witnesses to provide statements³ and special procedures were devised to expedite the trial of their cases once the decision to prosecute has been taken. In particular, for the first time the defendant was required in such cases to set out in writing the nature of his defence to the charges in the same way that the prosecution is required to state its case in detail so that the defendant knows what he has to answer. In 1996 this requirement was extended to all cases tried in the Crown Court.

Thus, by 1997, when the new government decided to embark upon the creation of the Act, there were already changes which had been seen to make a significant and beneficial difference to the prosecution of crime.

VI. THE ASSETS RECOVERY AGENCY (ARA)

The first change is the setting up of another new agency - the ARA - which has a single focus and three key functions. These are:

³ These statements cannot generally be used in evidence against their makers at trial.

- The conduct of investigations with a view to confiscation of assets
- The conduct of investigations with a view to civil recovery of assets
- The training, accreditation and monitoring of private financial investigators

The Director is required to carry out his - actually the first Director is a woman - functions “in the way which he considers is best calculated to contribute to the reduction of crime”. He and his staff will operate under a Code devised by the Home Secretary. The Code - an extensive document with more than 200 paragraphs - is admissible in criminal proceedings, and serious breaches of its provisions may lead to the exclusion of evidence at trial. Officers are required under the Code to consider whether a less intrusive method may be appropriate, to consider the HRA and the proportionality of action and its effect on the right to privacy. There is a duty to take reasonable steps to check information. Information provided anonymously must be corroborated.

At this stage before looking at the details of the various orders available under the Act it is worth dwelling for a moment on the new “accredited investigators”. This development will be closely watched by those concerned at the possible abuses of power, opportunities for corruption and lack of day-to-day accountability of such investigators. The police themselves have always been suspicious of developments which substitute sworn constables with private citizens however regulated. However, the SFO has long used the services of leading accountancy firms with forensic divisions, albeit they have usually been used in a supporting role rather than in the “front line”. Provided these investigators remain true to the provisions of the Code and there are no early headline cases involving malpractice I believe that the initiative is worthwhile, since the expertise necessary to do the job properly is not sufficiently broadly developed within the current cadre of police or Customs investigators.

VII. ORDERS AVAILABLE UNDER THE ACT

It should be stressed that these orders are only available to investigators and prosecutors carrying out confiscation or money laundering investigations. A “confiscation investigation” is an investigation into whether a person has benefited from his criminal conduct or into the extent and whereabouts of such benefit. A “money laundering investigation” is an investigation into whether a person has committed an offence under Sections 327 - 329 (see above 4.2.1- 4.2.3).

Most of the orders under the Act can be obtained *ex parte* by the applicant, that is to say without giving notice in advance to the person against whom the order is sought. The decision to apply *ex parte* needs to be carefully thought through so as to survive any challenge later.

It is also important to note that the Act (Section 342) creates specific offences of prejudicing an investigation. The first is a “tipping off” offence identical to that mentioned earlier in connexion with disclosures (Section 333). The second is an offence - which could already be prosecuted as the common law offence of attempting to pervert the course of justice - of “falsifying, concealing, destroying or otherwise disposing of, or causing or permitting falsification ... of documents relevant to an investigation”. The maximum sentence is five years imprisonment.

There are seven orders. Many of these existed in some form or another but they have never before been consolidated into a coherent scheme and there are some new features which make them easier to use and - it is hoped - therefore more effective.

A. Restraint Orders (Section 41 - 47, 58)

These may be obtained by application (*ex parte* if necessary) to a Crown Court judge in five different circumstances.

- 1) When a criminal investigation has started and there is “reasonable cause to believe” that the alleged offender has benefited from his criminal conduct.
- 2) When criminal proceedings have started but not concluded and there is “reasonable cause to believe” that the alleged offender has benefited from his criminal conduct and provided there has been no undue delay in continuing the proceedings.

- 3) Following a conviction after which no confiscation order (see later) was made. If within 6 years of conviction evidence comes to light which suggests that a confiscation order should after all be made, then a restraint order can be made pending the decision.
- 4) Following a conviction after which a confiscation order was made but subsequently fresh material comes to light which causes the prosecutor to apply to reopen the question of the amount to which the defendant has benefited from his criminal activities. In these circumstances once again a restraint order can be made pending the decision.
- 5) Following a conviction after which a confiscation order was made but subsequently fresh material comes to light which causes the prosecutor to apply to reopen the question of the available assets of the defendant. In these circumstances once again a restraint order can be made pending the decision.

The order may be made against any person - not just the suspect, accused or convicted person - and applied to any form of property. The order prevents the person named from "dealing with any realisable property" held by him. Exceptions to the order may be made

- for reasonable living costs;
- legal expenses - though only for the purpose of the instant proceedings;
- or for the purpose of enabling any person to carry on any trade, business, profession or occupation.

The accused/suspect or any other person affected by the order may apply to vary or discharge the order.

The court may appoint management receivers (Section 48 et seq) to manage the property concerned during the life of the order. The Court may give the receiver wide powers to deal with it including selling, entering into contracts, suing, etc. He must take steps to ensure that there is no diminution in the value of the property and that innocent parties who may have an interest in particular property can retain that interest.

Either party may appeal to the Court of Appeal against the refusal or the grant of a restraint order.

B. Production Orders (Section 345-351)

This order may be made against any person by a Crown Court judge on the application (*ex parte* if necessary) of the prosecutor or other authorised person. It must be complied with within 7 days unless the judge orders otherwise. It may apply to all material other than legally privileged material or "excluded" material. Government Departments may be subject to orders. There are the same powers to vary, discharge or appeal such orders as for Restraint Orders.

C. Search and Seizure Warrants (Sections 352-356)

These can be granted on application if -

- A person has failed to comply with a production order, or
- It is not considered practical to seek such an order or
- It is not practicable to secure agreed entry to premises for the purpose of production.

The latter two conditions implicitly, though surprisingly not explicitly, allow for the application to be made *ex parte*.

Obviously this is a more intrusive order than the others and investigators need to be sure that they are justified in applying for it rather than a less intrusive order. Strict requirements are set down for those who wish to apply under the last two sub-headings above.

D. Customer Information Orders (Sections 363-369)

These may be obtained (*ex parte* if necessary) in order to discover the existence of accounts held at financial institutions. They do not extend to the statements of account, etc. merely to such details as the identity of the account holder, the number of the account, the date the account was opened (and closed if necessary), his/her most recent address, and any information which the institution gathered for the purposes of carrying out its own responsibilities concerning money laundering. If the account holder is a company or business like details as above but also the country of incorporation, registered office, and the identity of all signatories to the account. If, following the receipt of the information, evidence is sought as to the running of

the account such as bank statements, correspondence, etc. then a production order (see above) has to be obtained.

Criminal offences carrying a sentence of an unlimited fine are committed by an institution which either fails to comply with a Customer Information Order or knowingly or recklessly makes a statement which is false or misleading.

Subject to the last paragraph statements made by financial institutions in pursuance of a Customer Information Order may not be used in evidence in criminal proceedings against the institution itself.

Either party may apply to vary or discharge the order.

E. Account Monitoring Orders (Sections 370-375)

This order may be obtained on application (*ex parte* if necessary) to a Crown Court Judge. It is the only one of the orders which is entirely new, although the others have been modified and the new law makes them easier to obtain than before. It is perhaps for that reason that its operation has been limited. The order requires a financial institution to supply ongoing account information for a maximum period of 90 days (which will need to be justified in the application) following the order. Hitherto it was only historical information which could be obtained.

This welcome change does mark another move away from the strictly adversarial system which I described briefly earlier and back to the old system which was so much closer to the "Civil Code" systems which apply in most countries outside the so-called common law countries. Here is the judge, who may one day try the case if a prosecution is brought, making orders which are directly relevant to the ongoing investigation as opposed simply to allowing investigators access to already created material. This may seem unsurprising to most of you but for us it is a big change.

F. Disclosure Orders (Sections 357-362)

I have left this power and the following power until last since the two powers can only be exercised upon the application (*ex parte* if necessary) of the Director of the ARA rather than by a police officer or other authorised person. If made it can allow the Director to require a person to answer questions or provide information or documents. As with the Customer Information Order criminal offences are committed by those who fail to comply or provide, knowingly or recklessly, false information, and statements made cannot generally be used in evidence against the person who made them otherwise than in such prosecutions.

Comment

This power mirrors the power I described earlier when I referred to the setting up in 1987 of the Serious Fraud Office. It is not a power available to ordinary prosecutors even in cases of treason, terrorism, murder, etc. I would be surprised if this situation were to survive for long.

G. Application for Letter of Request for Assistance in Obtaining Outside the United Kingdom Evidence for Use in a Confiscation Investigation

This does no more than extend the power already available to prosecutors in other forms of crime to the investigation stage of matters under this Act. Some countries are more willing than others to comply with requests at this early stage when it is not certain that a charge will ever be brought in connexion with the investigation.

However, I believe that gradually the, to me, old-fashioned attitudes to assisting foreign investigations based either on the concept of "national sovereignty" or on a xenophobic belief that other countries are incapable of behaving fairly or of using information supplied appropriately, are gradually giving way to the urgent need to cooperate as fully as possible to combat crime and criminals who know no such restrictions.

VIII. CONFISCATION

This is the last but also the most important and controversial area covered by the Act. As I explained earlier, since the 1970's attempts have been made by successive governments to pass laws which enabled the criminal courts to relieve *criminals* of their dishonest gains. Most recently we have followed the route of

other countries in forcing convicted persons to prove, if they can, that their assets and those they have disposed of have been honestly acquired. These attempts have been challenged in the courts and the position even under the old law was not entirely clear. What is clear is that the Act significantly extends the degree to which the defendant is "on the back foot" and it is likely that there will be challenges to it both in domestic courts and before the European Court of Human Rights.

The Act creates two types of confiscation order.

- 1) Confiscation of the assets of those proved to have a "*criminal lifestyle*"
- 2) Confiscation of the benefit obtained by a defendant's "particular criminal conduct"

A number of conditions have to be met.

The person has to qualify as a candidate for an order - of either kind.

He does so if he has been convicted of an offence in the Crown Court or committed by the magistrates' court to the Crown Court for sentence generally or specifically for consideration of a confiscation order. And if he does so the court must proceed under the Section (10). Sections 27 and 28 allow the court to proceed if the defendant has absconded after (Section 27) or even before (Section 28) conviction.

The prosecutor or the ARA asks, or the court of its own motion decides, to bring confiscation proceedings.

Does the nature of his offence or series of offences show that he has a "criminal lifestyle? (More of this below).

(If the answer to 3 is Yes). Has he been proved to have benefited from his general criminal conduct? In answering this question the court must make the assumptions about property in the possession of the person or gifts, etc. he has made in the relevant period which the Act requires. I will deal with them later.

(If the answer to 3 is No). Has he been proved to have benefited from the particular criminal offences for which he has been convicted?

(In the event of the answer Yes to either 4 or 5). How much has he benefited either from his general criminal conduct or from the particular criminal offences for which he has been convicted?

Has the defendant shown that the available amount is less than the benefit?

If Yes then the order must be made in the lesser sum. If No then in the full amount of the benefit (subject to a deduction for sums in respect of which a victim has already or is likely to obtain in civil proceedings against the defendant).

There are a number of terms which are new to the English Criminal Law. The most obvious is the term "criminal lifestyle" hitherto confined to the pages of the popular press or detective novels. It was a concept for which the police pushed hard. The term is defined in Section 75.

A person has a criminal lifestyle if (and only if)One or more of his offences is set out in Schedule 2 to the Act. Briefly these are:

- Drug trafficking offences
- Fraudulent importation or exportation of other prohibited goods
- Money laundering offences (Sections 327 and 328 only)
- Directing terrorism
- People trafficking
- Arms trafficking
- Counterfeiting (money only)
- Copyright offences
- Profiting from prostitution
- Blackmail
- Attempting, conspiring, etc. to commit any of the above.

Or,

The offence constitutes conduct forming part of a course of criminal activity.

Such conduct is defined as follows:

- Conduct from which the defendant has benefited, and
- In the proceedings on which he was convicted he was convicted of three or more other offences each of three or more of which constitute conduct from which he has benefited, or
- In the period of 6 years from the day the proceedings started he was convicted on at least two separate occasions of an offence from which he has benefited.
- The total benefit must be at least £5000
- Relevant benefit includes

Benefit from the offences of which he was convicted.

Benefit from any other conduct which forms part of the criminal activity and which constitutes an offence of the same kind as one of those of which the defendant has been convicted. (If a defendant has committed a long series of similar offences - for instance fraud on the Social Security system the prosecution will only charge a sample of the offences on the indictment and will lead the evidence, if the defendant contests his guilt, of the remaining offences as evidence of "system". This provision allows the court to take these other offences into account when calculating the benefit).

Benefit from such conduct which has been listed in a list of offences "to be taken into consideration" by the court. (This applies to a similar situation as above when the defendant has pleaded guilty to a sample of his offending and the rest is placed on a list of offences which he agrees. It prevents the prosecution from bringing further proceedings against him.)

Or,

The offence is one which was committed over a period of at least six months and the defendant has benefited to at least £5000. Relevant benefit is similar to the relevant benefit defined above.

As I warned this is quite a lot to take in. Even reducing it to its most basic it is still a complicated scheme requiring sound and detailed information as to previous record, etc. and a careful consideration by the prosecutor in advance of trial as to how to frame the charges and by the defence lawyer as to how to run the defence.

The complications do not end there. How to calculate the benefit and the recoverable amount, which, as I said earlier, may be - usually are - different. In assessing benefit certain deductions must be made. These include property already the subject of court orders for forfeiture, compensation, etc.

If the court has found that the defendant has a criminal lifestyle then certain assumptions must be made by the court for the purpose of deciding both whether the defendant has benefited from his general criminal conduct and the extent of his benefit. These are the assumptions. I put them in italic type because of their importance and controversiality. They are that:

Any property transferred to the defendant after a date six years before the start of the proceedings was obtained as the result of his general criminal conduct.

Any property obtained by the defendant after his conviction was obtained as the result of his general criminal conduct.

Any expenditure of the defendant after a date six years before the start of the proceedings was met from property obtained by the defendant as the result of his general criminal conduct.

For the purpose of valuing any property obtained or assumed to have been obtained that the defendant obtained it free of other interests.

If the defendant shows that a particular assumption is incorrect or that there would be a serious risk of injustice if the assumption were made then and only then may the court not make the particular assumption.

The court must give reasons for any such decision.

In assessing the available amount the court must aggregate the total of all free property held by the defendant together with the total value of tainted gifts, less "priority" obligations such as court fines and "preferential debts" in a bankruptcy. Free property is all property except property subject to court orders in other proceedings. Tainted gifts are transfers of property for significantly less than its real value. If some money was paid for the property then that is deducted from the value of the tainted gift.

If the court decides that the defendant does not have a criminal lifestyle but has benefited from his particular criminal conduct then certain assumptions may be made as to tainted gifts made after the first of the two or more offences from which he has benefited.

Complicated provisions enable the court to value the gift or, if it has been disposed of, the proceeds of disposal by reference to market value plus inflation, etc.

There are of course many other provisions which set out how the procedure will operate. I shall summarise them because the way in which the procedure operates may have a bearing on the fairness or otherwise of the Act and *its operation*.

Procedure and Enforcement (Sections 14-39, 50-57, Etc.)

Once the court has embarked upon confiscation proceedings they may be adjourned for up to two years - or longer in exceptional cases. In particular the substantive sentence may be passed before the question of a confiscation order or its amount has been decided. However, no other sentence of a financial nature may be passed before the decision on the confiscation order.

The prosecutor serves a Statement of Information on the Court and the defence setting out the reason why he contends that:

- the defendant has a criminal lifestyle, (if he so contends);
- the defendant has benefited from general criminal conduct;
- the benefit is so much;
- there are matters which engage the statutory assumptions.

He must also include matters which operate against the application of the statutory assumptions if any.

If the prosecutor does not contend that the defendant has a criminal lifestyle but contends that he has benefited from particular criminal conduct he must produce a similar Statement of Information setting out the reasons why.

Once the prosecutor has served his Statement of Information the defendant is required to indicate the extent to which any allegation is accepted, and the particulars of any matters upon which he proposes to rely to rebut any allegation in whole or in part. The court may also order the defendant to supply information - usually information which only he can know. If the defendant fails to supply it the court may draw an adverse inference against him. Acceptance by either side of an allegation or contention is treated as conclusive proof of the allegation or contention for the purpose of the proceedings.

If the defendant absconds during the proceedings or after conviction the court may make a confiscation order in his absence. In the case of an unconvicted absconder the court must wait two years before embarking on the process. Any person other than the defendant who may be affected by the order may make representations to the court in these cases. If the absconder returns and is acquitted any order will cease to have effect. If he returns following conviction he has the right - as does the prosecutor - to reopen the question of the order or its amount.

Orders should be complied with when they are made. Six months, and exceptionally 12 months may be allowed. Interest is payable if the order is complied with late.

The enforcement process is similar but more sophisticated than the process for enforcement of ordinary fines. Periods of imprisonment in default range from 7 days in the case of an order below £200 to 10 years in the case of an order over £1,000,000. Once fixed by the court it is reduced by the amount by which the amount has been paid. If the Director of the ARA is not appointed to enforce payment the magistrates' court

will be responsible for enforcement. I expect - and hope - that in the majority of cases the ARA will be appointed since the magistrates' record in collecting fines is far from perfect.

A fundamental purpose behind the Act, which changes the previous situation, is that service of the default term of imprisonment does not extinguish the order. Thus, my client in the case I referred to earlier could not now use the money he had left after serving his term in default to provide dowries for his daughters! In order to ensure payment the Act provides for the appointment of enforcement receivers. I referred to management receivers some time ago in the context of restraint orders. Enforcement receivers have a similar mandate. They are appointed on the application either of the prosecutor or the ARA when an order is not complied with. Rules are provided to guide receivers in the order in which moneys recovered must be applied. The Act also provides for the prosecutor to ask the Home Secretary to request the assistance of foreign states to prevent disposal of assets and to secure their realisation. There is a right of appeal against the order to the Court of Appeal since the order is part of the sentence.

IX. HUMAN RIGHTS ISSUES

Many of the potential human rights issues which this legislation throws up had been considered in some way as the result of earlier legislation.

The first challenge was based on the premise that, since the judge was looking in confiscation proceedings beyond the actual offences of which the accused had been convicted to others, he was in fact trying and convicting the accused without the normal safeguards of the trial process. In other words it was alleged that there was a breach of Article 6(2) of the ECHR which requires "criminal charges" to be decided according to the presumption of innocence.

Are confiscation proceedings criminal proceedings? The first case decided by the English Court of Appeal⁴ held that they are but that the shift in the burden of proof is legitimate in certain criminal proceedings of which this was one. The next case was decided by the Privy Council⁵ on appeal from Scotland where there was parallel legislation. The Privy Council held that confiscation proceedings are not criminal proceedings and that the process involved no enquiry into whether the accused had committed specific crimes. Accordingly Article 6(2) of the ECHR was not engaged. The Privy Council did go on to consider the position on the basis that they were wrong and came to the same conclusion as the court in *Benjafield*. A further case came before the European Court of Human Rights⁶. The Court decided that the proceedings were not criminal proceedings. But having done so they held that Article 6(1) did apply because the general right to a fair trial in Article 6(1) included the presumption of innocence. This is - to me and others - a surprising conclusion since it seems to render Article 6(2) redundant. However, the court looked at the individual elements of the procedure - to remind you, the pre-Act procedure - and identified a number of features which in its estimation rendered the proceedings fair. These were there was no finding of guilt or innocence within the proceedings.

The hearing was public. There was advance disclosure of the prosecution case. The judge had discretion not to apply the assumptions if serious injustice would result. The defendant could give and call evidence. The order could be tailored to meet the actual resources of the accused.

In the given case all the facts found by the judge were underpinned by evidence or admitted by the accused. In any event the actual amount ordered was fair. If the defendant's account were true it would have been easy for him to demonstrate this independently.

More recently still the matter was considered again by the House of Lords in two consolidated appeals, one from *Benjafield* to which I have referred.⁷ Their Lordships found that the proceedings were not criminal and that Article 6 was satisfied in general by the safeguards outlined in *Phillips*.

⁴ *R v Benjafield & Others* [2001]3 WLR 75.

⁵ *McIntosh v HM Advocate* [2001] 3 WLR 107.

⁶ *Phillips v UK* (2001) BHRC 280.

⁷ *R v Rezvi, R v Benjafield* [2002] 1 All ER 801.

There are a number of ways in which the Act, or more particularly its operation in a particular case or type of case may be open to challenge.

The European Court, in this and in other instances when UK legislation has been under scrutiny, has looked at what happened in the individual case rather than, as the English courts do, the general principle of whether a piece of legislation is ECHR compliant or not. The judgement in *Phillips* did not give prosecutors and judges a free hand to use the old legislation as they pleased. It merely said that in the case before it the way in which that legislation had been applied was compliant. Even the then current regime which applied the assumptions only in cases of drug trafficking, it implied, could be non-compliant if unfairly applied.

The new Act goes wider, both in the scope of the assumptions but, also, more importantly, in the breadth of offending which may come within its remit. As well as the Schedule 2 offences which I summarised earlier, most of which are serious crimes (about which there can be little argument as to the necessity for tough measures to protect the human rights of the public at large), any offence or series of offences which benefits the offender to the value (£5000) of a second hand car is brought within its remit. It will be crucial to the success of the legislation for prosecutors, investigators and judges to have regard in the first place to the Code which places strong emphasis on proportionality and the ECHR in the individual decision-making processes required and to the need for the judicial discretion to be properly applied.

There is another potential ground for challenge which will diminish and eventually disappear. The legislation extends back six years - and therefore in most current cases to before the passing of the Act - and so it may be argued that an accused is now being subjected to a greater penalty than he would have been at the time that he committed the offence. If a confiscation order is to be regarded as analogous to a fine - and it is enforceable in much the same way - this could infringe his right under Article 7 of the ECHR which prohibits retrospectivity in the matter of penalty. If it is interpreted as simply the recovery of a civil debt which would be open to the victim, or society as victim, to recover, then this challenge will probably fail.

X. CIVIL RECOVERY, BANKRUPTCY AND REVENUE FUNCTIONS

I will say little about these since I have already said a great deal about the criminal process. It is however important to remember that these powers exist and it will be interesting to see when the ARA is working at full stretch what the division of work between criminal, civil and revenue work is. The intention is that criminal proceedings will be the priority for the ARA and the Code makes this clear.

The relationship between bankruptcy proceedings and confiscation orders is complicated and perhaps confusing. I believe the purpose of the legislation was to give confiscation orders primacy over bankruptcy proceedings but the effect of the provisions taken together seems to be that if bankruptcy proceedings were under way before the confiscation investigation began, the bankruptcy proceedings have priority, but if the bankruptcy proceedings post-date the confiscation investigation the confiscation proceedings oust the bankruptcy in respect of relevant property. The Act deals with this at Sections 417 et seq.

Two tough regimes are put in place to enable

- the recovery by High Court proceedings of property which is, or which represents, property obtained through unlawful conduct
- forfeiture of cash by civil proceedings in the magistrates' court which is or which represents, or is intended to be used in unlawful conduct.

These processes can be used in the absence of criminal proceedings in respect of the property or those in possession of it. They may even be brought if there has been an acquittal of the defendant in the Crown Court since the standard of proof in civil proceedings is lower than that in criminal. Property in such proceedings can be "traced" in the same way as in ordinary commercial cases. There are parallel regimes to those I have described in criminal proceedings for restraint and management of assets restrained, and a parallel discretion in the court not to act if to do so would cause injustice to the person affected. There are complicated provisions relating to jointly owned property which are designed to assist the ARA in obtaining the maximum benefit while protecting the rights of innocent spouses and others who have an innocent interest in such property. There is obvious scope for lengthy legal battles over such property.

As with the criminal confiscation regime there are likely to be ECHR challenges on the basis that these are criminal proceedings masquerading as civil and invoking fair trial rights under Article 6 and 7, and in the case of, say, a family home, Article 8 the right to respect for family and private life.

Until now income tax has been the exclusive preserve of the Inland Revenue. For the first time this new agency - the ARA - will be able if it is unable to pursue suspicious funds by the criminal confiscation route or the civil recovery route, to levy tax upon monies which it discovers in the course of an investigation. It may use information gained during a criminal or civil investigation to inform its decision on revenue. It can raise taxes of most kinds from income tax to student loans, etc. The money sought to be taxed must be "chargeable from the criminal conduct of himself or another". Unlike the Revenue it does not have to prove the source of the income - merely that it exists. (If it was able to prove the source he would be able to take civil or criminal remedies to recover the sums in full). Appeal against such orders lies to the Commissioners of Inland Revenue.

XI. CONCLUSION

I hope I have been able to show how the law in England and Wales has developed over the years and how this latest attempt to codify the law and to focus the minds of investigators, prosecutors and judges, not just on issues of guilt or innocence and the length of the prison term or probation order, but on the reduction or elimination of the motive for the commission of the vast majority of crimes in a society in which economic well-being is for most people the ultimate aim in life and which offers infinite opportunities to those who would achieve that well-being through dishonest or other illegal means. Much will depend, as I have said, upon the way in which the courts accept the new legislation and interpret it.

Much more will depend on the care, enthusiasm and effectiveness with which it is implemented. My function as Director of Public Prosecutions was to try, by organising seminars and training events, by the appointment of specialists in each area of the country, and by personally stressing the message whenever I could, to ensure that prosecutors played their full part in trying to implement the legislation fully and firmly but without the sort of heavy-handedness which may provoke a legitimate challenge in the courts. In short I urged all prosecutors to have an automatic "default" button in their heads when considering a case to check whether a confiscation order would be possible and to draft charges and advise the police with that in mind. Only then will confiscation become part of the "culture" of our criminal process.