36. The pursuit of criminal property

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Over the last few decades, increasing attention has been paid not only to prosecuting those who commit crimes but also to depriving them of the proceeds of those crimes. In the United Kingdom, a key policy document was the Report of the Cabinet Office’s Performance and Innovation Unit, ‘Recovering the Proceeds of Crime’, published in June 2000. This discussed why the British Government felt that asset recovery was important before setting out how this was to be achieved, paving the way for the Proceeds of Crime Act 2002. Although certain forms of recovery of criminal property were already in place in the United Kingdom, the 2002 Act both extended these forms, including the introduction of civil proceedings, and brought all the provisions under one piece of legislation, ending the divide that had existed up to then between drug trafficking and all other forms of crime.1

There are clear reasons why the removal of criminal property is important, above and beyond the mere fact that international instruments now demand it.2 One is the commonly stated argument that since certain crimes are committed in order to make money, if conviction will result not only in a prison sentence but also removal of the proceeds, then the motivation will be removed. In itself, this is questionable: almost 30 years after severe measures were first introduced in the United Kingdom to remove property linked to drug trafficking,3 the incidence of drug trafficking remains high.4 Similarly, in the United States, despite the use of both criminal and civil forfeiture provisions to combat drug trafficking, the problem remains sufficiently severe for New York City to maintain a specialist investigation and prosecution unit devoted solely to this category of offence.5 It is, however, true that certain forms of acquisitive crime both provide extravagant lifestyles for the offenders and cause considerable hardship for the victims. Corruption and embezzlement by political leaders are particular examples, with leaders being found in possession of assets with a value that dwarfs their official salaries. A particularly notable example was Teodoro Obiang, Minister of Forestry and Agriculture (and son of the President) of Equatorial Guinea, who settled a

1 The provisions relating to terrorist property, however, continued to be covered separately in the Terrorism Act 2000, as subsequently amended.
2 For example, Recommendation 4 of the Financial Action Task Force.
3 Through the Drug Trafficking Offences Act 1986. This Act was later superseded by the Drug Trafficking Act 1994, itself replaced in 2003 with the coming into force of the Proceeds of Crime Act 2002.
5 Office of the Specialist Narcotics Prosecutor for the City of New York.
forfeiture action brought against him by the U.S. Department of Justice in October 2014. Despite an official salary of US$6,799 per month, he was able to buy a mansion in Malibu, California, for a price of $38.5 million and his total assets were stated by the Department of Justice to be over $100 million. Similarly, at the other end of the scale, there are communities where a combination of severe poverty and a strong sense of loyalty to one’s family mean that even long prison sentences are not a sufficient deterrent. Put bluntly, if a man engages in violent robbery, kidnapping or poaching of endangered animals and is sentenced to ten years’ imprisonment, he may regard that as an acceptable price to pay for his parents being able to have a comfortable house, his aunt receiving medical treatment or his cousin going to school. This is a reality in many parts of the world. If, however, the man knows that conviction will result not just in a prison sentence but in him and his family being stripped of what little property they have, the deterrent may be rather greater.

Before continuing, however, one needs to define the concept of ‘criminal property’. Property shown to be the proceeds of, at least, serious crimes is generally included in most jurisdictions. The United States, however, at both Federal and state level, focuses with equal vigour on the ‘instrumentality’ of a crime: property not deriving from a crime, but rather used to commit it or even merely to facilitate it. In the United Kingdom, in contrast, although such a concept exists, it is confined to certain specific offences, notably drug trafficking, smuggling (whether of drugs or other contraband), human trafficking and certain of the more serious road traffic offences.

CRIMINAL MEASURES: UNITED KINGDOM

The criminal measures to remove the proceeds of crime in the United Kingdom are termed ‘confiscation’. They are found in Parts 2–4 of the Proceeds of Crime Act 2002, although Parts 3 and 4 essentially replicate, for Scotland and Northern Ireland respectively, the measures set out in Part 2 for England and Wales. (The principal differences relate to the different court systems of the three jurisdictions.) Two key points need to be made at the outset. Firstly, the proceeds of all crimes are covered, regardless of how grave or minor. ‘Criminal property’ is defined as a benefit from ‘criminal conduct’, which in turn is defined simply as ‘conduct which (a) constitutes an offence in England and Wales’. Just as, as a matter of law, the proceeds of trafficking in illegal drugs, human beings or contraband tobacco and alcohol may be confiscated, or those of a contract murder or corruption, so may be those of selling alcohol or cigarettes to a minor. It may be that limited resources mean that greater priority is in...
practice given to pursuing the proceeds of the former offences than the latter, but that could swiftly change with a change of government policy.

Secondly, confiscation, like its criminal law counterparts in other jurisdictions, is dependent on a criminal conviction. Property may be seized prior to conviction, but only in order to prevent the defendant from hiding it or, worse, transferring it to a jurisdiction from which it will be difficult or even impossible to retrieve it.9 If it is to be definitively confiscated, the defendant must first be convicted of a criminal offence. Even the criminal lifestyle provisions, discussed below, under which the burden of proof shifts to the defendant to show that the property is not in fact the proceeds of crime, require a criminal conviction (or, in some cases, more than one) before they will apply.

It should be noted that the proceeds of overseas crimes are also covered: the definition of criminal conduct extends to conduct which ‘would constitute [an] offence if it occurred in England and Wales’.10 The impact of this, however, is limited by the requirement of a criminal conviction before an English court. Although the extent to which the English criminal courts have jurisdiction over acts committed overseas has grown in recent years, it is still relatively limited, compared to that in some other jurisdictions.11 In terms of offences likely to give rise to proceeds, the key offences are bribery of a foreign public official12 and involvement in child prostitution or child pornography.13 All of these offences only cover defendants who are British citizens or residents. Foreign nationals (not resident in the United Kingdom) who commit crimes abroad may, however, find themselves subject to the English courts in relation to money laundering where the proceeds are transferred to, from or within the United Kingdom. A notable example was James Ibori, the former Governor of Delta State, Nigeria, convicted in February 2012 of laundering £50 million derived from defrauding Delta State government funds. The entire amount involved, however, was estimated to have been as £157 million or even higher.14

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9 To do so would, if the property were indeed derived from a criminal offence, constitute the money laundering offence of transfer of criminal property and/or removal of it from the jurisdiction (Proceeds of Crime Act 2002, s 327). But this may be of limited comfort if the property cannot be retrieved.
10 Proceeds of Crime Act 2002, s 76(1)(b).
11 For example France, whose criminal courts have jurisdiction over crimes (the most serious category of offence) committed by French nationals abroad as well as in France and also over délits (moderate offences) committed abroad, albeit with the additional proviso in the case of délits that the act was also a criminal offence in the jurisdiction in which it was committed (the double criminality rule). Code Pénal, art 113–16.
12 Bribery Act 2010, s 6.
13 Sexual Offences Act 2003, ss 48–50. For the purposes of these offences, a child is a person under the age of 18 unless the defendant has reasonable grounds to believe that they were at least 18 or a person under the age of 13 in any event. Trafficking persons for sexual exploitation, whether within the United Kingdom or elsewhere, is a separate offence under s 59A.
14 In his sentencing remarks, the trial judge, Judge Anthony Pitts, referred to the £50 million which Ibori admitted to having laundered as ‘perhaps … a ludicrously low figure and the figure may be in excess of £200 million’. Mark Tran, ‘Former Nigeria state governor James Ibori receives 13-year sentence’ The Guardian, 17 April 2012.
The procedure leading to a confiscation order begins with a hearing that follows the conviction itself. It is triggered either by the prosecution or by the trial judge: under section 6 of the 2002 Act, the court must proceed with a confiscation hearing if either the prosecution asks it to or if it ‘believes it is appropriate to do so’. The first stage is to determine whether or not the defendant has a ‘criminal lifestyle’. In practice, however, this will be a simple matter. The criteria for determining a criminal lifestyle, discussed below, are clearly stated, and hence there is little room for discretion. Put another way, either the defendant satisfies one of the criteria (and if they do, this will already be a matter of record) or they do not. If they do not, the court focuses on the specific offences of which the defendant has just been convicted. This will include any offences ‘taken into consideration’, but not any offences of which they were convicted in the past or in respect of which they have been charged but not yet prosecuted. Aided by the prosecution, the court then determines what ‘benefit’ the defendant has derived from their present crime(s). This will often be the money that they have derived from the offence. For example, in a case involving the sale of smuggled alcohol or tobacco, it will be the money that they have received from selling the contraband goods; in a fraud case, it will be the proceeds of the fraud. It may, however, be other forms of property: in an insider dealing case the securities that were purchased, in a theft case the property that was stolen.

It should also be considered that while some crimes enable the offender to make money, others enable them to save it. An example is where a person (natural or legal) engages in a business that is in itself legitimate but saves costs by employing undocumented, or even trafficked, workers. This will enable them to pay these workers below the legally prescribed minimum wage and also evade the payment of National Insurance contributions. The money from the business is derived from a legitimate activity such as farming, food processing or the manufacture of clothes, but costs are saved, resulting in higher profits, through a criminal offence.

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15 Where the defendant has in fact committed several other offences similar to that for which they have been prosecuted, they may ask for these to be taken into consideration by the court for the purposes of sentencing. This will not result in further actual convictions; however, it will mean that they receive a somewhat higher sentence than would otherwise have been the case (to reflect their overall criminality). These other offences are then considered dealt with: the defendant will not be prosecuted for them at some later date.

16 Past convictions may, however, trigger the criminal lifestyle provisions; similarly, a future conviction may trigger them in a subsequent hearing. See below.

17 A conviction for any kind of drug trafficking offence will trigger separate criminal lifestyle provisions; see below.

18 It is preferred to use the term ‘undocumented workers’ rather than the more popular ‘illegal workers’, since the persons are not illegal per se, they are merely not legally permitted to work in the jurisdiction concerned. See Hsiao-Hung Pai, Chinese Whispers: The True Story behind Britain’s Hidden Army of Labour (Penguin 2008).

19 For a detailed discussion of how saved costs have been deemed by the English courts (although less so in the United States) to constitute the proceeds of crime, see R.C.H. Alexander, “‘Cost savings’ as proceeds of crime: a comparative study of the United States and United Kingdom” (2011) 45(3) The International Lawyer 749.
the case, the position taken by the English courts has been that the entire proceeds (receipts) derived through the illegal activity.\footnote{R v Xu (David Kai) [2008] EWCA Crim. 2372, approved in R v Harvey (Jack) [2014] 1 WLR 124 at p. 139.}

A further category of proceeds is where the criminal offence does not directly produce an income but creates the opportunity to obtain it. The classic example of this is bribery. In the case of the corrupt recipient of the bribe, the money or other gift, such as the payment of tuition fees for the recipient’s children at expensive overseas schools or universities, is the proceeds. But the payer of the bribe also gets something: this is, for the most part, why they pay it! A company may pay a bribe in order to obtain a commercial contract. Mabey & Johnson and Innospec are merely two well-publicised examples; in both cases, the sentence imposed included a confiscation order based on the profits from the contracts corruptly obtained plus, where it may be calculated, the value of the pecuniary advantage of excluding competitors from the bidding process.\footnote{R v Innospec Ltd. [2010] Lloyds Rep. FC 462. That it may not always, however, be possible for the court to calculate this additional pecuniary advantage was stated clearly by the Court of Appeal in R v Sale (Peter) [2014] 1 WLR 663 at pp. 675–76.}

One may remark that the focus on profits, rather than gross receipts, in corruption cases, as confirmed by the Court of Appeal in \textit{R v Sale (Peter)}\footnote{Note 21 supra. It is to be noted that that the Court in \textit{Sale} did not seek to distinguish \textit{Harvey} on this point; where it did cite the decision (in another context), it did so with approval. It did not refer to \textit{Xu} at all.} somewhat contrasts with that taken with respect to cases involving the illegal use of undocumented workers in \textit{R v Xu}, cited with approval by the Court of Appeal in \textit{R v Harvey (Jack)} less than a month earlier.\footnote{Note 20 supra.} Space, however, precludes a further discussion of this here.

It must be stressed that in such cases, the burden is firmly on the prosecution to prove that the property to be confiscated (or rather its value – see below) is a benefit from the defendant’s crime; it is not for the defendant to prove that it is not. The court, in order to establish the benefit, may order the defendant to provide it with specified information, such as financial records, and, if the defendant fails to do so, may draw such inferences from the refusal as it sees fit.\footnote{Proceeds of Crime Act 2002, s 18.} Further, section 6 of the 2002 Act makes clear that the standard of proof is the civil one of the balance of probabilities, that is, 50.0001 per cent. But ultimately, it is down to the prosecution to demonstrate to the court that the assets to be confiscated are the defendant’s benefit from their criminal behaviour. Demonstrating this is by no means simple in every case. The case of James Ibori, referred to above, is a case in point. The first part of the proceedings was clearly a success: Ibori pleaded guilty to a series of offences, including both fraud and money laundering, and was sentenced to 13 years’ imprisonment. Further, in his sentencing remarks, Judge Anthony Pitts made clear that a confiscation hearing would follow. The course of that confiscation hearing, however, has to date been less than ideal from the prosecution’s point of view.\footnote{The confiscation case, at the time of writing, is still ongoing following a reference to the Court of Appeal and hence no final outcome has yet been reached.}

ended with Judge Pitts admitting that by the end of the defence submissions, he was ‘confused’.

Those submissions had included that the fact that Ibori had admitted defrauding and laundering £50 million did not, as the prosecution claimed, prove that he had personally benefited at all; this notwithstanding the fact that he had been shown to have considerable assets, including properties both in London and elsewhere in England and luxury cars.

It should further be noted that it is not in fact mandatory after a criminal conviction to seek a confiscation order at all. The court is obliged to hold a hearing if the prosecution asks it to do so or, alternatively, if it itself deems it appropriate. Should the prosecutor not apply for confiscation or the court not decide that it is appropriate, neither is required to explain why. In consequence, by no means every conviction for a crime that potentially gives rise to proceeds is followed by a confiscation hearing. A combined report in March 2010 by the bodies responsible for overseeing the Crown Prosecution Service, the courts and the police stated as much: ‘not all cases with restraint and confiscation potential are identified as such, largely because issues are not mainstreamed into the daily work of frontline police investigators and CPS area prosecutors’.

In possible explanation, the report went on to remark on the complexity of confiscation hearings: ‘there is a feeling that the identification of and exploitation of cases is a job best left to the specialists, because it is a separate complex area of law which should not impinge on the main job of prosecuting and sentencing criminals in the conventional way’. Since that report was published, some action has been taken and asset recovery specialists are now used by the CPS in at least some cases, including the Ibori case. However, it may be remarked that the Ibori case is not the kind of case that the report most had in mind; even before 2010, a confiscation order would be sought in a large-scale fraud and money laundering case such as this. One suspects that it is the smaller cases of acquisitive crimes that the report had in mind – and in these, confiscation orders are still not sought as often as they might be.

Where the defendant is shown to have a criminal lifestyle, however, the matter, from the prosecution point of view, becomes a little simpler: the burden of proof shifts to the defendant. Every item of property that the defendant received during the period of six years up to the start of their trial is presumed to derive from crime; similarly, every item of expenditure during the same period is presumed to have been funded from the proceeds of crime. This may seem draconian – indeed, it is and is intended to be – but...
The third presumption is harsher still. Every asset that the defendant holds on the day following their conviction is presumed to derive from crime, regardless of how long ago they acquired it. Section 76 is explicit: property acquired or expenditure incurred before the 2002 Act was passed is included. In other words, if the defendant acquired an asset, say, 35 years ago (at the time of writing 23 years before the 2002 Act was passed), but still has it on the day after their conviction, the presumption will apply to it.

The presumption is rebuttable: if the defendant shows that a particular asset or item of expenditure has a legitimate origin, its value will not be included in the confiscation order. But if they cannot, it is subject to confiscation. Also not included is any property that was the subject of an earlier confiscation order. Hence, although earlier convictions may, as seen below, cause the criminal lifestyle provisions to be applied, the value of any confiscation order that followed them will be subtracted from the sum of the defendant’s assets. No item of property is to have its value confiscated twice.

As indicated above, however, a criminal lifestyle will only be determined in certain circumstances. Three categories are set out in section 75. The first is where the defendant is convicted of one of a specified list of offences. This is in many ways a successor to the original ‘confiscate all’ presumption applied to those convicted of drug trafficking under the Drug Trafficking Offences Act 1986, part of the 1980s ‘war on drugs’ and since replaced by the 2002 Act itself. Drug trafficking is still a ‘criminal lifestyle’ offence, but it has been joined by a number of categories, contained in Schedule 2 of the Act:

1. money laundering (except for acquisition, use or possession of criminal property under section 329 of the 2002 Act);
2. directing terrorism;
3. people trafficking;
4. arms trafficking;
5. counterfeiting of currency;
6. intellectual property offences;
7. sexual exploitation of children (whether for prostitution or pornography);
8. causing, inciting or controlling prostitution for financial gain.

A number of these offences are substantive crimes under English law regardless of where in the world they are committed; however, it will be recalled that the definition of criminal property extends to the proceeds of any act committed outside the United Kingdom if it would be a criminal offence were it committed within it.

A single conviction for any of the above offences will trigger the criminal lifestyle provisions; this is designed to indicate the seriousness with which the British Government regards them.

The second category applies to repeat offenders: either where the defendant has two previous convictions from two separate occasions – again, the relevant period is six years up to the start of the current proceedings – or where they have been convicted of three other offences in the current proceedings. In either case, for the criminal lifestyle provisions to apply, the prosecution must also show that the defendant derived a benefit from each of the offences. This contrasts sharply with the first category, where the mere
conviction is sufficient: no actual benefit need be proven. Furthermore, for the repeat offender category, the prosecution will be required to show that the benefit from the current offence was at least £5,000. Thus, for example, three convictions of relatively small scale insider dealing, giving rise to total proceeds of £3,000, will not suffice. The prosecution may seek to show that the benefit was in fact higher than that, in order to trigger the criminal lifestyle provisions, but the burden of proving this will be on it.

The final category is where the offence was committed over a continuous period of at least six months; an example would be sustained embezzlement or other fraud. Again, the prosecution must show that the offence gave rise to a benefit of at least £5,000 before the burden of proving the origin of the assets will shift to the defendant.

Although the criminal lifestyle provisions have rightly been described as draconian, they do offer an advantage to the prosecution that is more than the obvious. It is not simply that the prosecutor is spared the effort of calculating the defendant’s removable assets: they, or their investigator, will still need to assess what assets the defendant holds now, what they have received over the past six years (or more if the trial has been lengthy) and what they have spent over the same period. This will be all the more challenging where some, possibly even a large part, of the assets are located abroad: it is well known that some jurisdictions are rather more cooperative with foreign investigations than others. Rather, where the defendant has been convicted of acquisitive crimes and has significant established assets, but there is doubt regarding what level of benefit they actually derived from those crimes, the criminal lifestyle provisions require the defendant to ‘explain or lose’. The Ibori proceedings, discussed above, were a case in point. Ibori pleaded guilty to laundering £50 million derived from fraud and was found to have assets that included a number of high-value real estate properties in London and elsewhere and a number of luxury cars including a Bentley, a fleet of Range Rovers and an armoured Mercedes Benz, as well as amassing a credit card balance of £920,000, despite having an official salary of £4,000 per annum. However, his defence claimed that the prosecution had failed to show that he had personally benefited from the fraud. Had the criminal lifestyle provisions been applied, it would have been for Ibori himself, not the prosecution, to show how these assets, including the credit card expenditure, had been funded.

This in turn raises a further issue. It highlights the problems that can be caused by only certain money laundering offences being included in the list of specified criminal lifestyle offences. Although transfer, conversion, concealment and removal from the jurisdiction of criminal property under section 327 of the 2002 Act, as well as facilitating another person’s benefit from criminal property under section 328, are on the Schedule 2 list, acquisition, use and possession of criminal property under section 329 are not. That is not to say that the presumptions can never be applied in section 329 cases, but it does mean that, for them to be, either the defendant will need to have been convicted of multiple offences or the prosecution must show that the current offence was committed over a protracted period of time. Neither is necessary following a conviction under either section 327 or 328. Yet acquisition, possession or

31 Mark Tran, note 14 supra.
use are precisely the kind of money laundering offences with which Ibori and his like are most vulnerable to being charged. While one could argue that houses, cars, and so on represent conversion of criminal property, that is, from money to a house, car or whatever, it may be more difficult to prove to a criminal standard that the conversion took place in the United Kingdom; the purchases may have been made from abroad.\footnote{In Ibori’s case, one of the properties and at least one of the cars were located in South Africa and the purchase transactions may well have taken place there.}

In contrast, proceeds discovered in a U.K. bank account or houses, cars and the like can much more easily be shown to have been received within the jurisdiction – and certainly possessed and used there. If the criminal lifestyle provisions could be applied following a conviction for a section 329 offence, the assets of such individuals could much more simply be pursued.

Lest the extension of the criminal lifestyle provisions be considered a draconian step too far, it must be remembered that, as stated above, the presumptions are rebuttable. Although the burden of proof is on the defendant, section 10(6)(a) of the 2002 Act is clear: no presumption is to be applied if it is shown to be incorrect. If the defendant shows that a given asset has a legitimate origin, that asset is not subject to confiscation.

Although mention has been made of criminal property consisting of cars, houses and the like as well as actual cash, it should be stressed that what is actually confiscated, whether or not the criminal lifestyle provisions are applied, is the value of the assessed property, not the property itself. This was remarked on in the recent case of *R v Waya (Terry)*.\footnote{[2013] 1 AC 294.} Often, this will make little difference. The only way that a defendant can raise the funds necessary to meet the order may well be to sell the assets concerned. Alternatively, if the defendant fails to pay, an enforcement receiver may take property that has already been seized pending the confiscation order and sell it. However, if a defendant does have sufficient funds from a legitimate source and chooses to use them to pay the order rather than part with an asset that they particularly like, they are free to do so. An example would be a senior officer of a financial institution convicted of insider dealing or fraud who has significant assets derived from the salary from the position which they abused to commit the offence.

Brief mention should be made of the position of victims of crime. Unlike some other jurisdictions,\footnote{For example, several U.S. states.} the United Kingdom does not require confiscated funds to be used for certain specific purposes.\footnote{Other than expenses incurred during the confiscation process, such as the fees of management receivers: ss.54 and 55.} Rather, they are paid into the ‘Consolidated Fund’, in effect for HM Treasury to use to whatever end it pleases.\footnote{http://www.parliament.uk/site-information/glossary/consolidated-fund/. Last accessed, 26 June 2015. The key exception to this is that part of the funds may be paid to the authorities of another jurisdiction if either the offence was committed there or that jurisdiction has provided assistance in the investigation. More recently, funds have also been allocated to community projects or other “good causes”.} That purpose may be linked to law enforcement; alternatively, it may be contributing to the building of a new railway line or even simply reducing the deficit. It is not, however, the purpose of the Act that a victim seeking compensation finds that, by the time a compensation order is made, all

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assets that could have satisfied it have been confiscated. Section 13 of the Act therefore provides that where the court finds that, following the making of a confiscation order, the defendant will not have sufficient assets left to satisfy a compensation order in full, the balance (i.e. the difference between the level of the compensation order and the level of the remaining assets) is to be paid out of the confiscated assets. Nonetheless, it should be considered in this context that under English criminal procedure, in contrast to that of some civil law jurisdictions, the victim is not separately represented at the offender’s trial and the amount awarded in a compensation order may therefore be less than they might have received in a subsequent civil action.

At the other end of the scale is the power to award compensation to the alleged offender. Although a confiscation order may only be made after a criminal conviction, suspected assets may be seized, or an account frozen, before that as an interim measure if there is reason to fear that they will otherwise be dissipated. This raises the question: what if assets are seized, but the defendant is acquitted at trial? In many cases, the answer is simple: the assets are returned or the freezing order lifted as the case may be. But in others, the assets may have significantly deteriorated in value or the business that they were used to fund gone into insolvency. Where, therefore, the defendant is acquitted or their conviction is quashed on appeal or the investigation is dropped before the matter even gets to trial, but, by then, they have suffered loss in relation to seized or restrained property due to ‘serious default’ on the part of an investigating officer, section 72 of the 2002 Act provides them with the right to compensation. A wide range of investigating agencies are covered, including the police, the Crown Prosecution Service, the National Crime Agency and even the immigration services. As with most causes of action, the onus is on the person concerned to make an application, but if they do so, the Crown Court is empowered to make the order. A similar power exists under section 73 of the 2002 Act where a confiscation order is made but later amended or discharged.

‘Serious default’ is not defined in the Act, nor has its meaning been clarified by the judiciary: in the few cases in which section 72 has been considered, they focused on other issues, such as whether a confiscation order should have been made at all, whether a private prosecutor is entitled under the 2002 Act to apply for such an order or who, when assets have been held by an appointed management receiver under an order which should not have been made, should pay the management receivers’ fees. It was remarked in submissions in Crown Prosecution Service v Eastenders Group that it is a high test to satisfy, but the Supreme Court did not comment on this in its judgment. That such a provision for compensation exists at all, however, may be seen by some as controversial. The author held ‘off the record’ conversations with senior representatives of law enforcement from two other jurisdictions as to their view on whether compensation should ever be paid in such circumstances. One remarked that if

37 For example, France.
38 The full list is set out in s 72(9).
40 R v Zingga [2014] 1 WLR 2228.
42 Ibid. at p. 12.
a person is arrested on suspicion of a serious offence and held on remand for several months, but then acquitted, they were not entitled to compensation either in his home jurisdiction or in England and Wales; the same, he felt, should apply to wrongful seizure of assets. Another took a rather more nuanced approach: precisely in order to avoid the introduction of a provision like section 72 of POCA 2002, his agency had offered a settlement in cases where it took the view that the assets should not have been restrained. In England and Wales, the debate over how to balance the protection of the innocent (or at least the acquitted – one must remember that a criminal conviction requires a very high standard of proof) against the risk to the budgets of law enforcement agencies, not least in an age of austerity, may well continue.

CIVIL RECOVERY

A chapter on the pursuit of criminal property would not be complete without at least referring to the civil recovery regime, contained in Part 5 of the 2002 Act. This provides that the National Crime Agency\(^43\) may bring civil proceedings to recover proceeds of crime. The targeted property is termed ‘property obtained through unlawful conduct’, but its definition is much the same as ‘criminal property’ discussed above. The key feature is the civil standard of proof: not only must it be shown on the balance of probabilities that the property to be removed is derived from a criminal offence, but the same standard applies to showing that a criminal offence even occurred. Nor need it be shown what type of offence gave rise to the property: it is sufficient to show, on the balance of probabilities, that the property derived from one of a number of possible activities, each of which is a criminal offence (or would be if it were committed in the United Kingdom). Similarly, the criminal conduct may be that of the current holder of the property or, alternatively, that of someone else: section 242 is clear that either will suffice.

Such a wide-ranging provision might be expected to be a very powerful weapon indeed against the proceeds of crime. Its effect, however, at least at present, is less significant than its counterparts in some other jurisdictions. A key reason is that it is only to be used when there is no realistic prospect of the offender being convicted, for example where they are deceased or, less extreme, in a jurisdiction that is unlikely to extradite them.\(^44\) The policy is that asset recovery should not be used as a convenient alternative to prosecution: criminals should be prosecuted and sentenced wherever possible and their assets can then be removed through confiscation. The 2000 Report of the Cabinet Office’s Performance and Innovation Unit, ‘Recovery of the Proceeds of Crime’, referred to at the beginning of this chapter, made this very clear. It even referred to cases in the United States, where, faced with a limited prosecution budget, it was decided to prosecute a cannabis trafficker rather than a heroin dealer because the...

\(^{43}\) Previously the Serious Organised Crime Agency and, before that, the Asset Recovery Agency.

\(^{44}\) For a full discussion of this, see Anthony Kennedy, ‘Civil recovery proceedings under the Proceeds of Crime Act 2002: The experience so far’ (2006) 9(3) JMLC 245.
former had greater funds that could be forfeited.\textsuperscript{45} That said, at least two prosecutors in the United States\textsuperscript{46} informed the author that the volume of forfeitable assets had never been the decisive factor neither in their offices nor that of any other prosecutor’s office that they had encountered. It would appear, therefore, that the British Government’s concern was inspired by a fairly atypical case.

The reservation of civil recovery actions for cases where it has been accepted that a criminal prosecution is unrealistic is, certainly, a marked contrast to the approach in the United States. As has been stated directly by leading U.S. asset forfeiture specialist Stefan Cassella:

\begin{quote}
Civil forfeiture is \textit{not} part of a criminal case. In a civil forfeiture case, the Government files a separate civil action \textit{in rem} against the property itself, and then proves by a preponderance of the evidence that the property was derived from or used to commit a crime. Because a civil forfeiture does not depend on a criminal conviction, the forfeiture action may be filed before indictment, after indictment, or if there is no indictment at all.\textsuperscript{47}
\end{quote}

Either/or it most definitely is not. A further contrast, however, is referred to rather more obliquely in Cassella’s remarks: civil forfeiture can be and regularly is used to remove not merely the proceeds of a crime but also any property that is used to commit it, termed in U.S. forfeiture law the instrumentality. Although there are, as previously referred to, specific cases where an instrumentality of a crime may be removed under English law (and indeed that of the United Kingdom in general), they are the exception, not the rule and furthermore do not form any part of the civil recovery regime. In Part 5 of the Proceeds of Crime Act 2002, as seen above, property liable to civil recovery is ‘property \textit{derived from} unlawful conduct’, not property used to commit it. In contrast, in the United States, property that forms the instrumentality of a crime will often be very much the target of the civil forfeiture laws.\textsuperscript{48} Examples have included not only a ranch used for drug trafficking but also the horses on the ranch as these, by providing the superficial appearance of legitimate activity, were also held to facilitate the

\textsuperscript{45} It should here be clarified that the term ‘forfeiture’ has rather different meanings in the United Kingdom and the United States. In the United Kingdom, it refers to: (1) the removal of cash – but only cash – where a legitimate origin cannot satisfactorily be shown, (2) the removal of assets which are unlawful by their very nature, such as contraband goods, illegal drugs and firearms or pornographic material, (3) property used to commit certain very specific offences. In the United States, in contrast, it refers to the removal of any property linked to crime, whether proceeds, instrumentality or subject.

\textsuperscript{46} It is a common requirement imposed both on law enforcement officers and prosecutors in the United States that any comments they make may not be attributed either to them personally or to their agency/office. This applied to the two prosecutors referred to here.


\textsuperscript{48} The United States does not have any all-encompassing civil forfeiture statute analogous to Part 5 of the Proceeds of Crime Act 2002 in the United Kingdom, but rather has a very wide range of different statutes covering property related to different specific crimes. Whether the proceeds, instrumentality or both, can be forfeited will depend on the particular crime and statute. See Cassella (2013) \textit{supra}, pp. 4–5. The 1st edition in fact contains a CD supplement, providing a chart of which statutes provide for the forfeiture of property related to which crimes.
nor does there appear to be any particular requirement of proportionality between the value of the instrumentality and the gravity of the offence. A Porsche used for kerb crawling was forfeited, in contrast to an unreported case in Chelmsford Crown Court in which the court held that to forfeit (in the English sense) a Maserati in which the defendant had committed the offence of dangerous driving would be excessive.

A key question is the position of ‘innocent owners’, persons who own the property but who had no knowledge of the offence. In confiscation cases, the question does not arise: the removed assets are the proceeds of the defendant’s own crimes and hence, by definition, there is no innocent owner. The exception to this is that proceeds passed on to a third party will be covered; however, since it is the criminal defendant who is presented with the confiscation order and since, moreover, the order is for the confiscation of the value of the assets, not the assets themselves, this may be considered to be a relatively minor exception. With civil recovery, however, it is not. By definition, the perpetrator of the originating crime will often not be around; hence it will often be a third party that holds the property.

One category, under the 2002 Act, is clearly protected: victims of theft. If a person steals property and that property is later found in their possession or that of a third party (perhaps a fence), it clearly constitutes the proceeds of unlawful activity and hence is liable to recovery. Section 281 of the 2002 Act makes clear, however, that the interests of the person from whom it was stolen take priority. The court may make a declaration that the property belongs to the applicant, was taken from him unlawfully and furthermore was not recoverable (i.e. liable to civil recovery before it was taken). Where such a declaration is made, the property is not recoverable. In other cases, the position is less clear: there is an innocent owner defence of sorts, but it is difficult to satisfy. Section 266(3) states that a civil recovery order must not be made if a number of conditions are satisfied. The first four are that:

(a) the respondent obtained the recoverable property in good faith;
(b) he took steps after obtaining the property which he would not have taken if he had not obtained it or he took steps before obtaining the property which he would not have taken had he not believed he was going to obtain it;
(c) when he took the steps, he had no notice that the property was recoverable; and
(d) if a recovery order were made in respect of the property, it would, by reason of the steps, be detrimental to him.

In themselves, however, even these four will not be sufficient; a fifth condition must also be met: ‘it would not be just and equitable’ for the court to make the order. The combination was described as ‘a high hurdle’ in the recent case of National Crime Agency v Amir Azam and others (No. 2). Here, Kalsoom Sanam, the ex-wife of Amir Azam, a man claimed by the National Crime Agency to have funded his assets through drug dealing and money laundering, sought to oppose a civil recovery order in respect of a house on the basis that that house would form the basis of a claim for financial

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51 [2014] EWHC 3573. High Court of Justice, Queen’s Bench Division, 30 October 2014.
provision following their divorce. Andrews J made it clear that she found Kalsoom a completely innocent party and indeed had considerable sympathy for her:

She has done nothing to deserve the situation in which she has found herself. This is not the case of a woman who was happy to live ‘high on the hog’ from the proceeds of crime with no questions asked, turning a blind eye to where the money was coming from. … She genuinely believed that Thurza Court was hers to keep as a wedding gift; that was what she was told by both Mohammed [her ex-father-in-law] and Mr. Azam, although it was not in fact the truth. … If the court had an unfettered discretion as to what should happen to the property registered in her name, there would be much to be said for allowing her to keep it.52

She went on, however, to state clearly that the court in fact had no discretion at all: either the conditions in section 266(3) and (4) were satisfied, in which case an order must not be made, or they were not, in which case they must be. The innocence of the holder of the property, or even any hardship that might be caused to them, was irrelevant. In the present case, she found that Kalsoom had not taken any steps either before obtaining the property or afterwards which she would not have done otherwise – since she neither knew that she would receive the house until shortly before it was transferred to her, nor was in a position to do much with it afterwards. Thus the condition in section 266(4)(b) was not satisfied. Parliament had clearly intended the exceptions set out in section 266(3) and (4) to be the only exceptions to the rule that recoverable property was to be recovered and the court’s duty was to give effect to that.

CONCLUSION

In conclusion, the United Kingdom is equipped with significant measures to remove criminal proceeds from offenders and those linked to them. In practice, however, although there have been a number of successes, the record could be significantly better: the Ibori case, in particular, has not proven the system’s finest hour. It is suggested that amendment of the criminal lifestyle provisions, to include all money laundering offences, would be a useful step forward. Another would be to have a group of confiscation specialists within the Crown Prosecution Service, not merely the National Crime Agency, and to place confiscation hearings in their hands rather than the general prosecutors. This was hinted at four years ago in the Criminal Justice Joint Inspection report; perhaps it is now time that it was implemented. As for civil recovery, this is already in the hands of a specialist unit, the National Crime Agency, and the recent case of National Crime Agency v Azam and others (No. 2) demonstrates that the National Crime Agency has both the willingness and the ability to use the provisions effectively. It could, however, be more effective if its use were widened. In the United States, criminal prosecution and civil forfeiture work well under a ‘both and’ system rather than ‘either/or’. Perhaps the United Kingdom could learn from this. The scope for removal of the instrumentality of a crime could perhaps also be extended: the offences whose instrumentality is currently liable to forfeiture in the United Kingdom are few and a decidedly ‘mixed bag’.

52 Ibid. at paras. 66–67.
On the other hand, the Azam case does raise troubling questions about whether the application of the civil recovery regime in the United Kingdom is unduly inflexible. In the United States, although the innocent owner defence does not exist in the laws of all states, it does in several, as it also does at Federal level. The Federal defence was introduced as part of the Civil Asset Forfeiture Reform Act (CAFRA) of 2000, passed in response to a perception that the previous system was on occasion abusive. It may be that a similar review is required in the United Kingdom.