SWEET & MAXWELL

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Archbold Review

Cases in Brief

Appeal—against conviction—application to appeal against a count when an application determined in relation to a different count on same indictment—jurisdiction of the Court of Appeal to consider

WILLIAMSON [2019] EWCA Crim 2289; 12 December 2019

(1) On an ordinary reading of the Criminal Appeal Act 1968 s.(1), there was no basis for concluding that a defendant must appeal on a single occasion against all counts on an indictment. That the position was different in relation to applications to appeal against sentence was a result of the drafting of s.11(2)(i) of the 1968 Act (an appeal/application against any one sentence in the same proceedings to be treated as appeal/application against all) – the court was concerned with a review of the overall sentence (see *Geraghty* [2016] EWCA Crim 1523, [2017] 1 W.L.R. 657). There was no similar concept of overall criminality in an appeal or application for leave to appeal against conviction. The principle of finality in legal principles did not provide an argument against this conclusion. The issues in relation to conviction on one count could and often would be distinct from those in relation to another on the same indictment. It followed that the court had jurisdiction to entertain an appeal against conviction on a count in an indictment even though there had been a previous appeal in relation to another count on that indictment.

(2) The jurisdiction would be exercised sparingly and with caution. The usual principles in relation to the inevitable extension of time would apply (see *Thorsby* [2015] 1 W.L.R. 290, [2015] 1 Cr.App.R (S) 63 and *Roberts* [2016] 2 Cr. App. R. (S.) 16, [2016] 2 Cr.App.R (S) 16). There was a parallel to be drawn between such different count appeals or applications and the addition of fresh grounds of appeal on a renewed application for leave to appeal, as considered in *James* [2018] EWCA Crim 285, [2018] 1 W.L.R. 2749 (but, unlike in that context, a second application should be considered by the single judge in the ordinary way, not the full court). In any such case, the court would consider: (a) the extent of the delay in advancing the second appeal; (b) the reasons for the delay and for not advancing the second appeal at the same time as the first appeal; (c) whether the facts and/or issues giving rise to the second appeal were or should have been known to the applicant at the time of the first appeal; (d) the overriding objective in the Criminal Procedure Rules, in particular, the requirement to deal with every case efficiently and expeditiously; and (e) the interests of justice, a factor which allowed the court to consider the propriety of a second appeal in the round.

Appeal—human rights—European Convention on Human Rights Art.6—safety of conviction—approach of Court of Appeal where breach

ABDURAHMAN [2019] EWCA Crim 2239; 17 December 2019

A was convicted of offences of assisting an offender with intent to impede his apprehension or prosecution (Criminal Law Act 1967 s.4(1)) and failing to give information about acts of terrorism (Terrorism Act 2000 s.38B(2)), arising out of harbouring a wanted, and, it was feared, active terrorist after a failed outrage. He was initially interviewed as a witness. At a certain point, the officers interviewing him considered that there were grounds for concluding that he had committed offences, but, when informed of this conclusion, a senior officer instructed the officers not to arrest or caution him and to continue the interview. After A had signed the resulting witness statement, he was arrested, cautioned and advised of his right to legal advice. At trial and subsequently, he argued that this statement should not have been admitted in evidence. His appeal against conviction was dismissed by the Court of Appeal (*Sherif* [2008] EWCA Crim 2653). The

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Fourth Chamber of the European Court of Human Rights found no breach of the European Convention on Human Rights Art.6 (*Ibrahim v United Kingdom* (App nos 50541/08, 50571/08, 50573/08 and 40351/09), but, by a majority, the Grand Chamber found that there had been a violation. The CCRC referred the case to the Court of Appeal on the basis of the Grand Chamber's decision.

(1) The court approached the appeal on the basis that the question it was required to determine was not the same as that before the Strasbourg Court. The Court of Appeal must determine whether the conviction was unsafe. It was not directly concerned with the question before the Strasbourg Court, which was whether the proceedings before the domestic courts involved a violation of Art.6. The court noted that the Grand Chamber had, when considering remedies, recognised that it did not follow from its finding that A had been wrongly convicted.

(2) There was, however, a considerable overlap between the issues relevant to the safety of the conviction and those relevant to the Art.6 question. In every case, the safety of the conviction would depend on the kind of breach and the nature and quality of the evidence in the case: *Dundon* [2004] EWCA Crim 621, [2004] U.K.H.R.R. 717, [15]; *R (Dowsett) v Criminal Cases Review Commission* [2007] EWHC 1923 (Admin), [16] and [24]).

(3) In assessing whether there had been a breach of Art.6, and if so, what kind of breach and the nature and quality of the evidence, the court was bound by the Human Rights Act 1998 s.2 Act to "take into account" decisions of the Strasbourg Court. In doing so, the court should "usually" follow any "clear and constant line of decisions" of the Strasbourg Court. It might, however, be right to depart even from a "clear and constant" line of decisions if: (a) it was inconsistent with some fundamental substantive or procedural aspect of the law of this jurisdiction, or (b) its reasoning appeared to overlook or misunderstand some argument or point of principle: *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104, [48].

(4) But this should be viewed as guidance rather than a straitjacket. The degree of constraint the Strasbourg jurisprudence imposed was context-specific. Even where the Grand Chamber had endorsed a line of authority, it was not necessary for the domestic to court to conclude that it involved an "egregious" oversight or misunderstanding before declining to follow it: *R (Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344, [21]; *R (Hallam) v Secretary of State for Justice* [2019] UKSC 2, [2019] 2 W.L.R. 440, [79], [82] and [113].

(5) In a judgment in which the court indicated on a number of occasions that it preferred the views of the Fourth Chamber and of the dissenting judges in the Grand Chamber, the court considered that as the Grand Chamber decision had itself significantly developed the Strasbourg case law (creating a new presumption that, in the absence of compelling reasons for restricting access to legal advice, the admission of a statement made before advice was available gave rise to irretrievable prejudice; and that the presumption could only be rebutted if the state could demonstrate convincingly why it should not be drawn), it did not amount to an application of a "clear and consistent line of decisions". Further, in its insistence on the importance of there being no evidence from the senior police officer why he had ordered the interview of A as a witness to continue, the Grand Chamber demonstrated a misunderstanding of domestic procedure.

(6) The court, in any event, concluded (as had the Fourth Section and the dissenters) that there were indeed "compelling reasons" for restricting access to legal advice (and, despite criticising the development of the new presumption referred to in (5) above, the court expressly declined to come to a final view on whether a strong presumption of irretrievable prejudice should apply in a case where there were no compelling reasons for restricting access to legal advice).

(7) In assessing the safety of the conviction, the court concluded that the other evidence against A was overwhelming. Even on the assumption that the Grand Chamber was correct that the fairness of the trial was "irretrievably prejudiced", that conclusion would still be sufficient to compel the dismissal of the appeal.

(8) The court reviewed both Strasbourg case law on Art.6, before and in *Ibrahim*, and domestic case law on the domestic reception of Strasbourg case law.

Appeal—reopening determination of an appeal—Crim PR 36.15—whether merits of applications to be considered by the Registrar of Criminal Appeals before referring to full court—whether to be considered similarly by single judge

CUNNINGHAM; DI STEFANO [2019] EWCA Crim 2101, 29 November 2019

Two applications for the re-opening of an appeal under Crim PR 36.15 were refused by the Registrar of Criminal Appeals, who declined to refer them to the full court on the basis that they were wholly unmeritorious. At the request of the applicants, they were referred to a single judge who agreed with the Registrar on the merits but the applications were referred to the court to consider the proper procedure.

(1) Crim PR 36.15 arose as a result of the acceptance by the Court of Appeal, Criminal Division in *Yasain* [2015] EWCA Crim 1277, [2016] Q.B. 146 (and see *Gohil* [2018] EWCA Crim 140, [2018] 1 Cr.App.R 30) that the Criminal Division had the same implicit jurisdiction to reopen a determination on very limited grounds as the Civil Division had identified in *Taylor v Lawrence* [2002] EWCA Civ 90; [2003] Q.B. 528.

(2) The scheme of the Criminal Appeal Act 1968 was that decisions on the merits of applications or appeal were made in all instances by the full court, with applications for leave being considered in the first instance by the single judge. Provided the procedural merits were met in the context of a Crim PR 36.15 application, the Registrar must refer an application to the court. The court in *Hockey* [2017] EWCA Crim 742; [2017] 2 Cr.App.R 23 set out the relevant procedural requirements in relation to the *Yasain* jurisdiction before Crim PR 36.15 had been made. If the court had intended that the Registrar should consider whether an application was arguable or not (in addition to complying with the procedural requirements), it would have given the matter detailed consideration, rather than relying only on the word "effective" when specifying that the Registrar would refer "an effective application" to the court.

(3) In the context of Crim PR 36.15, the references to "the court" meant the full court (cf the definition in Crim PR 36.1(2)). A streamlined process was required. If applications went to the single judge, either there would be a two-stage process including renewal to the full court, or, following a refusal, the full court would be excluded (as in the Civil Division: CPR 52.30). The procedure of the two divisions diverged, given that the Criminal Division was dealing with

convictions and the liberty of the subject, and it would be wrong to deny the full court the opportunity of considering the merits of an application. Accordingly, applications under Crim PR 36.15 should be sent by the Registrar straight to the full court of three judges, to be resolved on paper, unless the court ordered otherwise.

Public order—Public Order Act 1986 s.14(1)—"public assembly"—whether capable of describing numerous separate gatherings—nature of provision

R (BARONESS JONES) v COMMISSIONER OF POLICE FOR THE METROPOLIS [2019] EWHC 2957 (Admin); 11 November 2019

The applicants sought judicial review of the decision by the bronze commander of the police operation in respect of the Extinction Rebellion movement's series of gatherings in London in October 2019 to impose a condition under Public Order Act 1986 s.14(1) that "any assembly" linked thereto "must now cease". The officer had no power to impose a condition under s.14. A "public assembly" in s.14 must be in a location to which the public or any section of the public had access, which was wholly or partly open to the air, and which could be fairly described as a "scene". Separate gatherings, separated both in time and by many miles, even if co-ordinated under the umbrella of one body, were not one "public assembly" within the meaning of s.14(1) of the 1986 Act. The officer purported to impose a condition not only on those public assemblies already in existence but also on intended future assemblies yet to be held. The gatherings intended to be held by Extinction Rebellion from 14 to 19 October 2019 were not a public assembly in the presence of the officer on 14 October 2019 (the court rejecting the submission that "the scene" should be the police station where the response to the events was being co-ordinated by the officer).

The court reviewed the following authorities: *Kent v Commissioner of Police of the Metropolis, The Times*, 15 May 1981; *Director of Public Prosecutions v Jones* [2002] EWHC 110 (Admin); *Austin v Commissioner of Police of the Metropolis* [2005] EWHC 480, [2005] HRLR 20; *R (Moos) v Commissioner of Police of the Metropolis* [2011] EWHC 957 (Admin), [2011] HRLR 24; *R (Jukes) v Director of Public Prosecutions* [2013] EWHC 195 (Admin) and *R (Brehony) v Chief Constable of Greater Manchester* [2005] EWHC 640 (Admin).

Torture—Criminal Justice Act 1988 s.132—United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984—"a person acting in an official capacity"—application beyond recognised states

TRA [2019] UKSC 51; 13 November 2019

Per Lord Lloyd Jones, with whom Lady Hale and Lords Wilson and Hodge agreed (Lord Reed dissenting), a person was "acting in an official capacity" for the purposes of the offence of torture under the Criminal Justice Act 1988 s.134 (a provision implementing United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984) not only where the person was acting for a recognised state, but also included a person who acted or purported to act, otherwise than in a private and individual capacity, for or on behalf of an organisation or body which exercised, in the territory controlled by that organisation or body and in which the relevant conduct occurred, functions normally exercised by governments over their civilian populations. Furthermore, it covered any such person whether acting in peace time or in a situation of armed conflict. That the functions being exercised by the organisation or body were governmental was a core requirement. The exercise of governmental functions were to be distinguished from purely military activity not involving any governmental function. Following the first instance decision of Treacy J in *Zardad*, 7 April 2004, [33] [ruling available at [2004] 4 WLUK 633], in considering what were the features of governmental authority it was necessary to look at the reality of any particular situation and to consider whether the entity in question had a sufficient degree of organisation and actual control over an area and whether it exercised the type of functions which a government or governmental organisation would exercise. This would require examination of evidence as to the position on the ground. In doing so it would be necessary to make allowance for the particular conditions which may make administration difficult and for different views of appropriate structures of government. The question would be whether the entity has established a sufficient degree of control, authority and organisation to become an authority exercising official or quasi-official powers, as opposed to a rebel faction or a mere military force. Whether a degree of permanence was necessary (as Treacy J considered) was more in doubt – the fact that the long-term survival of the entity may be unlikely would not prevent it being a de facto government. (Application to dismiss remitted to the trial judge for further consideration.)

Trial—summing up—directions—oral only directions—desirability of written directions—whether lack of written directions of itself capable of rendering conviction unsafe

R v N [2019] EWCA Crim 2280; 13 December 2019

(1) In answer to a jury question, the judge had cured an initially incomplete or unclear oral direction to the jury on the law of joint enterprise, and N's conviction for wounding with intent contrary to Offences Against the Person Act 1861 s.18 was not unsafe.

(2) It was surprising that the judge did not give written directions to the jury. The defendants were charged with very serious offences and the law on joint enterprise was far from straightforward. Clarity of expression was required. It would have been far preferable for the judge to have devoted time to the preparation of written directions and a route to verdict which should then have been shared with counsel for their due consideration and observations. As the Crown Court Compendium 2019 strongly indicated, counsel should, if necessary, invite the judge to provide written directions and to assist if need be. The court had increasingly emphasised that the norm should be the provision of written directions: see e.g. *Atta-Dankwa* [2018] EWCA Crim 320, [2018] 2 Cr. App.R. 16 and *R v PP* [2018] EWCA Crim 1300. Had the judge done so, the court anticipated that a jury question would not have had to be asked.

(3) The court rejected a submission that the failure on the part of the judge to give written directions in and of itself rendered the verdict unsafe. When an oral direction only was provided, a conviction would, in normal circumstances, be quashed because that oral direction was wrong or materially confusing, etc, but not merely because there were no written directions. The court did not rule out the possibility that, exceptionally, a direction might be so complex that absent an exposition in writing a jury would be at a high risk of being confused and misled in a material manner.

SENTENCING CASE

Conspiracy; burglary; reduction for age

MOORHOUSE, COATES [2019] EWCA Crim 2197, 21 November 2019

The appellants were among a group sentenced in respect of a conspiracy to commit burglary between July and October 2016.

The first appellant was 18 at the time of sentence. He was 15, nearly 16, at the time of the offence. He was sentenced pursuant to s.91 of the Powers of Criminal Courts (Sentencing) Act 2000. The judge concluded that, were he a young person (somebody between 18 and 21) at the time of the offence, a sentence of between nine and ten years would be appropriate. He adopted a starting point of eight years with credit for the guilty plea which had been entered before the jury were sworn. Having regard to totality (the first appellant also fell to be sentenced for a drugs offence), the judge imposed a sentence of six years for the conspiracy, and a consecutive sentence of 18 months for the drugs offence. The second appellant was 18 at the time of sentence and 16 at the time of the offences. The judge identified the appropriate starting point for a young offender aged between 18 and 21 as nine years, and imposed a sentence of seven years' detention. Both appellants submitted that the judge had failed to take the appellant's age sufficiently into account.

The Court of Appeal referred to para 6.46 of the Sentencing Council's Definitive Guideline on Sentencing Children and Young People and stated that, while a judge can pass a sentence on a 15/16-year old in excess of two-thirds of what would have been the appropriate sentence for a young adult/adult if they find that the defendant's emotional and developmental age and maturity justify it, in such cases the sentencing judge should explain why a reduction of one-third or more was not being made.

In the case of the first appellant, the sentencing judge found that the starting point before reduction for the guilty plea would have been nine years, and after reduction for the guilty plea would have been around eight years. A reduction of one-third from that to reflect the appellant's age would have given a figure of five years and four months. A further reduction would have produced a figure of five years. The Court of Appeal adopted this figure as there was no evidence that the sentencing judge concluded that a reduction of a third was inappropriate. The sentence of six years for conspiracy was quashed and a sentence of five years substituted. The 18-month consecutive sentence for the drugs offences remained, giving a total sentence of six-and-a-half years' detention.

In the case of the second appellant, who had also turned 18 between crime and sentence, the judge adopted a starting point of nine years after giving credit for the guilty plea. This indicates a notional starting point after trial, for an adult offender, of ten years: nine years being appropriate given the late guilty plea. The Court concluded that the notional starting point was entirely appropriate, but that the appellant was entitled, in the absence of a specific finding by the judge about his maturity, to a reduction of one-third. The Court of Appeal therefore quashed the sentence of seven years detention and substituted a sentence of six years' detention.

Features

A touch too far?

By Paul Jarvis[1]

In January 2019, a "dangerous sexual predator" was sent to prison for 12 years for "truly appalling acts"[2]. According to reports in the media at the time, those acts included the defendant, Garyth Twiselton, ejaculating into a woman's cup of tea, which she later drank doubtless without realising what was in it. The defendant subsequently told her what he had done. He went on to tell her that he had done it in part at least to humiliate her. It is unclear from the reports in the press what charge that specific act gave rise to.[3]

Three years earlier a defendant in Canada committed a similar act.[4] Douglas Whaley sneaked into a co-worker's office when no-one was around and ejaculated into her coffee. She returned after he had left whereupon she drank the coffee. The defendant recorded himself in the act, which is how the police were able to apprehend him. He was charged with an offence of mischief to property, which is contained in s.430 of the Criminal Code of Canada. Section 430(1) provides that everyone commits a mischief who wilfully, *inter alia*, damages property, or obstructs, interrupts or interferes with the lawful use or enjoyment of property. By ejaculating into his co-worker's coffee it seems that Mr Whaley either damaged the coffee or, at the very least, interfered with his co-worker's enjoyment of her coffee, thereby making him guilty of the offence of mischief.

Mr Whaley's conviction sparked a lively debate in Canada as to whether, on those facts, he should have been prosecuted for committing a sexual offence. Certainly, in her personal statement served ahead of the sentencing hearing the victim of his offence said that by tricking her into ingesting his semen for his own sexual gratification Mr Whaley had effectively committed an offence of oral rape. She went on to say that she considered herself to be the victim of a sexual assault. The offence of sexual assault in Canadian law is contained in s.271 of the Criminal Code. That section does not define what a sexual assault is, but in s.265, an assault for the purposes of s.271 takes place where, *inter alia*, a person "without the consent of another person … applies force intentionally to that other person, directly or indirectly". Where an assault is committed in circumstances of a

1 Barrister, 6KBW College Hill, and Junior Treasury Counsel at the Central Criminal Court.
2 https://www.bbc.com/news/uk-england-stoke-staffordshire-47002405.
3 At §12.8 on p.516 of the 7th edition of *Simester and Sullivan's Criminal Law: Theory and Doctrine*, Hart (2019), the authors state that Mr Twiselton pleaded guilty to sexual assault on these facts.
4 https://www.thestar.com/news/crime/2016/05/22/mans-disgusting--disturbing-acts-in-office-feel-like-sex-assault-not-a-mere-mischief-says-victim.html.

sexual nature,[5] the s.271 offence will be made out. It would appear that as Mr Whaley had not applied force, directly or indirectly, to his victim no assault was committed and hence he could not be guilty of the offence of sexual assault.

In England and Wales it is conceivable that Mr Whaley or, indeed, Mr Twiselton, could be prosecuted for criminal damage of his victim's beverage contrary to s.1(1) of the Criminal Damage Act 1971. The elements of that offence simply refer to the property being destroyed or damaged without the elaboration that is found within the definition of mischief in Canadian law. Nevertheless, impairing the physical condition of an item of property is generally sufficient to establish that the property has been damaged, as was the case in *Roper v Knott*[6] where the defendant was held to have damaged milk by diluting it with water. It is also conceivable that Mr Twiselton and Mr Whaley could be prosecuted for an offence of administering a poison or other destructive or noxious thing to another person with intent to injure, aggrieve or annoy that other person contrary to s.24 of the Offences Against the Person Act 1861. In this context, a thing will be noxious if it is unwholesome,[7] and there could be little argument that by ejaculating into the victim's beverage the defendant in question administered an unwholesome substance to her when she drank it. The more difficult question is whether the defendant had the necessary state of mind at the time the drink was consumed, and the noxious substance thereby administered. If the defendant intended to keep his actions a secret from the victim in the hope that she would not come to appreciate what he had done, then the necessary intention could be lacking and that would be so even if he intended to, and did, derive some sexual thrill from what he had done. As Mr Twiselton, by his own admission, intended to humiliate his victim then the mental element of the s.24 seems to be made out on the facts of his case.

As with Canada, the harder question is whether ejaculating into a drink intending that someone else should consume it, and they do, amounts to a *sexual* offence. In England and Wales the obvious offence to look to is sexual assault, contrary to s.3 of the Sexual Offences Act 2003. Unlike in Canada, however, the 2003 Act contains a number of specific provisions that assist with interpreting the elements of the sexual assault offence. Section 3 of the 2003 Act provides that a person commits a sexual assault if he intentionally touches another person, the touching is sexual, the other person does not consent to the touching and the defendant does not reasonably believe that the other person consents. Section 79 of the 2003 Act contains a number of "*general interpretation*" provisions that apply to the offences in Pt.1, which includes sexual assault. Section 79(8) provides that "touching" includes touching (a) with any part of the body, (b) with anything else, and (c) through anything else. The effect of s.79(8) is that where a defendant uses an object to make contact with the victim that will amount to a touching even where the contact is with the victim's clothes rather than directly with her flesh.[8] It follows that throwing an object at the victim with the result that it strikes a garment she is wearing is capable of being a "touching" and so a defendant who ejaculates onto an item of clothing the victim is wearing also touches her for the purposes of the s.3 offence.[9] That is also the law in Scotland, where the conduct element of the offence of sexual assault expressly includes circumstances where the defendant has ejaculated semen onto another person.[10]

Is the meaning of "touching", as expanded upon by s.79(8) of the 2003 Act, elastic enough to encompass situations where the defendant leaves his bodily excretion in a certain place intending that the victim will come into contact with it and she does? The authors of *Simester and Sullivan* take the view that it would "stretch the boundaries of the English language too far to conceive of Twiselton's conduct as involving even an indirect 'touching' of V".[11] That is probably correct. In such a situation it is more accurate to say that the victim has touched the defendant's bodily excretion rather than that the defendant has touched the victim through the medium of his excretion. By way of comparison, the authors point out that while spitting at someone would amount to a common assault, and a battery if the spittle landed on that person,[12] spitting into an item of food the victim then consumes would not amount to either offence. The sexual motive of a defendant in Mr Twiselton's position cannot turn a non-touching into a touching for the purposes of the offence of sexual assault and it appears that there is no other sexual offence in the 2003 Act that captures his conduct. Perhaps that is not surprising. Although the Sexual Offences Act 2003 ushered in a new suite of sexual offences where the conduct had never been expressly criminalised before, it could obviously not cater for every situation where activity of a sexual nature has arguably tipped from "the private sphere of sexual morality"[13] into the domain of the criminal law.

Outside the Sexual Offences Act 2003, there is no obvious "catch-all" sexual offence that would cover Mr Twiselton's conduct either. The common law offence of outraging public decency comes closest, but that requires the lewd, obscene or disgusting act which outrages public decency to have taken place in public.[14] If Mr Twiselton had ejaculated into the victim's tea in a public place then his conduct would probably have been caught by the common law offence, but as that act presumably took place in private it cannot be said that *public* decency was thereby outraged. There is no offence in England and Wales of committing lewd, obscene or disgusting acts in a private place, but the position is different in New Zealand. There, s.126 of the Crimes Act 1961 makes it an offence where a person "with intent to insult or offend any person does any indecent act in any place". The indecent act can take place either in public or in private. In contrast, s.125 makes it an offence for a person to wilfully perform an indecent act in a public place, which is broadly

5 See the decision of the Supreme Court of Canada in *Chase* [1987] SCJ No 57, [1987] 2 S.C.R 293 for an exposition of those circumstances that likely to turn an assault into a sexual assault. The motivation of the defendant is relevant to that enquiry, but an assault is still capable of being sexual even where the defendant did not have a sexual motive at the time the assault took place.

6 [1898] 1 QB 868.

7 *Veysey* [2019] EWCA Crim 1332; [2019] 2 Cr.App.R 29 at 26. In that case, the Court of Appeal held that the judge in the Crown Court had been correct to rule that throwing a cup of urine into the face of another person was capable of amounting to the administration of a noxious thing.

8 *H* [2005] EWCA Crim 732; [2005] 2 Cr.App.R 9. See also *Gaynor* [2016] EWCA Crim 1629.

9 *Bounekhla* [2006] EWCA Crim 1217.

10 Sexual Offences (Scotland) Act 2009, s.3.

11 Fn 3, at p.516. Against that it could be argued that as a general interpretation provision s.79(8) does not provide for an exhaustive definition of touching and so the possibility remains open that a court could stretch the term so as to include contact of the sort that took place in Mr Twiselton's case. After all, on a variation of the facts, why should ejaculating onto the victim's foot be a touching but ejaculating onto the floor moments before the victim steps in it is not? The former would be a sexual assault but the latter would seemingly be no offence at all.

12 *Smith* (1866) F & F 1066; 176 ER 910.

13 *Committee on Homosexual Offences and Prostitution: Report* (CM 247, 1957) 62.

14 See *Hamilton* [2007] EWCA Crim 2062; [2008] 1 Cr.App.R 13.

similar to the offence of outraging public decency that is part of the common law of England and Wales. The additional mental element serves to distinguish the s.125 and s.126 offences. Indecent acts that take place in private are only criminal if they are done with the intention of insulting or offending someone else. The act does not have to be an assault, and so presumably ejaculating into a co-worker's coffee in a private place but with the intention of insulting or offending that co-worker would be caught by s.126 if it was "indecent". Mr Twiselton's case might just go some way towards laying the foundations for an argument that introducing an equivalent offence in England and Wales would serve to ensure that those who commit *sexualised* offences are appropriately labelled as sexual offenders.

Account Freezing Orders: Part 1 – An Introduction

By Rachel Barnes and Ryan Dowding*

Account Freezing Orders (AFrOs) and Account Forfeiture Orders (AFOs) are stepping out of the shadows and being used more frequently in financial crime investigations. This new statutory scheme was established by the Criminal Finances Act 2017 (CFA), in large part modelled on the cash seizure provisions in Pt.5 of the Proceeds of Crime Act 2002 (POCA). The powers enable law enforcement officers to obtain an order from a magistrates' court to freeze monies held in bank or building society accounts where there are reasonable grounds to suspect that they have been obtained by or in return for unlawful conduct or are intended for use in unlawful conduct.[2] If a magistrates' court finds on the balance of probabilities that the funds are "recoverable property", it may order forfeiture.[3]

This is the first of two articles in which we share our experience of representing individuals and companies subject to some of the initial raft of AFrOs. In Part 1, we examine the statutory test for making an AFrO and draw attention to certain key issues. In Part 2, we shall look in more detail at some practical aspects of advising and representing targets of these new measures, including applying to vary or discharge AFrOs and resisting AFO applications.

Background

The objective of the CFA was, according to the Government:

> [To] significantly improve our ability to tackle money laundering, corruption, tax evasion and terrorist financing [and to] make the UK a hostile environment for those seeking to move, hide and use the proceeds of crime and corruption.[4]

Its crowning jewel was the Unexplained Wealth Order (UWO). The first UWO case grabbed headlines with details of a £16 million Harrods shopping spree.[5] While no doubt invasive, the applicability of the UWO is limited by design: its focus is on individuals whose known sources of legitimate income do not correlate with their extravagant lifestyles.[6] Amidst the furore surrounding the introduction of the UWO, more draconian powers of wider application slipped through the parliamentary net and the court of public opinion in the form of AFrOs and AFOs.[7]

The new provisions have been in force since 31 January 2018. There is now a body of first instance cases in which the National Crime Agency (NCA), Serious Fraud Office (SFO), Her Majesty's Revenue and Customs (HMRC) and police forces have used these tools to freeze and forfeit millions of pounds. By 27 June 2019, £110 million in over 670 bank and building society accounts had been frozen under AFrOs[8] and by August 2019, this figure had increased to over £210 million.[9] Already, there have been some high profile AFOs: £25,000 from the niece of Syrian president Bashar al-Assad[10]; £466,000 from the student son of an ex-prime minister of Moldova jailed for corruption[11]; and a £190 million settlement, including £140 million previously subject to AFrOs, between the NCA and Malik Hussain in relation to alleged corruption in Pakistan.[12] As yet, neither AFrOs nor AFOs have been subject to proper scrutiny by the High Court or the Court of Appeal; although we expect this may change shortly. We anticipate that it will be confirmed that many of the principles applicable to civil recovery proceedings under Pt.5 of POCA can be read across to AFrOs and AFOs.

The Application

"Enforcement officers", namely: constables, officers of HMRC and the SFO, and "accredited financial investigators"[13], can apply to a magistrates' court to freeze a bank or building society account[14] containing more than the "minimum amount" (currently £1,000[15]) where:

* Barristers, Three Raymond Buildings. We are very grateful to Professor John Spencer QC for his comments on an earlier draft of this article; any errors remain our own.

1 CFA, Explanatory Notes para.24. See also Hansard HC vol 617 col 110 (17 November 2016), Rt Hon. Ben Wallace MP, Minister of State for Security and Economic Crime: "POCA already contains provisions for the seizure of cash, but we do not have an equivalent power to take quick and effective action against funds held in bank accounts, and criminals know that … The clause will allow the police or the [NCA] to seek the freezing and forfeiture of those funds."

2 POCA, Ch.3B, ss.303Z1-303Z19.

3 POCA, s.303Z14(4).

4 Hansard HC vol 621 col 975 (21 February 2017), Rt Hon. Ben Wallace MP.

5 *NCA v Hajiyeva* [2018] EWHC 2534; [2018] 1 W.L.R. 5887 (appeal pending).

6 Transparency International (UK), "Empowering the UK to recover corrupt assets: Unexplained Wealth Orders and other new approaches to illicit enrichment and asset recovery", May 2015.

7 CFA, s.16 inserting Ch.3B, ss303Z1-303Z19, into POCA.

8 Home Office, *Asset Recovery Statistical Bulletin 2013/14 – 2018/19 England, Wales and Northern Ireland* (September 2019) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831394/asset-recovery-financial-years-2014-to-2019-hosb2019.pdf.

9 See NCA "£100m Account Freezing Orders are largest granted to the NCA" 14 August 2019: https://nationalcrimeagency.gov.uk/news/100m-account-freezing-orders-are-largest-granted-to-nca.

10 David Brown "Aniseh Chawkat: Police freeze Assad niece's bank account in London" *The Times* 22 May 2019: https://www.thetimes.co.uk/article/aniseh-chawkat-police-freeze-assad-niece-s-bank-account-in-london-5qr07sxpl.

11 David Pegg, "Court orders son of Moldova's former PM to pay £466,000" *The Guardian* 7 February 2019: https://www.theguardian.com/world/2019/feb/07/court-orders-son-moldova-former-pm-pay-£466,000. On 8 November 2019, this AFO was upheld at Southwark Crown Court by an appellate bench led by Gledhill J. See, A Clifford "Banking on account forfeiture" *Lexology* 21 November 2019: https://www.lexology.com/library/detail.aspx?g=6f977bf8-6e1c-432e-bbba-02f47e1e14ba.

12 NCA "NCA agrees £190 settlement after frozen funds investigation", 3 December 2019: https://www.nationalcrimeagency.gov.uk/news/nca-agrees-190m-settlement-after-frozen-funds-investigation-3.

13 POCA, s.303Z1(6). For "accredited financial investigator" see POCA, s.453; POCA 2002 (References to Financial Investigators) (England and Wales) Order 2015/1853, Sch. 2.

14 "Bank" is defined as an "authorised deposit-taker" under Pt 4A of the Financial Services and Markets Act 2000 (POCA, s.3037(1)-(2)); "Building Society" bears the same meaning as under the Building Societies Act 1986 (POCA, s.303Z1(6)).

15 POCA, ss.303Z7(1) and 303Z8(1). The Secretary of State is empowered by s.303Z8(2) to amend the "minimum amount".

> (1) [the officer] has reasonable grounds for suspecting that money held in an account maintained with a bank or building society –
>
> (a) is recoverable property, or
>
> (b) is intended by any person for use in unlawful conduct.

Applications are governed by The Magistrates' Courts (Freezing and Forfeiture of Money in Bank and Building Society Accounts) Rules 2017 (the Rules).[16] The Rules envisage on-notice applications since they require that a copy of the written application and notification of the hearing be served by the applicant on any person by or for whom the account is operated (Rule 3(3)). The Rules make no provision for without-notice applications and ex parte hearings. However, the Act provides that applications can be made without notice where there is a risk that efforts to forfeit the money will otherwise be prejudiced.[17] The general duty on applicants in without-notice applications will apply to the enforcement officer, namely to provide "full, fair and accurate disclosure of material facts to the court".[18]

Enforcement officers can apply for an AFrO of up to two years' duration. Where an application is for a lesser period, the enforcement officer can then apply to extend the order for up to a total of two years. The extent to which law enforcement officers have considered proportionality when assessing the length of time of a proposed AFrO is, in our experience, mixed. In some cases, applicants addressed the issue in their written applications and identified reasons why orders were sought for certain periods. In other cases, orders for the full two years had been sought and obtained without any evidence that the proportionality of an order of this length had been considered.

Making the Order

To make an AFrO, the court must itself be satisfied that there are reasonable grounds to suspect the account contains recoverable property or is intended by any person for use in unlawful conduct.[19] If it is, it has a power, not a duty, to grant the order for up to two years.[20] Assuming the statutory requirements are satisfied, the court should consider whether the freezing order would be proportionate. This should include consideration of the length of time of the prospective order, with relevant factors including the complexity of the investigation, whether it will include overseas inquiries and the proportion of the target's assets that will be frozen. When the Criminal Finances Bill passed through Parliament, the Minister for Security appeared to recognise both the punitive nature of such orders and the importance of expedition when he defended the introduction of another form of freezing order – "interim freezing orders" – which now accompany the UWO. He said:[21]

> Freezing someone's property is a very invasive measure and may not be necessary in every case … It is also important to note that if property is frozen, the court may quite reasonably expect the case to progress at a quicker pace.[22]

Our experience of whether courts have adopted this expectation when granting AFrOs has again been mixed.

Recoverable property

"Recoverable property" is "property obtained through unlawful conduct"[23] unless it has been acquired by an innocent third party in good faith, for value and without notice (the "Section 308 exception")[24]. Chapter 3B incorporates the definitions in Part 5[25]: "unlawful conduct" encompasing conduct which is unlawful both in the UK and overseas including overseas conduct which constitutes or is connected with a gross human rights abuse or violation which, if it had occurred in the UK, would be an offence[26]; "[a] person obtains property through unlawful conduct (whether his own conduct or another's) if he obtains property by or in return for the conduct"[27]; and "it is not necessary to show that the conduct was of a particular kind if it is shown that the property was obtained through conduct of one of a number of kinds, each of which would have been unlawful conduct."[28]

In a number of without-notice AFrO applications, enforcement officers have identified "money laundering" as the relevant unlawful conduct without specifying any type or types of predicate conduct said to produce the criminal property suspected to constitute, directly or indirectly, the funds in the target account. This calls into question the extent to which such applications should set out the reasons said to give rise to an inference that the funds derive from criminal property.[29]

A common issue in cases where deposits into accounts were made through third-party international money remittance networks is whether (i) the funds were obtained "by or in return for" unlawful conduct and/or (ii) the s.308 exception applies.[30] In some case known to us, the account holders transferred lawfully obtained money from overseas into their UK bank accounts through money services businesses (MSBs) which were duly registered in the relevant overseas jurisdiction and are not themselves alleged to have engaged in unlawful conduct. Instead, it is alleged that the funds deposited have been obtained by the unlawful conduct of third parties acting as MSBs when not registered in the UK to do so (an offence punishable by up to three months' imprisonment on summary conviction and two years' on indictment[31]). There is, however, High Court dicta to the effect that monies obtained through activities that are lawful but for the failure to obtain a requisite licence are not "recoverable property" for the purposes of civil recovery under Chapter V of POCA.[32]

Enforcement officers apparently failed to recognise the potential applicability of the s.308 exception in these cases. In

16 SI 2017 No. 1297.
17 POCA, s.303Z1(4). In contrast, the rules governing other asset freezing measures such as POCA s.336A moratorium extensions, criminal restraint and property freezing orders, which also allow for ex parte applications, make specific provision for such applications.
18 *R (Merida Oil Traders Ltd) v Central Criminal Court* [2017] 1 W.L.R. 3680, 3699D [81]. See also, in relation to property freezing and disclosure orders: *NCA v Simkus* [2016] EWHC 255; [2016] 1 W.L.R 3481, 3491 [27]; *In re Stanford Bank Limited* [2010] EWCA Civ 137; [2011] Ch 33, 108-109 [190]-[191]. This principle is reflected in the Practice Direction on Civil Recovery Proceedings para.10.2.
19 POCA, s.303Z3(2). See also *R (Bright) v Central Criminal Court* [2001] 1 W.L.R 662, 677D-678A (in respect of the grant of search warrants).
20 POCA, ss.303Z3(2), (4).
21 POCA, ss.362J-362R.
22 Hansard HC vol 617 col 90 (17 November 2016).
23 POCA, s.304(1).
24 POCA, s.308.
25 POCA, s.316.
26 POCA, ss.241, 241A.
27 POCA, s.242(1).
28 POCA, s.242(2)(b).
29 *Anwoir* [2008] 4 All ER 582.
30 See n.24 above.
31 Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, regs. 56, 86.
32 *Director of Asset Recovery Agency v John* [2007] EWHC 360, [69]-[77].

one case, the enforcement officer accepted that the monies in the account were legitimately obtained and had been transferred from Iran to the UK through a registered Iranian MSB but maintained that the UK remittance network used was involved in transfers of criminal property for unrelated third parties. Importantly, the enforcement officer accepted that this was unknown to our client. The successful application to discharge the AFrO was based on the submission that the deposited funds were obtained by our client in good faith, for value and without notice of the (alleged) unlawful conduct, which removed the funds from the statutory definition of recoverable property and the reach of the AFrO mechanism.

Reasonable Suspicion

Perhaps the most problematic aspect of the AFrO scheme is the "reasonable grounds to suspect" test which mirrors POCA's cash forfeiture provisions.[33]

First, this is a lower test than that employed in High Court property freezing orders. To obtain a property freezing order under the POCA civil recovery regime, an enforcement officer must prove to a High Court judge that there is a "good arguable case" that the property is recoverable or associated property.[34]

Secondly, while other provisions permitting the freezing of bank accounts also only require "reasonable grounds to suspect," these are accompanied by more stringent safeguards. For example, an application for a restraint order must be made in the Crown Court. The Crown Court judge must be satisfied, at least, that a criminal investigation has been started *and* that there are reasonable grounds to suspect that the alleged offender has benefitted from his criminal conduct.[35] An AFrO, by contrast, can be made before an investigation of any description (be it a criminal, civil, money laundering, or a "frozen funds"[36] investigation) has started. The negative effect of this can be significant. It means enforcement officers may have only very limited information and may not have obtained easily available information which could undermine their suspicions. In one of our cases, the applicant obtained material from a bank showing that a sum of money related to a suspect entity had been deposited into the account but not the further information that over 90% of that amount had since been withdrawn in the ordinary course of business. The enforcement officer explained to the court that he had been unable to do so because a POCA investigation had not yet started. If it had, he could have obtained the information in response to a production order against the bank.[37] This was not a case in which the applicant officer had failed to disclose material information known to him but one in which he had failed to obtain such information in the first place.

The lack of any requirement to have started an investigation enables bank accounts to be frozen extraordinarily quickly. Where there is a well-founded risk of immediate dissipation of the funds such speed may be necessary to prevent that risk materialising. We suspect, however, that the proportion of such cases is small.

Thirdly, a restraint order made following the start of a criminal investigation must include a requirement to report to the court on the progress of the investigation (unless the judge expressly concludes otherwise) and will be discharged if proceedings are not started within a reasonable time.[38] No such requirement exists in respect of AFrOs, although they are limited to a maximum of two years.

The "reasonable ground to suspect" threshold may well be appropriate in other situations. It is the test in search warrant applications but in such cases, the nature of the interference with the subject's rights is different. Whilst the execution of search warrants results in serious interferences with personal or property rights, these are temporary in nature. In *Haralambous v St Albans Crown Court,* which concerned the lawfulness of a search warrant, Lord Mance noted, firstly, the interference caused by a search warrant is only a short term interference with property which cannot alter the substantive position of its subjects,[39] and, secondly, if a search warrant does cause prejudice it will only do so through its potential use in an investigation or prosecution in which criminal law safeguards apply.[40] In contrast, AFrOs can constitute a significant interference with their targets' domestic law and Convention rights on an ongoing basis for up to two years.

A further problem with the wholesale adoption of the "reasonable suspicion" test from the cash forfeiture regime is that it is divorced from the rationale upon which the latter provisions are based – namely, "the possession of large quantities of cash is inherently suspicious in an age of electronic banking".[41] This does not extend to large amounts of money located in bank accounts. Context is, of course, everything. There may be particular cases in which the specific circumstances mean that large balances in bank accounts are suspicious, but this is not necessarily the case or, in our view, the appropriate starting point.

Where the police recover a large bundle of cash at the home of a suspected drug dealer, most would agree that it is reasonable to suspect that the entire amount constitutes the proceeds of crime. But with bank accounts, by contrast, though there will be some comparatively simple cases where the holder has no demonstrably legitimate income, the funds they contain will usually be mixed and the line between legitimate and suspect funds blurred.

For instance, suppose a foreign businessman has generated vast amounts of wealth through overseas ventures. On his retirement, he transfers a large sum of money into a joint account for his adult children, based in the United Kingdom, who then move a portion into their current accounts each month where it is mixed with their own money from other sources. In this scenario, two issues arise. First, calculating the amount of money in the accounts that is derived from the allegedly suspect overseas source is not necessarily a simple mathematical exercise. Unlike in the case of the suspected drug dealer, the use of such a blunt instrument to summarily freeze all of the money in all of the children's accounts appears clumsy and disproportionate. In one case similar to this, the magistrates' court on a without-notice application was content to accept that the very fact of the paternal gift constituted reasonable grounds to suspect the monies were recoverable property on the enforcement officer's generalised assertion of "money laundering" without

33 POCA, ss.294-298.
34 POCA, s.245A(5); *Merida Oil Traders Ltd* (n.18, above), pp3694H-3695A [59].
35 POCA, s.40(2)(a)-(b).
36 "A frozen funds investigation is an investigation for the purposes of Chapter 3B of Part 5 [of the Act] into – (a) the derivation of money held in an account in relation to which an [AFrO] has been made … or (b) whether [such money] … is intended by any person to be used in unlawful conduct". POCA, s.341(3C).
37 POCA, ss.345-346.
38 POCA, ss.41(7A)-(7C).
39 *R (Haralambous) v St Albans Crown Court*; [2018] AC 236, 273E [64].
40 *Haralambous* (n.39), p273G [64].
41 *Merida Oil Traders* (n.18), at [57]; see also *R (Director of Asset Recovery Agency) v Green* [2005] EWHC 3168, [33].

exploring whether the officer could identify any underlying predicate criminality of which the father was suspected (it later transpired he could not), or the reasons said to give rise to an irresistible inference that the funds derived from criminal property.[42]

This is to be contrasted with the case of Vlad Luca Filat, whose father is an ex-prime minister of Moldova convicted of a $1 billion bank fraud.[43] Mr Luca was a student in London with no legitimate income and an extravagant lifestyle funded by large deposits from overseas companies connected to his father. The NCA was able to freeze and ultimately forfeit around £500,000 following the court's determination that these funds derived from his father's criminal conduct.

Magistrates' Courts are ill-equipped to deal with complex cases

In our experience, enforcement authorities are choosing to make AFrO applications in the magistrates' courts in complex cases in which property freezing applications could have been made in the High Court. We have found that (i) some applications have been decided by lay magistrates rather than district judges, (ii) courts have not been given prior reading time despite pre-hearing requests; (iii) "over-listing" has resulted in insufficient time being available for the parties' agreed time estimates causing unnecessary adjournments; and (iv) in one case, a hearing has been curtailed expressly because these are "summary proceedings" in the magistrates' court, not the High Court. All this is notwithstanding that appellate courts have recognised as axiomatic that complex asset restraint applications should be listed before (ideally specialist) judges with sufficient time to read and absorb the papers and conduct proper hearings.[44] Put shortly, our experience is that for legal and practical reasons, applications for restraint or property freezing orders before the Crown Court or the High Court respectively are subject to far more rigorous scrutiny than similarly complex cases being dealt with under the AFrO regime in the magistrates' courts.

Conclusion

There are a few high-profile cases which have resulted in AFOs. Nevertheless, some applications are being made where there is relatively little positive information indicative of the targeted funds having been obtained by or in return for unlawful conduct. For obvious reasons of expedition, enforcement authorities are utilising the AFrO/AFO regime to freeze large sums rather than applying for High Court property freezing orders under the established civil recovery regime, notwithstanding that magistrates' courts are ill-equipped to deal with such complex cases. We anticipate that reliance on these potentially draconian orders will increase, including in response to requests from overseas authorities to freeze funds in the UK. In our follow-up article, we shall turn to the practicalities of advising and representing the targets of AFrOs and AFOs.

42 See n.29 and accompanying text.
43 See n.11.
44 *Barnes v Eastenders Cash and Carry* [2015] AC 1, [118]; *Director of the SFO v Lexi Holdings PLC (in administration)* [2009] QB 376, [92]-[93].

Christine Keeler's Legal Legacy

For those who can remember the events in question, the BBC's six-part series *The Trial of Christine Keeler* prompts many thoughts.

For me, one is how it sometimes takes a cause célèbre to bring about a simple and much-needed legal change for which informed opinion has quietly pressed for many years in vain. When the Court of Appeal quashed Lucky Gordon's conviction for assaulting Christine Keeler on account of fresh evidence which cast doubt on his guilt but fell far short of establishing his innocence, the rules of criminal appeal were quickly changed to give the Court of Appeal the power, when quashing a conviction for this reason, to order a retrial: an obviously necessary change proposed by the Tucker Committee[1] many years before but never implemented. With little fuss, the power to order a retrial was then made general in 1988.

The trial, conviction and suicide of Stephen Ward shone a spotlight on another obvious deficiency of the law, which was the overbreadth of the offence of living on immoral earnings.[2] The intended object of this offence was the ponce – the man (or occasionally the woman) who makes a living by controlling prostitutes for gain. But as widely drafted and then broadly interpreted by the courts, it potentially caught many other people too. The loose young women with whom Ward liked to be surrounded sometimes gave him small sums in return for use of the telephone and other services he provided for them; and their presence and the opportunities they presented may have been an added attraction for some of the men who frequented his practice as an osteopath. But Ward did not control them, nor was he kept by them: in truth, it was he who kept them. Nor were they prostitutes in the usual sense. As Mandy Rice Davies allegedly once put it, "I was game – but not on the game."

This offence was eventually abolished by the Sexual Offences Act 2003, which replaced it with the more narrowly focused offences of causing or inciting prostitution for gain, and controlling prostitution for gain.[3] Though this was some forty years after the death of Stephen Ward, his trial and death had continued to cause disquiet and public discussion in the interval. As such, I suspect, they played their part in bringing this needful change about.

JRS

1 Departmental Committee on New Trials, Cmnd. 9150 (1953-54).
2 Sexual Offences Act 1956 s.30.
3 Sexual Offences Act 2003 ss.52 and 53.

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