

## THE PROCEEDS OF CRIME ACT: A LAW FOR SHARKS THAT CATCHES MINNOWS

*Shaun Walbridge, Director of Matrix Forensic Accounting & Investigations, looks at how a law aimed at organised crime can impact catastrophically on small scale wrong-doers, and how a Forensic Accountant can assist the Court*

Organised crime is nasty, brutish and exists solely for criminals to make money from the exploitation of victims. It manifests itself most graphically in drug addiction, sexual exploitation and gun crime, but is also strongly linked to many other areas such as fraud, money laundering, immigration, vehicle crime, counterfeit currency, kidnap and extortion, and at the extreme end of the spectrum, terrorism. Players at the top end often resort to extreme violence, intimidation and corruption to protect their business.

The perception is that organised crime is confined to the major conurbations of the UK – London, Manchester, Glasgow and Belfast. The reality is that we are no more immune from organised crime than any other area – witness the discovery of more than 20 Vietnamese and Chinese-linked ‘cannabis factories’ across England and Wales over recent years.

So the introduction of The Proceeds of Crime Act in 2002 was an important step in the battle against organised crime. The primary thrust of the Act was to reinforce previous legislation aimed at putting an end to the ‘champagne lifestyle’ of certain criminals, as well as tackling the smaller fish – and to reduce the money available for further criminal activity.

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In May 2007 the Home Office published an important consultation paper called “The Asset Recovery Action Plan”. One of its principal aims is that “**Nobody charged with an acquisitive crime should be leaving the (criminal justice) system still benefiting from the proceeds of that crime.**” In a nut shell, under the PoCA, anyone convicted of a crime faces the possibility of further action, whereby the Court may subsequently order that the “proceeds of his criminal activity” are made subject to a confiscation order. In other words, the value of any property

acquired by criminal means will be taken away as part of a separate procedure from the original trial.

PoCA is often described as “Draconian” – it’s meant to be, as deterrence is the name of the game. The powers under PoCA need to be taken extremely seriously, since anyone involved in criminal activity, however defined, on conviction could become subject to a confiscation order. Moreover the legislation firmly favours the Criminal Justice system rather than the defendant, and the confiscation order applies not just to the offence of which someone has been convicted, but may also apply the assumption that ALL his income over the past six years represents the proceeds of crime.

In order for an action under PoCA to happen, the court must determine whether the defendant has a ‘criminal lifestyle’. This is the gateway into the general confiscation regime as it triggers an historical enquiry into the defendant’s ‘criminal conduct’, which unsurprisingly, means crime.

In determining the benefit of the defendant’s general criminal conduct, the Court must apply four assumptions, which work on the basis that the defendant’s benefit represents – “what he has received, what he has retained, what he has spent and what he has obtained”.

In order to assess the benefit, the police will examine all income from the previous six years – though quite simply the enquiry is not confined to this period but looks at ALL the defendant’s criminal conduct regardless of when it occurred up until the time the court makes its decision.

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The sum to be paid depends on the ‘benefit’ he has received from this conduct - ‘the value of property obtained’.

If the prosecution is seeking to enforce a confiscation order, I as a Forensic Accountant am often asked to investigate the case. To do so, I need to gain an understanding of the defendant’s financial position, investigate his sources of income, and look for corroborating evidence to support the sources. I have on numerous occasions investigated cases where the calculated benefit is out of all proportion both to the original offence and to the defendant’s ability to pay,

because the law treats all criminal activity the same – and the onus is on the defendant to prove that his income is legitimate.

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Take the (real) investigation into the financial affairs of Tom who went on holiday with his friends Dick and Harry (not their real names). While abroad, the friends thought they could make some money by buying counterfeit Euros to exchange on their return home. The Euros were of such poor quality that no-one would accept them. Once home, Tom put the counterfeit Euros away and forgot about them.

Several months later, Dick and Harry were arrested and charged with drug dealing. As part of the investigation, Tom's home was raided, as he was a known associate, despite the fact that he had no involvement in drugs. During the raid, the police found the counterfeit Euros. He was charged with possession of £100 worth of counterfeit currency, to which he pleaded guilty.

Following his conviction, the police carried out a financial investigation and calculated that the benefit of his criminal conduct over the previous 6 years was £88,000. Potentially, this meant losing all his savings and having to sell his house.

Luckily, being self-employed he had kept business records and accounts, and completed tax returns, all of which I was able to use in the investigation. Whilst the prosecution had accepted that he was self-employed, and had said that they would not look into his business accounts – they failed to take into account that most of the money paid into his private account was derived from his business.

After protracted negotiations between the prosecution (the police) and the defendant (Tom), the Court, on whose behalf I was working, made an order for £5,000 as being the benefit from his criminal conduct.

Contrast Bob (again, not his real name), a self-employed builder who damaged his back, and first bought, then grew, cannabis to help with the pain. A tip-off resulted in a police raid on his home, a guilty plea in Court, and a Community Order sentence, since the Judge accepted that he was not growing cannabis for commercial gain. However, after his conviction, the police conducted an investigation into his financial affairs, and calculated that the benefit he had received was

£321,000. There was the real possibility that he would have to sell the family home in order to repay the amount of benefit.

Unfortunately, he had not kept books or records which could prove his income, and had not completed tax returns, so the job of reconstructing his affairs from copy invoices and his customers' records was extremely difficult. Despite the lack of accounting records, I was able to demonstrate that 80% of the unexplained income arose from legitimate sources. As a result, the prosecution were able to agree a final settlement of less than £20,000, a reduction of over £300,000 from the original amount sought.

The moderating role of the Forensic Accountant in such cases is obviously crucial, and a good one will be able to absorb vast quantities of documentation and to understand a wide range of business models as well as being able to communicate effectively with experts and non-experts alike.

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But the warning in these cases is clear - regardless of how small and foolish a fish you may actually be, conviction of any crime which has had as its motive a desire to make, or not spend money, lays you open to the full rigour of a law which was designed to deal with underworld sharks of the worst variety.

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