33
Money laundering

In a series of complex and draconian statutes over the last two decades successive governments have sought to combat serious crime by targeting not just the offenders (who may commit a money laundering offence in relation to their own criminal conduct), but all those who assist in the disposal of criminal proceeds.[1] Accordingly, Parliament has enacted a raft of measures providing for confiscation, asset recovery, civil recovery, restraint proceedings and prevention orders. In some respects, the offences of money laundering share a similar rationale to handling: to target the individuals who render criminal activity profitable rather than those committing the substantive crime itself.[2]

However, the money laundering offences are concerned not just with stolen goods but with criminal proceeds more generally. The legislation has been driven by international treaty obligations, and these are relied upon by the courts as an aid to interpretation.[3]

The offences under the Criminal Justice Act 1988 (CJA 1988) and the Drug Trafficking Act 1994 (DTA 1994) provided a series of offences which criminalized entering into or being concerned in an arrangement involving the retention, acquisition, use, possession, etc of criminal proceeds (CJA 1988) or the proceeds of drug crime (DTA 1994).[4] This strict division between laundering 'drug' money and 'other criminal proceeds' (eg those from theft or

[1] See generally HHJ M Sutherland Williams, HHJ M Hopmeier and R Jones, *Millington and Sutherland Williams on The Proceeds of Crime* (2018); P Dyer and M Hopmeier, 'Confiscation: An Update: Part 1—Benefit, Realisable Amount and Proportionality' [2017] 5 Arch Rev 5; P Dyer and M Hopmeier, 'Confiscation: An Update: Part 2—Procedure & Practicalities' [2017] 7 Arch Rev 6; A Mitchell, S Taylor and K Talbot, *On Confiscation and the Proceeds of Crime* (3rd edn, 2014, looseleaf) Ch 9; *Blackstone's Criminal Practice*, B.22; for an accessible account see also R Fortson, 'Money Laundering Offences Under POCA 2002' in W Blair and W Brent (eds), *Banks and Financial Crime: The International Law of Tainted Money* (2nd edn, 2017) and for a more theoretical account see P Alldridge, *Money Laundering Law* (2003) Ch 9.

[2] On whether these should be seen as true crimes, see D Husak, *Overcriminalization* (2008) 104–7.

[3] See *Montila* [2004] UKHL 50. Note also the EU influence: Council Framework Decision 2001/500/JHA of 26 June 2001 on which see D Atkinson (ed), *EU Law in Criminal Practice* (2012) para 6.29; V Mitsilegas, *EU Criminal Law* (2009) 66–7.

[4] For an excellent review of some of the problems under the old law, see J Fisher and J Bewsey, 'Laundering the Proceeds of Fiscal Crime' [2000] JIBL 11.

any crimes other than drugs) created significant practical problems. Even greater complexity arose in prosecutions for conspiracies of these offences.[5]

The Proceeds of Crime Act 2002 (POCA) remedies some of these problems but creates its own problems with offences of a no less draconian nature. These often contain mens rea of mere suspicion or even objective tests of fault. The legislation is extremely technical and cannot be dealt with in detail in this work. That is not to deny its importance in practice. The Act also creates important offences for those in the 'regulated-sector'[6] to fail to disclose suspected money laundering and an offence of 'tipping off' another person that suspected money laundering has been reported. These offences are not dealt with in this work.[7] This chapter offers only an overview of the three principal money laundering offences to serve as a contrast to the offence of handling.[8]

33.1 The Proceeds of Crime Act 2002

Part 7 of the Act introduces three sections—ss 327, 328, 329—replacing the separate categories of offence relating to drug and non-drug crime.[9] These are the 'money laundering' offences. Technically, by s 340(11), 'money laundering' is much wider and includes not only: (a) the substantive offences under ss 327, 328 and 329; but also (b) inchoate forms of those offences; (c) secondary participation in those offences; and (d) any act which would constitute (a), (b) or (c) if it were done in the UK.

33.1.1 Criminal property

Sections 327 to 329 of POCA criminalize D's dealings (concealing, disguising, converting, transferring, acquiring, using, possessing, etc) with 'criminal property'. Section 340 defines what constitutes criminal property and is therefore central to their operation. It is a complex provision.[10]

Take a case where D runs a bureau de change and takes receipt of bags full of used £20 notes which he converts into Swiss francs. Leaving aside for the moment the requirements of the money laundering activity (probably 'converting' under s 327 in this case) and what that entails, it is worth beginning by looking at what the Crown must prove in order to show that the property (the bags of cash) was criminal property under s 340.

It is first essential for the prosecution to establish that the property that D is alleged to have laundered (by converting, etc) is the product of 'criminal conduct'. Perhaps the used

[5] See *El Kurd* [2001] Crim LR 234; *Hussain* [2002] Crim LR 407.

[6] Catalogued in Sch 9 to the Act (as amended).

[7] See generally the Law Com report on anti-money laundering and suspicious activity reports: No 384, *Anti-Money Laundering: The SARs Regime* (2019).

[8] The offences are supplemented by the important provisions in the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017, SI 2017/692. The Office for Professional Body Anti-Money Laundering Supervision (OPBAS) will help improve the overall standards of supervision and ensure supervisors and law enforcement work together more effectively.

[9] See on the history *Bowman v Fels* [2005] 1 WLR 3083. See also E Rees, R Fisher and R Thomas, *Blackstone's Guide to the Proceeds of Crime Act 2002* (5th edn, 2015); R Fortson, *Misuse of Drugs: Offences Confiscation and Money Laundering* (6th edn, 2012); *Mitchell, Taylor and Talbot on Confiscation and Proceeds of Crime* (2014) Ch VIII; C Montgomery and D Ormerod (eds), *Fraud: Criminal Law and Practice* (2008) Ch D9.

[10] See eg the detailed yet controversial analysis in *Ogden* [2016] EWCA Crim 6 where the Court of Appeal held that deals of 'illegal drugs' amounted to money laundering offences because they involve criminal property being transferred.

£20 notes are the product of drug trafficking, prostitution, tax fraud,[11] burglary, etc. This criminal conduct is often called the 'predicate offence' to distinguish it from the money laundering offence (in our example D converting criminal property) which is being alleged. Criminal conduct includes the launderer's own criminal conduct.[12] It also includes conduct abroad that is not an offence under the laws of the State where the conduct occurred, but which would be such an offence if committed somewhere in the UK.

Secondly, the property must be 'criminal property'. That concept comprises not just money which is the product of criminality, but a much wider range of property,[13] and by s 340(3) property is 'criminal' if:

(a) it constitutes a person's benefit[14] from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and

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

Thirdly, the prosecution must prove mens rea—the property only becomes criminal property if D knows or suspects it to be criminally tainted. It is not enough to show merely that the property constitutes someone's benefit from crime, for example that the £20 notes were from drug trafficking. There is an element of mens rea to be proved. For the property that is the product of the predicate crime to be treated as criminal property for the purposes of money laundering, the prosecution must prove that the alleged launderer had mens rea about the nature of the property. In our example, D running the bureau de change must know or suspect that the £20 notes derive from criminal conduct. Equally, it seems now to be accepted that it is *not* enough that D suspects that the property he is dealing with is the proceeds (benefit) from criminal conduct[15] if it is not in fact (perhaps D suspects that a bag of used £20 notes is criminal, but in fact the person wanting to exchange them is just an eccentric who does not trust banks):[16] there must be criminal property in fact.[17] In *Shah v HSBC*,[18] the High Court held that 'If the property in question is not in fact "criminal property" then no offence is committed.'

11 cf P Alldridge and A Mumford, 'Tax Evasion and the Proceeds of Crime Act 2002' (2005) 25 LS 353.

12 *Greaves* [2010] EWCA Crim 709.

13 By s 340(9), 'property is all property wherever situated and includes—(a) money; (b) all forms of property, real or personal, heritable or moveable; (c) things in action and other intangible or incorporeal property'. See *Ogden* [2016] EWCA Crim 6, n 10.

14 A person 'benefits' from conduct if he obtains property as a result of or in connection with the conduct. By s 340(8), 'if a person benefits from conduct his benefit is the property obtained as a result of or in connection with the conduct'. By s 340(6) 'If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage.' And s 340(7): 'References to property or a pecuniary advantage obtained in connection with conduct include references to property or a pecuniary advantage obtained in both that connection and some other.'

15 See *Montila* [2005] 1 WLR 3141, [41].

16 Although the case law might not all seem to be consistent, on closer inspection it is. Some of the pronouncements are from cases on the s 330 offence which criminalizes D's failure to report a suspicion that property is 'criminal property', and under s 330 it is immaterial whether the property is actually criminal property or not. Accordingly, in the High Court of Justiciary in *Ahmad v HM Advocate* [2009] HCJAC 60, it was held that the s 330 offence (based on reasonable grounds to suspect) may be committed even where D's suspicion that the property in question is 'criminal property' proves to be wrong. This was based in part on the decision in *Squirrell v National Westminster Bank plc* [2006] 1 WLR 637.

17 See *Montila* [2005] 1 WLR 3141. A person cannot commit an offence of attempting to deal with criminal property if he merely suspects that the property in question is criminal property: *Pace* [2014] EWCA Crim 186, see p 437.

18 [2009] EWHC 79 (QB) at [39] per Hamblen J; a decision reversed on its merits in the Court of Appeal (Civ Div) [2010] EWCA Civ 31.

The reach of the money laundering offences is greater still because criminal property is extended by s 340(4): it does not matter who carried out the 'criminal conduct', who benefited or even whether the conduct occurred before or after the passing of the Act.[19] Clearly, there is considerable overlap with the offences of handling stolen goods and dishonestly retaining a wrongful credit.

Determining whether property constitutes 'criminal property' and which of a defendant's property might be criminal, can prove difficult. As an example, in *William*[20] the defendants were convicted of converting and transferring criminal property contrary to s 327. They had operated a security company and failed to supply VAT and tax returns to the Revenue. By the time the defendants' activities came to the attention of the Revenue, the company had an annual turnover of over £1m. On appeal, the defendants argued that the sums derived from the security business only became criminal property at a time when there were insufficient funds to pay the tax due. In rejecting this submission, relying upon the earlier case of *IK*,[21] the Court of Appeal held that there is a difference between the sum constituting the pecuniary advantage and the monies falling within the definition of criminal property. In this case, the defendants had obtained a pecuniary advantage within the meaning of s 340(6) by failing to pay the tax they owed and were taken to have obtained a benefit within the meaning of subs (3) equal to that pecuniary advantage. The value of the benefit was the amount of tax unpaid. However, the criminal property was held to be the entirety of the undeclared turnover and not merely the tax due because the benefit is in part derived from that sum. *William* demonstrates the potential breadth of the definition in s 340.[22] As another example, where D runs an unlicensed activity and it is a crime to do so, the turnover of the business is criminal.

33.1.1.1 The predicate offence

As noted, the prosecution must prove that there is criminal property under s 340.[23] Controversy has arisen over how much detail it is necessary for the Crown to establish about the criminal conduct which generated this criminal property. What must the prosecution prove about this 'predicate offence'? In our example with the bureau de change, is it necessary for the Crown to prove precisely what earlier offence generated the money?

The courts struggled with this question of the degree of specificity with which the Crown must identify the predicate offence. Early cases[24] declined to impose any requirement for the Crown formally to prove that the property emanated from a specified crime or any specific type of criminal conduct.[25] In *NW*,[26] the court suggested that the prosecution needed

[19] In *Re Assets Recovery Agency (Jamaica)* [2015] UKPC 1, the Privy Council accepted that the Crown must prove that the predicate offence was committed by somebody, but not necessarily who (nor need there be a conviction already secured): 'What has to be proved is that an antecedent offence was committed, not that a conviction followed.' At [9].

[20] [2013] EWCA Crim 1262. [21] [2007] 1 WLR 2262. [22] See also *Mo* [2013] NICA 49.

[23] See commentary on *NW* [2008] Crim LR 900 and V Walters, 'Prosecuting Money Launderers: Does the Prosecution Have to Prove the Predicate Offence?' [2009] Crim LR 571 and *Ahmad (Mohammad) v HM Advocate* [2009] HCJAC 60; D McCluskey, 'Money Laundering: The Disappearing Predicate' [2009] Crim LR 719.

[24] eg *Craig* [2007] EWCA Crim 2913. [25] ibid, [29].

[26] Laws LJ in *NW* tried to avoid an 'anomalous' or 'bizarre' position where the Crown had a less onerous obligation in proving the source of criminal property in a prosecution than they would have under civil recovery. In civil proceedings for recovery under Part 5 of POCA, a specified 'kind' of unlawful conduct must be proved to have occurred: *R (Director of the Assets Recovery Agency) v Green* [2005] EWHC 3168 (Admin); *Director of the Assets Recovery Agency v Olupitan* [2008] EWCA Civ 104.

to identify the predicate offending in 'type' at least. More recently, the courts have accepted that it is not necessary to prove the precise crime, or type of crime.[27] The prosecution must:

(1) prove that the property is criminal; and

(2) prove that to the criminal standard;[28]

(3) provide sufficient detail of the predicate for D to know the allegation he faces (D, the launderer, need not be shown to know precisely what crime is involved. It is enough to show that he knew or suspected it was criminally tainted property[29]);

(4) prove that the predicate offence preceded the money laundering.

(i) The predicate: how specific?

In *Kuchhadia*,[30] in upholding D's conviction for converting criminal property Macur LJ said:

> . . . criminal conduct, specific or generic, must be evidenced and proved to the criminal standard. We do not accept [counsel's] argument, that a specific crime or criminal conduct must be specified and proved by the prosecution and a direction given so as to ensure that the jury are not divided about the nature of the criminal conduct which entitles them to convict. The statute does not support such a narrow construction. . . . There is no reason why the prosecution could not rely upon alternative or several allegations of different criminal conduct provided that they can prove at least one to the criminal standard to the satisfaction of the jury.[31]

Further guidance was given on this issue in *DPP of Mauritius v Bholah* in which Lord Kerr, delivering the opinion of the Board, stated as follows:

> In England and Wales proof of a specific predicate offence is not required, although there has been debate in some of the authorities in this area as to whether it is necessary to adduce evidence of the class or type of criminal conduct that is alleged to have generated the property dealt with by the accused.[32]

Although a decision of the Privy Council, *Bholah* was relied upon by the Court of Appeal in the subsequent case of *Anwar.*[33] In this case, the prosecution did not allege any particular kind of criminal conduct on the indictment. Its case was that the circumstances were such that it was an irresistible inference that the cash represented, and the acquisition of the BMW cars in question derived from, the proceeds of unspecified crime. After they retired, the jury asked the judge whether tax evasion in the UK could constitute criminal conduct for the purposes of the case. The judge reiterated that the prosecution case was that they did not know the sources of the funds in question but that tax evasion could constitute a criminal offence. In quashing the defendant's conviction, the Court of Appeal held that the judge had two options. The most appropriate one was to direct the jury that tax evasion had never been part of the prosecution case and that they could not speculate upon the matter further. The second option was to give the jury some legal instruction as to the elements of

[27] *F* [2008] EWCA Crim 1868, following *Anwoir* [2008] EWCA Crim 1354. In that case, the inference that the property was criminal may not have been too difficult to draw as the two defendants had £1,184,670 in cash in their luggage on a plane to Iran.

[28] *Anwoir* [2008] EWCA Crim 1354, [21].

[29] For a case in which the Court of Appeal held that the inference was strong enough such that the judge was correct to reject a submission of no case, see *Saleh* [2012] EWCA Crim 484. The court reviewed the law on the drawing of inferences.

[30] [2015] EWCA Crim 1252. [31] At [21]. [32] [2011] UKPC 44, [23].

[33] [2013] EWCA Crim 1865. See also *Solanki* [2020] EWCA Crim 47.

'tax evasion'. However, the Court of Appeal observed that this approach was not ideal as there had been no evidence relating to the issue of tax evasion. It is submitted that this case demonstrates the difficulty inherent in not specifying the predicate offence on the indictment, or at least the type of criminal activity it is alleged the defendant was involved in. In the absence of such information, jurors may look for it anyway. Although there is no explicit requirement to do so, it is submitted that the best approach is to give notice of the criminal conduct that it is alleged produced the property in question. A failure to do so invites the jury to speculate about matters that potentially were not in evidence and could unfairly prejudice the defendant.

(ii) Proof to the criminal standard

The manner in which that is proved can be by proving that it derives from unlawful conduct of a specific kind or kinds or that there is an irresistible inference from the evidence of the circumstances in which the property was handled that it could only be derived from crime. In *IK*,[34] the Court of Appeal held that it was open to a jury to infer that very large sums which were being concealed in D's money-transfer business represented criminal property even though 'the prosecution could not identify the provenance of the money'. Difficulties can arise particularly where the property in question is something as innocuous as an LCD TV or a car. If the prosecution alleges that these are criminal property that D is converting (perhaps D has them advertised on eBay), how easy will it be to infer that they are criminal property from the circumstances (D's low income, the circumstances in which he came to possess them, etc)?

(iii) Providing enough detail for D to know the allegation

In *Gabriel*,[35] the Court of Appeal provided further clarification of the prosecution's responsibilities:

> In our judgment it is a sensible practice for the prosecution, either by giving particulars, or at least in opening, to set out the facts upon which it relies and the inferences which it will invite the jury to draw as proof that the property was criminal property.[36]

In *Bholah*, Lord Kerr added important guidance:

> The decisions in the English cases are informative beyond their firm conclusion that proof of a specific predicate offence is not required, however. They are unanimous, in the Board's view, in suggesting that where it is possible to give particulars of the nature of the criminal activity that has generated the illicit proceeds, this should be done. Some of the cases appear to suggest that this is an indispensable requirement; others that it is merely required where it is feasible. All are agreed, however, that where it is possible to give the accused notice of the type of criminal activity that produced the illegal proceeds, fairness demands that this information should be supplied.[37]

This is a welcome decision in that it offers guidance as to what the prosecution have to specify when relying upon the offences in ss 327 to 329.

33.1.1.2 The predicate offence must precede the money laundering

A money laundering offence by D can be proved in the absence of a conviction by D or another for the predicate offence.[38] However, the prosecution must prove that the criminal

[34] [2007] 1 WLR 2262. [35] [2006] EWCA Crim 229. [36] At [29]. [37] At [34].

[38] *Sabaharwal* [2001] 2 Cr App R (S) 81. *Re Assets Recovery Agency (Jamaica)* [2015] UKPC 1: the Crown must prove that the predicate offence was committed by somebody, but need not prove that that other was convicted.

conduct in s 340, which generates the proceeds of crime, coupled with D's knowledge or suspicion of that fact (and which thus constitutes 'criminal property') *occurred before* the alleged money laundering conduct took place, and not as part of it.[39]

Putting this another way, the criminal property has to exist before the alleged laundering offence occurs, as the Supreme Court held in *GH*.[40] As the Court of Appeal stated succinctly in *Ogden*:[41] 'Property has to be criminal property . . . before it can be converted.' In *Loizou*,[42] the trial judge ruled that the Crown would be entitled to put its case under s 327, on the basis that property transferred for a criminal purpose would thereby become 'criminal property' within the meaning of s 340. This is clearly not what the statute intended. The Court of Appeal allowed the prosecution's appeal. The offence (under s 327) involves, inter alia, transferring criminal property. It is not an offence of criminally transferring property. The prosecution must prove that the property is criminal property within s 340 at the time of, or immediately before, the acts alleged to constitute the transfer, etc. The same is true of acquiring contrary to s 329.[43]

Identifying when the predicate occurred (and in particular when it commenced) may be difficult, particularly in allegations of tax evasion. In the case of *IK*,[44] it was accepted that the Crown can rely on allegations of non-declaration of income as the predicate offence for s 327 provided D has, at the time of the conduct alleged to constitute money laundering, already made a false tax declaration to the Revenue or has committed some other cheat upon the Revenue.[45] *William* (see earlier) demonstrates that although the predicate offence must precede the money laundering, profits generated by the predicate can constitute criminal property even if they accrue after the predicate offence occurred.

33.1.2 The s 327 offence

Section 327 creates an offence where D conceals, disguises, converts,[46] transfers or removes criminal property derived from the UK. On one construction, the section appears to create five different offences and therefore the indictment should specify the relevant act to avoid the count being bad for duplicity. Some support for this interpretation was given by the Court of Appeal in *Haque*[47] where Davis LJ stated:

> There has in fact been some debate in some quarters as to whether section 329 creates one offence, albeit capable of being fulfilled in three different ways, or whether it creates three different offences. The explanatory notes to the 2002 Act seem to treat section 327, 328 and 329 as each containing one offence. We have to say, however, that we consider that very questionable. Both section 327 and section 329 (which are, for whatever reason, drafted in a way very different from section 328) are on their face worded and structured so as to connote, ostensibly, different offences.[48]

However, it is submitted that the better view is that s 327 creates a single offence that can be committed in a number of ways.[49]

[39] *Geary* [2010] EWCA Crim 1925. [40] [2015] UKSC 24. [41] [2016] EWCA Crim 6.
[42] [2005] EWCA 1579. [43] See *Haque* [2019] EWCA Crim 1028. [44] [2007] 1 WLR 2262.
[45] cf Alldridge and Mumford (2005) 25 LS 353. See also *William*, n 20.
[46] In *Ogden*, the Court of Appeal endorsed the trial judge's direction on the definition of converting: 'Property has to be criminal property . . . before it can be converted. Any dealings in criminal property are potentially capable of being classed as "converting" . . . conduct that changes the state of the thing—for want of a better word—is capable of being classed as "converting". Examples of conversion include selling, transferring, lending, dividing up, giving, creating a debt, passing money (or promise of money), earnings, favours in some other form are all capable of being called "converting".'
[47] [2019] EWCA Crim 1028. [48] At [31]. [49] cf *Griffiths v Freeman* [1970] 1 All ER 1117.

33.1.2.1 Actus reus

Section 327(3) defines concealing or disguising criminal property as including 'concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it'. The offence is broadly drawn and has the scope to apply in cases that would usually be thought of as classic instances of handling stolen goods (eg *Thompson*[50]—selling a stolen train set to a specialist shop for £180 when its true value was £3,500), or drugs offences (*Ogden*—possessing and intending wholesale supply of drugs).[51] As noted, the property must have become criminal property before it is concealed/disguised/converted/transferred, etc.[52]

The scope of the s 327 offence is demonstrated by the case of *Fazal*.[53] F was convicted on seven counts of *converting* criminal property contrary to s 327. F gave his bank details, debit card and PIN to a friend, P, who had said he needed an account to pay in his wages. F claimed that he did not use the account in question. Deposits were made into the account by people duped by P into paying for non-existent goods. The prosecution alleged that F had facilitated the 'conversion', not that he had deposited or withdrawn monies himself. The question was whether, even assuming mens rea, F's conduct could amount to converting criminal property within the meaning of s 327. F was charged as a principal offender, not as an accessory to P. The Court of Appeal upheld his conviction: if someone lodged, received, retained or withdrew money from his account, each act would amount to a conversion for the purposes of s 327. A person with a bank account could be said to be converting the money through that account merely by allowing some third party to use the account. Once there was a credit in F's account representing the fraudulently obtained sums, it is easy to see how that can be treated as property constituting or representing a person's benefit from criminal conduct (fraud/deception) under s 340. It is also easy to see how F has obtained an interest in it and how withdrawals from F's account constitute conversions. However, the court is equally clear that even mere 'receipt' of a deposit to F's account can amount to 'conversion'. (In automated bank transfers there is strictly no 'receipt' or 'transfer' of property; there is a transfer *of value*.) There are difficulties with such a broad interpretation.[54] F's conduct in this case might more naturally be thought of as an offence under s 328 (see later).

33.1.2.2 Mens rea

There is no requirement to prove dishonesty. Nor is there any requirement that D is aware of the precise criminality which created the property. It is sufficient that he does one of the acts—concealing, disguising, etc—and knows or suspects the property is the proceeds of criminal conduct.

The mens rea requirement is very wide. Suspicion is an ordinary English word. In *Da Silva*,[55] the judge directed the jury that 'to suspect something, you have a state of mind that

[50] [2010] EWCA Crim 1216.

[51] 'Illegal drugs (sic) by their nature always represent "criminal property". The reason is that the process of manufacturing, trafficking, importing, distributing, supplying and selling Class A, B and C drugs always necessarily involves a benefit for one or more of the individuals involved.' Ibid.

[52] *Louizou* [2005] 2 Cr App R 37, [30]; *Ogden* [2016] EWCA Crim 6. See also *Kensington International Ltd v Republic of Congo (formerly People's Republic of Congo) (Vitol Services Ltd and others, third parties)* [2008] 1 WLR 1144.

[53] [2009] EWCA Crim 1697.

[54] In the language of s 340, before the credit appearing in F's account, what was the property which constituted or represented P or F's conduct and in which either of them had obtained an 'interest'? When did they acquire that interest?

[55] [2006] EWCA Crim 1654. On suspicion, see Fortson, n 9, paras 7.46–7.49. See also LC 384, *Anti-Money Laundering: The SARs Regime* (2019) Ch 5 for discussion.

is well short of knowing that the matter that you suspect is true. It is an ordinary English word . . . the dictionary definition of "suspicion" [is] an act of suspecting, the imagining of something without evidence or on slender evidence, inkling, mistrust.'[56] The Court of Appeal held that the effect of the word 'suspect' and its affiliates was that the defendant had to think that there was a possibility, which was more than fanciful, that the relevant facts existed. A vague feeling of unease would not suffice; however, the statute did not require that the suspicion had to be 'clear' or 'firmly grounded and targeted on specific facts', or based upon 'reasonable grounds'.[57] Where a judge feels it appropriate to assist the jury with the word 'suspecting', a direction along those lines would be adequate and accurate. Expressions such as 'inkling' and 'fleeting thought' are liable to mislead and their use is best avoided. The only possible qualification was whether, in an appropriate case, a jury should also be directed that the suspicion had to be of a settled nature; a case might, for example, arise in which a defendant had entertained a suspicion in the above sense but, on further thought, had honestly dismissed it from his or her mind as being unworthy or as contrary to such evidence as existed or as being outweighed by other considerations. In such a case, a careful direction to the jury might be required; however, before such a direction was necessary there would have to be some reason to suppose that the defendant had gone through some such thought process. This interpretation is consistent with earlier pronouncements including, notably, that of Lord Devlin in *Hussein v Chong Fook Kam*:[58]

> Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of prima facie proof is the end.[59]

The court's interpretation of suspicion has been held to apply in the civil law relating to this offence: *K Ltd v National Westminster Bank Plc*.[60]

33.1.3 The s 328 offence

Section 328 creates only one offence of entering into or becoming concerned in an arrangement which D 'knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person'. It has been held that this extraordinarily broad offence does not cover the normal conduct of litigation by professions.[61] It is a complex offence which can involve technical issues of civil law.[62]

33.1.3.1 Actus reus

The concept of 'arrangement' is a vague one. It has long been clear that the commission of an offence under s 328 requires the property to constitute criminal property prior to the arrangement coming into operation; it is not enough that the accused dealt with the property in question for the purpose of committing a criminal offence.[63]

56 [2006] EWCA Crim 1654. See [16]–[19] for the correct approach.

57 At [16]. 58 [1970] AC 942 at 948.

59 See also the Joint Money Laundering Steering Group, *Prevention of Money Laundering/Combating Terrorist Financing* (2017 Consultation Version) Part I at paras 6.11–6.12: 'Suspicion is more subjective [than knowledge] and falls short of proof based on firm evidence. Suspicion has been defined by the courts as being beyond mere speculation and based on some foundation.'

60 [2006] EWCA Civ 1039. Cf *Shah v HSBC* [2011] EWCA Crim 1154.

61 *Bowman v Fels* [2005] EWCA Civ 328. See also *Squirrell Ltd v National Westminster Bank plc* [2006] 1 WLR 637, [16].

62 See eg *GH* [2015] UKSC 24.

63 See also *Akhtar* [2011] EWCA Crim 146 and *Gillies* [2011] EWCA Crim 2140.

In earlier editions, we noted that the Court of Appeal in *Geary*[64] referred to the requirement that property was 'criminal property *at the time when the arrangement begins to operate on it*' and that implied that the offence may apply where D and E arrange to deal with property which although not yet tainted by criminality will be by the time their agreement takes effect on it.

The Supreme Court has now confirmed that the property does *not* have to exist at the time when the defendant enters into or becomes concerned in the arrangement provided the property would be criminal at a time when the arrangement operates on it.[65] In this case, a fraudster, B, established four 'ghost' websites falsely pretending to offer cut-price motor insurance. In order to carry out this plan, he recruited associates to open bank accounts for channelling the proceeds. H was one such associate. At the time B and H made the arrangement to receive and retain money in bank accounts, the monies that were to be paid in were not yet criminal property: by the time they were paid by the victims of an online fraud, they were criminal. This was alleged to be a money laundering arrangement, contrary to s 328(1). The Supreme Court, agreeing with the Court of Appeal, held that it did not matter that no relevant criminal property existed (no victims having yet been defrauded) when B and the defendant first entered into this arrangement, as long as it related to property which was criminal property at the time when the arrangement began to operate on it. However, the Supreme Court disagreed with the Court of Appeal's conclusion:[66] that the latter part of that test was not satisfied on the facts because the payments made into the accounts by the victims were not payments of criminal property. The Supreme Court held that the character of the 'money' (as it is referred to) changed on being paid into the defendant's accounts. It was lawful property in the hands of the victims at the moment when they paid it into the defendant's accounts. It became criminal property in the hands of B, not by reason of the arrangement made between B and the defendant but by reason of the fact that it was obtained through fraud perpetrated on the victims.

The Court of Appeal was wrong in holding that there was no criminal property at the time the arrangement began to operate.

Lord Toulson noted:

> There may be cases properly founded on the laundering of property in the form of a chose in action, but it is not a subject with which jurors . . . are likely to be readily familiar. If the prosecution is going to advance a case on that basis, it has not only to consider whether the case is capable of being presented in a readily comprehensible way (or whether there might be a different and simpler method of approach) but also to ensure that its tackle is properly in order. Abstract references to a chose in action, without the basis being clearly and properly identified and articulated, are a recipe for confusion.[67]

Section 328 has a wide reach, but is limited in that it requires a settled arrangement which D knows or suspects facilitates (not 'will or may facilitate') the acquisition of criminal properly by or on behalf of another person. *Dare v CPS*[68] illustrates the point. D had been approached by someone he knew to be a car trader but who, as D knew, had been involved with stolen cars. D had been offered a car and arranged to meet the trader to negotiate. The sale to D never took place, but the magistrates found that D had agreed to meet the trader for a second time in order to buy the car, albeit at a reduced price, and in doing so had entered into an arrangement within the meaning of s 328(1). The Divisional Court quashed the conviction. Under s 328, the 'arrangement' had to be one that 'facilitates' not one that

[64] [2010] EWCA Crim 1925, [2011] Crim LR 321 and commentary. [65] *GH* [2015] UKSC 24.
[66] [2013] EWCA Crim 2237. [67] At [42]. [68] [2012] EWHC 2074 (Admin).

'will facilitate'. In this case, the agreement was to meet with a view to arranging a price; it was not even a contract of sale. If the price had been negotiated and the car was handed over, that would have facilitated the future acquisition of the car by another. The court suggested that s 328(1) applies if in the snapshot of time at the moment of the arrangement one could say it 'facilitates' the acquisition of criminal property by or on behalf of another person, and therefore that other person had to be identified or identifiable. The court was clearly concerned that on the prosecution's construction every case of handling stolen goods with a view to resale would constitute an offence under s 328(1), but would be criminal at a much earlier point in time. The court gave the example of a man who bought a stolen watch with a view to selling it on at a profit: such a person was undoubtedly guilty of handling stolen goods if he knew or suspected that the watch was stolen. On those facts, the purchaser had entered into an arrangement which he knew or suspected would facilitate, in the future, the acquisition of criminal property by or on behalf of another. On the prosecution's submission, both individuals would have committed a s 328 offence at the moment that those individuals arranged to meet with a view to the watch being sold.

33.1.3.2 Mens rea

There is no requirement of dishonesty, etc. D must know or suspect that the property is criminal property (as it in fact must be). The concept of 'suspicion' was considered earlier.

33.1.4 The s 329 offence

Section 329 creates one offence that can be committed in a number of ways. Subsection (1) provides that for the purposes of this section:

> (1) A person commits an offence if he—
>
> (a) acquires criminal property;
>
> (b) uses criminal property;
>
> (c) has possession of criminal property.

33.1.4.1 Actus reus

The offence has a wide reach. The thief who retains possession of property that he has stolen commits an offence under s 329(1)(b) or (c). In this respect, it is easier to prove than handling since there is no issue as to whether the money laundering occurred otherwise than in the course of theft. It has, however, been argued that the thief never obtains an interest (in the sense of a legal interest) in the stolen goods and that there is no criminal property to be laundered under s 329. The counter, and, it is submitted, stronger argument is that the thief would acquire possession of the property, and that is treated, in the law of theft at least, as a proprietary interest. The ease with which these offences can be proved by comparison with the offences under the Theft Act 1968 has led to some controversial convictions.[69]

In *Whitwam*,[70] the Court of Appeal accepted the force of the counter-argument in the previous paragraph. D was charged with acquiring criminal property, contrary to s 329(1) of the 2002 Act, when he was found in possession of a child's motorcycle that had been stolen in the course of a burglary. The issue arose as to whether this was criminal property as required under s 340 and, particularly, whether it could be criminal property if D had no

[69] See eg *Hogan v DPP* [2007] 1 WLR 2944 and *Wilkinson v DPP* [2006] EWHC 3012 (Admin).
[70] [2008] EWCA Crim 239.

'interest' in the motorcycle. On appeal against conviction, D conceded that a thief obtained an 'interest' within the meaning of s 340(10) of the Act in the property he stole because he obtained a right to possession of that property. Given the fact that the motorcycle had been obtained as a result of criminal conduct and constituted his benefit from that conduct, it was criminal property.

As in ss 327 and 328 the predicate offence must precede the possession. In *Amir*,[71] the Court of Appeal emphasized that 'The definition does not embrace property which the accused intends to acquire by criminal conduct and the language of the statute is not capable of construing the definition in that way. Property is not criminal property because the wrongdoing intends that it should be so.'[72]

33.1.4.2 Mens rea

Dishonesty is not required under s 329. D must know or suspect that the property in question is criminal property. Suspicion is considered earlier.

33.1.4.3 A specific defence to s 329

Section 329(2)(c) provides a defence if D has acquired the property for adequate consideration. By s 329(3):

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

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

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

The defendant bears the evidential burden of raising the 'defence': *Hogan v DPP*.[73]

33.1.5 Defences to ss 327 to 329 offences

There are two defences common to ss 327 to 329. The first is where a person makes an authorized disclosure to the authorities under s 338 or was intending to do so and had a reasonable excuse for failing to do. It was accepted in *Bowman v Fels*[74] that 'the issue or pursuit of ordinary legal proceedings with a view to obtaining the court's adjudication upon the parties' rights and duties is not to be regarded as an arrangement or a prohibited act within ss 327–9'. It follows that lawyers conducting litigation are not required to make disclosure to the National Crime Agency (NCA) and obtain NCA consent merely because of a suspicion that the proceedings might in some way facilitate the acquisition, retention, use or control of criminal property by one or more of the parties.[75]

Secondly, by the amendments made in Serious Organised Crime and Police Act 2005[76] D has a defence if he knows, or believes on reasonable grounds, that the relevant 'criminal' conduct occurred (or is occurring) in a country outside the UK, and is not (or was not at that time) criminal in that country. In *O'Mahony*,[77] the judge declined to leave to the jury the

[71] [2010] EWCA Crim 2361. [72] At [20] per Elias LJ. [73] [2007] 1 WLR 2944.

[74] [2005] 1 WLR 3083.

[75] The defence applies if: '(a) [D] makes an authorized disclosure under s 338 and (if the disclosure is made before he does the act mentioned in subsection (1)) he has the appropriate consent; (b) he intended to make such a disclosure but had a reasonable excuse for not doing so; (c) the act he does is done in carrying out a function he has relating to the enforcement of any provision of this Act or of any other enactment relating to criminal conduct or benefit from criminal conduct.'

[76] Serious Organised Crime and Police Act 2005, s 102. [77] [2012] EWCA Crim 2180.

issue of whether D believed on reasonable grounds that the relevant criminal conduct, in this instance the selling of Premiership football tickets, occurred in Spain where it was not criminal conduct. In fact, such conduct was criminal in Spain. The Court of Appeal stated that this was an issue of law for the judge and that:

> It is one thing to know something, it is another to believe, but, at the risk of stating the obvious, to believe something on reasonable grounds requires the existence of reasonable grounds for the belief. Here there were no such grounds. The belief was based on an error of law. That is not a reasonable ground for that belief.[78]

33.2 Charging money laundering or handling?

The overlap between the offences in POCA and the offence of handling seems obvious. They are both regimes designed to deter the predicate criminal conduct, or at least to ensure that those who perform such conduct will have a more difficult time in disposing of their ill-gotten gains, and to deter those who engage in disposing of such gains. Questions have been raised about the extent to which the money laundering offences have rendered the handling offence obsolete.[79] There are certainly advantages for the prosecutor in charging money laundering. There is no need to prove that D was dishonest, nor that he 'knew or believed' that the property in question was stolen goods. Mere suspicion is sufficient mens rea for money laundering. Money laundering also has the advantage of capturing the conduct of the thief himself, who under s 22 and following *Bloxham*, cannot be convicted of handling unless he does so 'for the benefit of another'. Moreover, there are no difficulties in money laundering charges if the goods were allegedly stolen abroad.[80] Indeed, the Court of Appeal has read the offences as extraterritorial. In *Rogers*,[81] D's conviction for a money laundering offence under s 327(1)(c) of POCA was upheld for his conduct in Spain converting criminal property which was derived from frauds against victims in England and Wales, but which was already in Spain by the time he came to launder it.[82]

However, some take the view that it is wrong to view the offences as overlapping, arguing that the purposes of the legislative regimes are different, with money laundering being intended to deal with those who operate with a veneer of respectability, under cover of which they clean up (launder) the proceeds of the activities of the front line criminals.

In *R (on the application of Wilkinson) v DPP*,[83] the court recommended that POCA charges (in that case s 329) should be resorted to only in serious cases, in accordance with CPS guidance, but the court accepted that if POCA was charged inappropriately where the facts suggest a simple handling offence, the court could do no more than encourage the prosecution to charge handling stolen goods.

In *Whitwam*, discussed earlier, the court also addressed the appropriateness of charging a money laundering offence under Part 7 of the Act in respect of conduct which had

78 At [20].

79 cf the CPS guidance (available at www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences and at www.cps.gov.uk/legal-guidance/theft-act-offences), and Criminal Law Week (2007) 19 Feb and see P Rule, 'An Alternative Handler' (2006) 170 JP 884.

80 If handling is charged it is necessary to prove the foreign law, see *Ofori* (1994) 99 Cr App R 223.

81 [2014] 2 Cr App R 515, [32].

82 See LC 384, *Anti-Money Laundering: The SARs Regime*, Ch 11 for a critical assessment of *Rogers*.

83 [2006] EWHC 3012 (Admin).

the hallmarks of ordinary burglary, theft or handling. The Court of Appeal considered the CPS Code and prosecution guidance acknowledging that money laundering charges should normally be considered where a defendant had actively tried to conceal or transfer criminal proceeds. The Court of Appeal expressed concern at the use of POCA in such circumstances (although accepting that charging decisions were for the CPS rather than the courts).

The Supreme Court has cautioned that the courts 'should be willing to use their powers to discourage inappropriate use of the provisions of POCA to prosecute conduct which is sufficiently covered by substantive offences, as they have done in relation to handling stolen property'.[84]

As Lord Toulson noted:

A thief is not guilty of acquiring criminal property by his act of stealing it from its lawful owner, but that does not prevent him from being guilty thereafter of an offence under one or other, or both, of those sections by possessing, using, concealing, transferring it and so on. The ambit of those sections is wide. However, it would be bad practice for the prosecution to add additional counts of that kind unless there is a proper public purpose in doing so, for example, because there may be doubt whether the prosecution can prove that the defendant was the thief but it can prove that he concealed what he must have known or suspected was stolen property, or because the thief's conduct involved some added criminality not just as a matter of legal definition but sufficiently distinct from the offence that the public interest would merit it being charged separately. *Brink's-Mat Ltd v Noye* [1991] 1 Bank LR 68 provides a notorious example of the laundering of the proceeds of the theft of gold bars from a warehouse, but the conduct of thieves in laundering property stolen by them would not have to be on such a grand scale to merit them being prosecuted for it.[85]

Further reading

HHJ M Sutherland Williams, HHJ M Hopmeier and R Jones, *Millington and Sutherland Williams on The Proceeds of Crime*

W Blair and W Brent (eds), *Banks and Financial Crime: The International Law of Tainted Money*

[84] *GH* [2015] UKSC 24. [85] At [48].