

# Criminal Law News December 2008 ISSUE 4



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# The Criminal Justice Act 2003 as at 2008

By Sally Ramage

The CJA 2003 is divided into 14 parts, 339 sections and 38 schedules. It is a complex statute introducing wide ranging reforms to court procedure. Many of the changes have already been introduced by way of amendment to previous legislation. Not all of its provisions are in force as implementation is still being carried out and many implementation dates have not yet been fixed.

The CJA 2003 is geared to obtaining the truth, convicting the offender as early as is possible and improving defence and prosecution by allowing the use of reported evidence ('hearsay') where there is a good reason, allowing for trial by judge alone on serious and complex fraud trials and some other complex and lengthy trials or where the jury is at risk of intimidation; and by extending the availability of preparatory hearings to ensure that serious cases such as drug trafficking can be properly prepared. The CJA 2003 also allows the court to be informed of a defendant's previous convictions where appropriate. The CJA 2003 has removed the double jeopardy rule for serious cases if compelling new evidence comes to light; gives witnesses greater access to their original statements at trial; and gives the prosecution the right of appeal against rulings which terminate the prosecution case before the jury decides.

Section 1 CJA 2003 inserts a new paragraph (e) in section 1(8) Police and Criminal Evidence Act (PACE) 1984. Police Officers can stop and search individuals where an officer reasonably suspects that articles intended for use in causing criminal damage are being carried. The powers of stop and search are extended to include offences under section 1 of the Criminal Damage Act 1971

Section 2 CJA 2003 inserts a new subsection (2A) in section 16 PACE. Civilians are now allowed to accompany Police Officers when executing a search warrant. An "authorised person" has the same powers as an Officer in respect of the execution of the warrant and the seizure of anything to which the warrant relates, provided he is in the company, and under the supervision, of a constable.

Section 3 CJA 2003 adds to the list of specific arrestable offences in Schedule 1A of PACE. Possession of Cannabis now attracts a power of arrest.

Section 4 CJA 2003 amends s 30 PACE. A Constable can release a defendant on bail from the scene of arrest with a condition to attend a police station. Notice in writing must be given, stating the offence and the ground on which he was arrested and details of the time and police station. If the notice does not give the latter details, a subsequent notice must be served which does give them. A suspect may be re-arrested without warrant if new evidence justifies this. Failure to attend as required gives rise to liability to arrest without warrant.

Section 5 CJA 2003 amends sections 38 PACE. The minimum age for drug testing has been reduced from age 18 to age 14, but where a person is under 17 PACE, an appropriate adult must be present when the request is made, the warning under subsection (5) PACE is given, and a sample is taken.

Section 7 CJA 2003 amended s42 (1) of PACE. An Officer of at least the rank of Superintendent can authorise detention for a period of up to 36 hours if the offence for which he is arrested is an arrestable offence and the remaining conditions of s42(1) PACE are met. Previously the power applied to “serious arrestable offences.”

Section 8 CJA 2003 amends s 54 PACE. The requirement to record a detainees' property is at the custody officer's discretion.

Section 9 CJA 2003 amends s61 PACE. The police have a wide power to take fingerprints from any suspect arrested for a recordable offence in police detention who withholds consent. This is conditional on him not having fingerprints taken already in the course of the investigation of the offence. The new power is available whether or not the fingerprint is required for the investigation of an offence in which the person is suspect of being involved. The authority of an Inspector is not required. This will prevent suspects avoiding detection by giving false details if their prints are on the National Fingerprint database

Section 10 CJA 2003 amends s63 PACE. The police have a wide power to take non-intimate samples from any suspect arrested for a recordable offence in police detention who withholds consent. The amended power is available whether or not the non-intimate sample is required for the investigation of an offence in which the person is suspect of being involved. The authority of an Inspector is not required. The existing requirement to give a person from whom a non-intimate sample is taken without consent reasons for doing so and recording the reasons as soon as practicable applies

Section 14 CJA 2003 amended Part I of Schedule 1 by substituting a new

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paragraph 2A. If a defendant aged 18 or over is on bail the date the current offence is allegedly committed, he will be refused bail unless the court is satisfied that there is no significant risk of his committing an offence on bail. Section 14 also amended Part I of Schedule 1 by substituting a new paragraph 9A. If the defendant is under 18 and on bail for another alleged offence on the date the current offence was committed, the court can give “particular weight” to this fact when deciding whether there are substantial grounds for believing he would commit further offences if admitted to bail.

Section 15 CJA 2003 amended paragraph 6 of Part I of Schedule 1 by substituting a new paragraph 6. If a defendant aged 18 or over without reasonable excuse fails to answer bail in current proceedings, he will be refused bail unless the court is satisfied that there is no significant risk that he will not abscond again.

Section 15 CJA 2003 amended Part I of Schedule 1 by substituting a new paragraph 9AB. If the defendant is under 18 and without reasonable excuse fails to surrender to custody (at the appointed place and time or as soon as reasonably practicable thereafter), the court can give “particular weight” to this fact when deciding whether there are substantial grounds for believing he would commit further offences if admitted to bail. Defendants granted conditional bail in the Magistrates Court can appeal any bail condition set out in s16 (3) (including surety, residence, curfew and tagging requirements) to the Crown Court.

Section 17 JA 2003 amended section 22 of the Criminal Justice Act 1967. The jurisdiction of the High Court to entertain bail application is abolished in most circumstances.

Section 18 CJA 2003 amended section 1 of the Bail (Amendment) Act 1993. The prosecution can appeal to the Crown Court where bail is granted for any offence punishable by imprisonment (removing the requirement that it be punishable by a term of five years or more. A defendant who is over 18 years old and charged with an imprisonable offence will not be granted bail (unless the court is satisfied that there is no significant risk of his committing an offence while on bail), where the three conditions below exist:

- i) there is drug test evidence that he has a specified Class A drug in his body;
- ii) either the offence is a drugs offence associated with a specified

- Class A drug or the court is satisfied that there are substantial grounds for believing that the misuse of a specified Class A drug caused or contributed to the offence or provided its motivation; and
- iii) the defendant does not agree to undergo an assessment as to his dependency upon or propensity to misuse specified Class A drugs or, has undergone such an assessment but does not agree to participate in any relevant follow up.

The assessment is carried out by a suitably qualified person, who has received training in the assessment of drug problems. If an assessment is proposed and agreed to by the defendant and he is bailed then he must be required to undergo the assessment and follow up as a condition of bail.

## Lawyers' own language

By Sally Ramage

Sometimes lawyers get caught up in their own language. In the courtroom or at other times with clients, lawyers may miss the opportunity to fully connect with those they serve by not taking care to use non-jargon. Every discipline has words particular to it, be it medicine, accounting, sociology, and law. Lawyers communicate with each other using this language of the profession. They in turn communicate with jurists, and jurists with them and with each other, using the same terms.

The layperson, the client, without whose presence there are no cases, without whom the practice of the profession is non-existent. The layman has his own language and to pursue a case, to prosecute it, defend it, *and win* it, the lawyer must understand this language and be able to use it to advance his case.

## Use of analogies

Lawyers who use analogies and key words can elicit strong mental and strong emotional, images or memories in the hearer, to stimulate a flood of associations. Many words that lawyers use paint effective word pictures. For example, in attacking the credibility of an opposition witness, a lawyer in court might use such devastatingly critical terms as *cowardly* for prudent; *disdainful* or *haughty* for proud; *indifferent* or *lazy* for easygoing; *brash* or *vicious* for assertive; *coerce*, *intimidate*, or *con* for persuade; *plot* for plan; *irresponsible* for uninhibited; *hasty* for swift; and *dream up* for formulate. Lawyers must remember to tailor analogies and references to the audience. What may be appropriate in one age group, for instance, may not be appropriate for someone younger. Mature lawyers need to know vocabularies used by, for example, Generation X or Generation Y clients. Young lawyers could profit by knowing, for example, World War II analogies when addressing mature jurors. Many terms are universal and also cover all generations, known by all. Terms from current or recent news, as well as words or phrases from classic films, among other expressions, fall into this category. One can be imaginative. Analogies are weapons. One can paint pictures in listeners' minds and arouse listeners' feelings to one's cause. Analogies that appeal to their feelings are your shortcuts to enlisting those feelings on your behalf. The wistful "September Song" could arouse poignant emotions in older jurors in, for example, a nursing home case. In terms of computer language, being eclectic is one's information arsenal and so is learning from the past. Lawyers do not always bear in mind the fact that they are speaking to an audience not versed in the law and since everybody has a life apart from their work, they ought to tap into that life and learn from it and use it in their professional life.

# The Credit Crunch and Weaknesses in Corporate Governance

By Sally Ramage

Despite the massive financial failures of businesses in the United Kingdom at the present time, the Financial Reporting Council still maintains that the UK's current voluntary corporate governance code is quite adequate enough.

*'The Code states that the role of a company's board is 'to provide entrepreneurial leadership of the company within a framework of prudent and effective controls which enables risk to be assessed and managed.'* We expect that directors of banks and other financial institutions are already reviewing their governance and risk management practices. We, therefore, currently believe that the recent difficulties in the financial sector do not require a generalised tightening of governance standards across the UK corporate sector. The focus should be on whether the existing standards have been observed in practice', said Paul Boyle, Chief Executive of the Financial Reporting Council, the UK's independent regulator for corporate reporting and governance. As to the performance of auditors, he said it was important not to judge auditors against objectives which it is not their role to pursue. He continued,

*'Suggestions that auditors should have intervened to encourage their financial services clients to constrain the rate of innovation and expansion of their businesses seem to me to be based on a fundamental misunderstanding of the relative roles of auditing on the one hand and on the other hand corporate governance and financial services supervision. That said, the work of auditors is now coming under a much greater degree of scrutiny than has been the case in the past and in our role as independent regulators of the profession we are requiring auditors to demonstrate to a much greater extent that the judgements made in the work are defensible'.*

# Caselaw of Interest

By Sally Ramage

## ***R v Norman, CA, 31 July 2008.***

Unfitness to plead cases need very careful case management to ensure that full information is provided to the court without delay. When full information is available, the court will need to consider whether to postpone the issue of trial of fitness to plead under s.4(2) as in *R v M (Edward)* [2001] EWCA Crim 2024 where the court held that the provisions of Article 6 of the HR Convention did not apply to the trial of the issue as to whether he committed the act with which he was charged. It is the court's duty under s.4A(2) of the Criminal Procedure (Insanity) Act 1964, to consider who is the best person to be appointed by the court on behalf of the defendant. The duty under s. 4A (2) is for the court to consider afresh the person who is to be appointed. The special position of the person so appointed is underlined by the fact that the person is remunerated not through the Criminal Defence Service, but out of central funds.

## ***R v Flynn and St John, [2008] 2 Cr. App. R. 266***

The issue in this case the admissibility of evidence of voice recognition by police officers involved in the investigation. Having heard evidence from an independent forensic consultant, the CA set out its conclusions from the expert evidence. Voice recognition is less reliable than visual identification, relies on the familiarity of the witness with the person whose voice he purports to identify and is less reliable than evidence from experts using acoustic, spectrographic and sophisticated auditory techniques. The ability of a lay listener to identify a voice is subject to a number of variables, including the quality of the recording, the gap in time between hearing the known voice and the disputed voice, for example.

However, the key to admissibility of identification is the degree of familiarity with the person's voice. Evidence from police officers should be treated with caution and where the prosecution seek to rely on such evidence an expert report should be obtained giving an opinion on the validity of the evidence.

## ***R v Shabbir, CA, 31 July 2008***

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In this case, the defendant was a chemist and obtained a money transfer by deception. All but £464 of the monies received was owed to him. Applying the Proceeds of Crime Act 2002, the entirety of the money transfers (in this case amounting to over £179,000) was held to form the benefit. Applying the assumptions brought the benefit figure over £212,000. The Order was quashed because it was oppressive.

## **Value Added Tax fraud has a sentence of ten years imprisonment**

**By Sally Ramage**

Jail sentences totalling eight years were handed down at Birmingham Crown Court in December 2005, to two men convicted of stealing £58 million in a “carousel” VAT fraud, following an HM Revenue & Customs investigation lasting over three years. Used car dealer Daniel Charles Jones, 47, of Badgers Rake House, Chester High Road, Ledsham, Ellesmere Port, Cheshire, was sentenced to six years on two counts of cheating the public revenue, to run concurrently. Haulage company boss Jeffrey Woolley, 55, of 18 Arundel Way, Stoke-on-Trent, Staffs, was sentenced to two years imprisonment on one count of cheating the public revenue.

### **Missing-trader fraud**

Missing Trader Intra-Community (MTIC or “carousel”) fraud is a deliberate attack on the VAT system, perpetrated by organised criminals operating across and beyond the EU. This theft of revenue has a direct affect on the amount of money that is available to spend on public services like schools and hospitals.

## **The operation of the fraud**

The court heard how the fraud, which ran for almost a year between September 2000 and July 2001, involved buying mobile phones from fictitious UK companies and then selling them on to other mobile phone brokers with the proceeds going to a company called Globalring Ireland Ltd in Cork. Woolley bought phones from two missing/hijacked traders which he then sold on to other UK traders with the VAT being sent to Globalring in Ireland. Jones ran a number of companies, including Globalring Ireland which received VAT from a number of UK companies involved in buying and selling mobile phones. The mobile phones never found their way onto the market, they were simply there to perpetrate the fraud by using false receipts to charge VAT on the transactions, tax which was never paid to the government.

## **A note about Europol**

**By Sally Ramage**

Europol, in fulfilment of Article 28 of the Europol Convention has the purpose of communicating the organisation's activity planning to its Member States in a transparent and structured manner. The Work Programme is prepared in the framework of key priorities and guidelines of the EU level and represents year one of the Europol Five Year Business Plan which is the organisation's long term strategic business plan.

The Work Programme is composed of three main business areas- Supporting the EU Member States' Fight against Organised Crime and Terrorism by Providing Intelligence and Analysis; Information Management and Technology and Corporate Governance. The Work Programme does *not* cover all the activities of Europol but highlights the main objectives to be achieved by the organisation. Europol is the EU intelligence organisation that provides support to the Member States Law Enforcement Authorities (LEA). The Europol Convention stipulates that it is Europol's objective to improve the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime.

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## **The Europol Vision**

*'Europol will be a world-class centre of excellence to support the European Union Member States' fight against organised crime and terrorism.'* Related strategic goals have also been decided in order to comply with the Mission Statement and are part of Europol's strategy. Europol is the European Union's law enforcement centre should establish cooperation. The EU Counter Terrorism Strategy and the EU Action Plan for Combating Radicalisation and Recruitment to Terrorism are policies that were confirmed by the European Council as the guiding framework to tackle international terrorism. The EU plan on best practices, standards and procedures for combating and preventing trafficking in human beings includes Europol's participation in various activities together with the Commission, Police Chiefs Task Force concerning preventing and combating of trafficking in human beings.

## **The Europol Convention**

Assuming that the protocols amending the Europol Convention are expected to be ratified by all Member States.

Certain Member States' competent authorities can contact Europol directly.

## **Querying EUROPOL'S Information System**

Certain Member States' competent authorities can query the Europol Information System. Experts of 3rd states and bodies are associated with the work of the Analytical Work Files group.

Retrieval of data stored in Europol's Analytical Work Files is allowed to participants of the analysis group. Europol can participate in Joint Investigation Teams' activities in a support function.

Europol can ask Member States MS to initiate investigations in specific cases.

Europol can deal with money laundering crime independently of the crime committed. The core product assigned to Europol is the 'Organised Crime Threat Assessment' and together with the EU Presidency, Europol has developed specific Council conclusions on intelligence-led policing and the development of the

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Organised Crime Threat Assessment. Europol plans to produce comprehensive and future oriented EU-wide Crime Threat Assessments.

### **Operational related services**

Europol's various operational related services can identify new trends and threats, prioritise and initiate effective actions against specific criminal targets or specific criminal phenomenon's and at national, regional or EU-level. The improved sharing of information and intelligence will enhance the needs and possibilities for initiating and coordinating bi-lateral cross border co-operation as well as initiation of comprehensive EURO-wide investigations.

### **UK participation**

As to the number of occasions when UK police forces have participated in Europol operations in the last five years to 2009, this is not known, but the United Kingdom is a significant participant in all intelligence aspects of Europol. Our liaison bureau at Europol, which is one of the largest, is responsible for handling the exchange of information between Europol and the United Kingdom Europol National Unit, which is based at the Serious and Organised Crime Agency. The UK liaison bureau also manages bilateral exchanges and cooperation between other member state liaison bureaux. The United Kingdom has a record of providing high quality data to the Europol Information System and is a major contributor to Europol's programme of serious crime analysis work files. ENDS+