Follow the Money: Confiscation of Unexplained Wealth Laws and Sport's Fixing Crisis

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Introduction

Over the past 50 years there has been a gradual introduction into various jurisdictions globally of laws on "unexplained wealth", which have often been controversial as they have provided for civil forfeiture of assets (without the traditional safeguards of a criminal trial) as a means of curbing criminal activity. Separately, and as a result of the increase in match-fixing (or its variant spot-fixing) in different sports, many countries have passed new laws making betting-related cheating at sport (i.e. fixing) a criminal offence. This article looks at the potential for combating fixing-related corruption in sport through: (i) the introduction of new rules into sporting bodies' Codes of Conduct for athletes in relation to unexplained wealth; and (ii) the use of civil forfeiture orders.

The growth in betting-related fixing in sport; calls for new measures to combat corruption and the growing role of law enforcement agencies

Gambling on sport has grown exponentially in recent years and with this growth has come an increase in betting-related corruption, now recognised as a serious threat to professional sport's continuing popularity and commerciality.[1] Athletes have been tempted to take financial reward from gambling syndicates in return for "fixing" either the result of a match (match-fixing), or an incident within a match (so-called spot fixing, for example the timing of the first corner in a football match or how many runs will be conceded in one over of a cricket match). Jacques Rogge, President of the International Olympic Committee, and one of the most powerful men in sport, issued a stark warning in 2011 that fixing is as much a danger to the health of competitive sport as illegal drug use, describing it as "potentially crippling" and a "cancer" with links to "mafia" organisations.[2] Michel Platini, President of UEFA, has called match-fixing "the biggest threat facing the future of sport in Europe".[3]

The fixing crisis facing a range of different sports, rather than abating continues to grow. A police investigation into match-fixing in top flight Italian football led to arrests of players and managers weeks before the start of the 2012 Summer European Football Championship entailing changes to Italy's national squad and a call from Italian Premier, Mario Monti, to suspend all football in Italy for two years.[4] More recently still, players have received bans for fixing in cricket's Indian Premier League 2012 Season.[5]

Evidence is emerging that much of the rise in match-fixing is fuelled by criminal gangs against whom individual sports governing bodies are relatively powerless. Sports governing bodies are therefore turning to law enforcement agencies to help in the fight against fixing. In May 2012, at the FIFA Congress in Budapest, INTERPOL Secretary-General, Ronald K. Noble, referred to the match-fixing crisis being the "result of transnational organised crime's global reach".[6]FIFA has entered into partnership with INTERPOL which in 2011 set up a dedicated Integrity in Sport unit based at the INTERPOL General Secretariat headquarters in Lyon, France[7] as part of a ten-year planned partnership between FIFA and INTERPOL in which FIFA has pledged to spend £17.5 million to clamp down on match-fixing and illegal betting.

Cricket has suffered arguably more than any other sport in adverse headlines concerning cheating through fixing. In 2011, three Pakistani cricketers were sent to prison in the United Kingdom for having fixed elements of an international Test Match in August 2010 between Pakistan and England. This was not an isolated incident, as in the previous two decades several international cricketers had received bans for involvement in betting-related corruption, including life bans for the captains of two of the strongest teams in world cricket, South Africa (Hanse Cronje) and India (Mohammed Azarudhin).

The global emergence of laws providing for civil forfeiture or "unexplained wealth" orders to combat crime

In 2012, respected figures within the world of sport have called for the use of unexplained wealth orders (UWOs) to combat fixing-related corruption in sport. UWOs are

[1] See K. Carpenter, "Match-fixing—The Biggest Threat to Sport in the 21st Century" [2012] I.S.L.R. 2 and also T. Serby "xxx" [2012] I.S.L.J. 1 for a summary of recent fixing incidents and the legal issues.
[2] See *http://www.telegraph.co.uk* January 27, 2011 [Accessed August 26, 2012].
[3] See *http://www.dailymail.co.uk* September 28, 2011 [Accessed August 26, 2012].
[4] As reported in the *Irish Independent* (May 30, 2012), see *http://www.independent.ie* [Accessed June 2, 2012].
[5] As reported by the BBC (May 15, 2012), see *http://www.bbc.co.uk/sport* [Accessed May 15, 2012].
[6] See *http://www.interpol.int/News-and-media/Speeches* [Accessed October 9, 2012].
[7] See *http://www.interpol.int/Crime-areas/Corruption/Integrity-in-Sport* [Accessed May 17, 2012].

court orders forfeiting wealth which has been adjudged to represent the proceeds of criminal activity. Prior to the controversial emergence of civil forfeiture orders, forfeiture of assets after conviction on a *criminal* charge after a *criminal* trial has been an uncontroversial feature of legal systems throughout the world. Also relatively uncontroversial have been the forfeiture laws targeted specifically at public officials. Several jurisdictions have made it an offence for public officials to acquire unexplained wealth (e.g. Hong Kong Special Administrative Region of China, Argentina, Botswana, Ecuador, El Salvador, India, Paraguay, Peru, Venezuela and Zambia). Article 20 of the United Nations Convention against Corruption (UNCAC) which criminalises illicit enrichment of public officials defines the offence as "a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income".

In the last 50 years the countries which have introduced civil forfeiture UWO laws, include the United States with the Racketeer Influenced and Corrupt Organisations Act 1970 (RICO), South Africa (Prevention of Organised Crime Act 1998), the United Kingdom (Proceeds of Crime Act 2002, hereafter POCA 2002), Ireland (Prevention of Crime Act 1996) and Australia (Criminal Assets Recovery Act 1990 of New South Wales and subsequent legislation in other states as well as the federal law referred to above, Proceeds of Crime Act 2002). This gradual global spread of civil forfeiture laws based on UWOs has been a reaction to the rise of organised criminal gangs that have been able to hide their criminal acts and the proceeds of crime from the eyes of the prosecuting authorities, thereby making criminal prosecution of them more difficult.

UWOs through *civil* forfeiture remain controversial, in essence because they involve a sanction for a criminal act without any of the safeguards provided by a criminal trial, namely the presumption of innocence. Godinho has observed that civil forfeiture is largely confined to common law systems and is generally unknown to civil law jurisdictions.[8] As Young points out,[9] this lack of universality explains the ambivalence of international treaties on organised crime that fall short of saying how states should arrange for forfeiture whether through criminal or civil procedures. Article 77(2)(b) of the Rome Statute of the International Criminal Court only provides for forfeiture after a person has been convicted of a crime (referred to in art.5 of the Statute).

The term "unexplained wealth" derives from laws on civil forfeiture in Asia and Australia. Rather than the nomenclature "unexplained wealth" the legislation in the United Kingdom, Ireland and South Africa refers instead to the "proceeds of crime".

How effective have civil forfeiture UWOs been? The picture is varied. A report dated 2011 and funded by the US Department of Justice by Booz, Allen and Hamilton[10] concludes that from 1998–2012 the Irish Criminal Asset Bureau recovered nearly US$160 million in forfeiture orders and taxation orders on the proceeds of crime.[11] Conversely, in England, during the first three years of its existence the Assets Recovery Agency set up under POCA 2002 cost over £60 million and managed to retrieve £6 million, according to a damning report published in February 2007 by the National Audit Office. In Australia, recovery under UWOs has been hampered by the fact that gambling and inheritance gains do not have to be declared for tax, making it difficult for the authorities to rebut the claims made by defendants that their wealth has accrued though these means.[12]

Unexplained wealth orders: a solution to the fixing crisis in professional sports?

The International Cricket Council (ICC), the international governing body of cricket, is acknowledged as having taken a lead in fighting corruption and it commissioned Bertrand de Speville, a former Solicitor-General of Hong Kong, to report into how best cricket could fight back against corrupt betting-related fixing in the sport. The final de Speville Report,[13] published in January 2012, included amongst other recommendations the following draft provision for inclusion into the relevant codes of conduct which cricketers and officials participating in ICC endorsed events are governed by:

> "(1) Any person to whom any of the ICC codes of conduct applies … who—
>
> (a) has a standard of living incommensurate with his present or past official emoluments; or
>
> (b) is in control of wealth disproportionate to his present or past official emoluments, is in breach of this code unless he gives to [a tribunal established by the ICC Code of Conduct Commission for the purpose] a satisfactory explanation of how he is able to have such a standard of living or how such wealth came under his control."

Another respected body within cricket, the Marylebone Cricket Club's World Cricket Committee (a committee set up by the MCC, guardian of cricket's laws), has also recommended the use of "unexplained wealth laws" to

[8] J. Godinho, "Civil Confiscation of Proceeds of Crime: A View from Macau", in S. Young (ed.), *Civil Forfeiture of Criminal Property* (Edward Elgar, 2009), Ch.11.
[9] Young, *Civil Forfeiture of Criminal Property*, p.2.
[10] In October 2011 a report into UWOs by Booz, Allen and Hamilton funded by the US Department of Justice was published and is available at *https://www.ncjrs.gov/pdffiles1/nij/grants/237163.pdf* [Accessed May 17, 2012]. The report reviews the recent global growth of Unexplained Wealth Order laws and recent developments in confiscation and forfeiture jurisprudence. The report focuses in particular on the effectiveness of UWOs in Ireland and Australia.
[11] Booz, Allen and Hamilton, *Report into UWOs*, pp.2 and 134.
[12] Booz, Allen and Hamilton, *Report into UWOs*, p.2.
[13] See *http://static.icc-cricket.com/ugc/documents/DOC_704* [Accessed May 17, 2012], p.8 and Annex 5.

combat corruption in the sport. This committee, comprising a group of highly respected former players chaired by former England captain, Mike Brearley, and whose anti-corruption working party was led by former Australian captain, Steve Waugh, reported to the ICC's Anti-corruption and security unit in February 2012 with its recommendations for curbing corruption in the sport. Steve Waugh, who was instrumental in producing the report, said: "cricket's administrators need to be bold in their actions and cannot be complacent in the fight against corruption". One of the recommendations made in the committee's report was that "relevant authorities should explore any unexplained wealth of suspected players and each governing body should hold a gift register for its players".[14]

The ICC's official response to de Speville's recommendation to introduce "unexplained wealth" sanctions into the ICC's codes was lukewarm

> "to attempt to try and implement such a system to international players and support personnel from different jurisdictions, whose assets may have been transferred into further jurisdictions, who are at different stages in their careers, who have many different sources of income, and which is likely to require the cooperation of governments and/or financial institutions, is likely to be very difficult indeed, not to mention hugely burdensome on the players and extremely difficult to administer. Nevertheless, the ICC understands and accepts the rationale behind the recommendation and will consider it further with its wider group of stakeholders."[15]

Both the Code of Conduct for Players and Player support personnel (ICC Code of Conduct) and the separate Anti-Corruption Code for Players and Player Support Personnel (the Anti-Corruption Code)[16] have been updated in the light of the match-fixing crisis that threatens the integrity of the sport. These codes govern all cricketers playing in any ICC-endorsed event, which comprises all international cricket matches. By way of introduction to the ICC Anti-Corruption Code, art.1.1.3 states "advancing technology and increasing popularity have led to a substantial increase in the amount, and the sophistication, of betting on cricket matches". The article refers to the development of new betting products such as spread betting and internet betting, which allow betting from any time or place including once a game has commenced that

> "have all increased the potential for the development of corrupt betting practices. Even where that risk is more theoretical than practical, its consequence is to create a perception that the integrity of the sport is under threat … it is of the nature of this type of misconduct that it is carried out under cover and in secret, thereby creating significant challenges for the ICC in the enforcement of rules of conduct."

Article 1.3 imposes on players a requirement to confirm that they consent to the "collection, processing, disclosure and use of [personal] information relating to him/herself and his/her activities", and obliges players to submit to the exclusive jurisdiction of any Anti-Corruption Tribunal convened under the Anti-Corruption Code, and to the exclusive jurisdiction of any Court of Arbitration for Sport panel on any appeal. The substantive offences in relation to fixing in the Anti-Corruption Code are set out at art.2 and cover "fixing or contriving in any way" any aspect of an ICC Event (art.2.1.1) and "ensuring the occurrence of a particular incident" for reward, which to the player's knowledge is the subject of a bet. Other offences include not reporting to the ICC's Anti Corruption and Security Unit any knowledge of an offence.

Article 3.1 states that the burden of proof for proving conduct offences is on a sliding scale "up to proof beyond reasonable doubt (for the most serious offences)". However, the proposed recommendation by de Speville on unexplained wealth would, in the case of a UWO, reverse this burden of proof, i.e. the offence is presumed where a player is in possession of wealth incommensurate with their official earnings, and the onus is on the player to prove the legality of such wealth. What is envisaged by the de Speville proposal (and more indirectly by the MCC proposal) is the application of sanctions (banning an individual from partaking in any matches, thereby affecting their right to earn a living as a professional sportsman) on a "reversed burden of proof".

Article 3.2 of the Code states that "the Anti-Corruption Tribunal shall not be bound by judicial rules governing the admissibility of evidence". How susceptible to legal challenge would a reversed burden of proof be? Under art.6(2) of the European Convention on Human Rights there is the right to a "presumption of innocence" when an individual is accused of a criminal offence. Where the burden of proof is reversed, there is a presumption of criminality simply on the basis that there is unexplained wealth. As Wilsher commented in 2006,[17] in the context of the offence of illicit enrichment for public officials, the rights of the accused are infringed since no criminal act needs to be proved and the ingredients, namely being a public official and having excessive wealth, do not in themselves constitute criminal activity.

However, the presumption of innocence is not absolute, and interference with it, through a reversed evidential burden of proof, may be legitimate. The European Court

[14] See *Report of the MCC World Cricket Committee to ICC's ACSU*, submitted February 20, 2012, *http://www.lords.org/data/files/mcc-world-cricket-committee-corruption-report-10770.pdf* [Accessed May 27, 2012], p.7.
[15] As reported in *The Hindu*, see *http://www.thehindu.com/sport/cricket/article2851492.ece* [Accessed May 17, 2012].
[16] The ICC Anti-Corruption Code for Players and Player Support Personnel is available at *http://www.icc-cricket.com/anti_corruption/useful_documents.php* [Accessed December 14, 2012].
[17] D. Wilsher, "Inexplicable Wealth and Illicit Enrichment of Public Officials: A Model Draft that Respects Human Rights in Corruption Cases" (2006) 45 *Crime, Law and Social Change* 27.

of Human Rights (ECtHR) in *Salabiaku v France*[18] considered the question of whether a presumption of liability is compatible with the presumption of innocence in the context of punishment for a crime. In that case the defendant was convicted of a criminal offence upon being found with cannabis in his suitcase, and he argued unsuccessfully all the way up to the ECtHR that the authorities should bear the burden of proving criminal intent (as opposed to, say, negligence). The ECtHR held:

> "Presumptions of fact or law operate in every legal system. Clearly, the convention does not prohibit such presumptions in principle. It does, however, require the contracting states to remain within certain limits in this respect as regards criminal law … [art.6(2)] requires states to confine [presumptions] within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence."

As de Speville[19] himself put it in 1997 commenting on a Privy Council decision on an appeal from Hong Kong in a case concerning illicit enrichment of a public official and the defence of the presumption of innocence enshrined in the Hong Kong Bill of Rights:

> "In summary, the right to a fair trial and the right to be presumed innocent until proved guilty according to law require that the onus of proof must fall upon the prosecution, but may be transferred to the accused when he is seeking to establish a defence."[20]

The alternative to the in personam measure of banning an athlete pursuant to an UWO sanction in the Code of Conduct of an individual sport is the *in rem* sanction of forfeiting unexplained wealth/the proceeds of crime through a civil forfeiture action. The lawfulness of the civil forfeiture regime has recently been tested in the highest civil court in the United Kingdom, the Supreme Court.

The UK law on unexplained wealth: Proceeds of Crime Act 2002; Gale v Serious Organised Crime Agency

The recent case involving the Serious Organised Crime Agency (SOCA), *Gale v Serious Organised Crime Agency*,[21] was the first time that the Supreme Court considered unexplained wealth and the tensions between fundamental human rights to a fair trial and the burden of proof contained within civil forfeiture laws. *Gale* was decided on the basis of POCA 2002, which introduced civil forfeiture in its present form into English law.

Potentially SOCA (through POCA 2002) could play an important role in fighting the fixing epidemic in sport. SOCA is the government agency responsible for fraud detection and prevention in the United Kingdom; it is a Home Office Non-Departmental Public Body created by the Serious Organised Crime and Police Act 2005 and is the UK National Central Bureau for INTERPOL. SOCA's functions in relation to civil recovery/forfeiture functions are set out in the Proceeds of Crime Act 2002 and the Serious Crime Act 2007. SOCA's Annual Plan 2011/12 whose foreword is by Home Secretary, Theresa May, describes how during 2011/12 SOCA employed in the region of 3,700 full-time equivalent staff operating from around 40 sites in the United Kingdom and overseas locations. The Home Secretary's priorities include "fraud against individuals and the private sector …". The UK Gambling Commission reports that there has already been a confiscation order (for £30,000) achieved under POCA 2002 for corrupt sports betting practices.[22]

POCA 2002 is based on, and very much typical of, other jurisdictions' existing laws on civil forfeiture. As Leong comments

> "during the establishment of the civil recovery regime in the UK, experience was drawn from RICO in the US, the Criminal Assets Recovery Act 1990 in NSW [the Australian state of New South Wales], the Proceeds Of Crime Act 1996 and Criminal Assets Bureau Act 1996 in the Republic of Ireland".[23]

Although the concept of forfeiture under English law dates back to mediaeval times, the Forfeiture Act 1870 abolished automatic forfeiture to the Crown of a convicted felon's property. In the United Kingdom the first modern Act of Parliament, prior to POCA 2002, allowing for the state to divest criminals of the proceeds of their crime was the Drug Trafficking Offences Act 1986. This law was introduced after the police successfully tracked down a gang of drug traffickers (Operation Julie) but there was no basis on which to confiscate the proceeds of their crimes. In fact, the House of Lords had ruled that £750,000 had to be returned to the convicted drug dealers. The Criminal Justice Act 1988 then extended the powers of confiscation to crimes other than drug dealing and in 2002, with the introduction of POCA 2002, a full civil recovery procedure of criminally acquired proceeds of crime was introduced.

POCA 2002, as amended by the Serious Organised Crime and Police Act 2005, allows for recovery of the profits of crime through either the civil or criminal courts as it provides for three distinct means of attacking the assets of someone who has been held to be in possession of the proceeds of crime. First, confiscation orders may be ordered in Crown Court (criminal) proceedings at the

[18] *Salabiaku v France* [1988] 13 E.H.R.R. 379.
[19] B. de Speville, "*Reversing the Onus of Proof: Is it Compatible with Respect for Human Rights Norms?* Paper presented at eighth International Anti-Corruption Conference, Lima (September 7–11, 1997), *http://8iacc.org/papers/despeville.html* [Accessed June 27, 2012].
[20] *Attorney General v Hui Kin-hong* [1995] 1 HKCLR; *Attorney General v Hui Kin Hong* CA No.52 of 1995 at 7 and 8.
[21] *Serious Organised Crime Agency v Gale v Gale* [2011] UKSC 49; [2012] H.R.L.R. 5.
[22] See *http://gamblingcommission.go.uk/PDF/AnnualReport* [Accessed November 10, 2011].
[23] A. Leong, "Assets Recovery Under the Proceeds of Crime Act 2002: The UK Experience", in Young, *Civil Forfeiture of Criminal Property*, Ch.7.

request of the prosecutor upon conviction, although the amount confiscated does not have to represent the actual proceeds of crime; and secondly, under POCA 2002 Pt 6, unlawfully obtained wealth may be taxed. When the three Pakistani cricketers were convicted in 2011 of the fixing charge in relation to the Lord's Test Match in 2010, as well as prison sentences they also received confiscation orders.

The third possibility, the making of a civil order forfeiting unexplained wealth acquired through unlawful activity is provided for under Pt 5 of POCA 2002. Under Pt 5 the actual proceeds of crime can be tracked down, whether in the hands of the criminal or a party who has received them, by SOCA (whose name changes to the National Crime Agency in 2013).

Civil forfeiture proceedings under POCA 2002 Pt 5 do not depend on there being a criminal conviction, and the proceedings are taken in the civil, not criminal, courts. Section 241 of POCA 2002 allows the civil court to order recovery of the proceeds of crime further to a request by SOCA where it is satisfied that the alleged unlawful conduct occurred on the civil standard, i.e. the balance of probabilities. Unlawful conduct is defined at s.241 as "unlawful under the criminal law" and includes conduct abroad which is unlawful under the criminal law of the relevant country. In the United Kingdom the Gambling Act 2005 s.42 created an offence of cheating at gambling, which the three Pakistani cricketers imprisoned in 2011 for fixing elements of an international match were charged with.

The civil forfeiture provisions under POCA 2002 Pt 5 were designed to target criminals who, owing to the nature of their crimes, were difficult to convict on the criminal burden of proof. Short of the type of successful journalistic "sting" operation that led to the criminal conviction in 2011 of the three Pakistani cricketers referred to above, it is extraordinarily difficult to prove "beyond reasonable doubt" that an athlete has deliberately underperformed further to an agreement with a bookmaker.

The Explanatory Notes to Pt 5 (at para.290) clearly state the underlying intention of the civil forfeiture powers under POCA 2002, namely to allow for civil recovery of unexplained wealth representing the proceeds of crime where the evidence will not allow for a successful conviction in the criminal courts (where a higher burden of proof is required)

> "… civil recovery … proceedings may be brought whether or not [criminal] proceedings have been brought for an offence in connection with the property. Cases where criminal proceedings have not been brought would include cases where there are insufficient grounds for prosecution, or where the person suspected of the offence is outside the jurisdiction or has died. Cases where criminal proceedings have been brought may include cases where a defendant has been acquitted, or where a conviction did not result in a confiscation order."

Initially a non-ministerial government department, the Assets Recovery Agency (ARA), was constituted under POCA 2002 to institute forfeiture actions. This was later merged with the Serious Organised Crime Agency which shortly will become the National Crime Agency.

With regard to the relationship between criminal proceedings and civil forfeiture orders arising from the same facts, Lord Goldsmith, speaking for the government in the House of Lords debate on POCA 2002, said on May 13, 2002:

> "We certainly do not accept that, where a criminal case has not resulted in a conviction, civil recovery action should automatically be barred. I do not shrink from the fact that … evidence is available in the civil process which would satisfy a court, even though it did not satisfy the criminal process."

As Lord Goldsmith's words show, it was clearly the intention of the government that the purpose of the Act was to allow for punishment of criminals where there was insufficient evidence to convict (in the criminal courts) of a crime. The difficulty in obtaining evidence of match-fixing has meant that there have been (internationally) very few instances of charging match-fixers under the criminal law; and yet match-fixing is widespread and the guilty athletes who have means beyond anything legitimately earned through sporting endeavour remain unpunished. This is what has led to calls for the use of laws allowing for the recovery of unexplained wealth.

Must there be evidence of a specific crime before a forfeiture order can be made under POCA 2002 Pt 5? Can a case be brought simply where the respondent appears to have means that exceed the documented earnings from his lawful trade or profession, as provided for in the "reversed burden of proof" provision in the draft de Speville code? It was held in *ARA v Green*[24] that: (1) the Director of ARA need not allege commission of a specific criminal offence but must set out matters alleged to constitute the particular kind of unlawful conduct by which property was retained; and (2) a claim for civil recovery cannot be sustained solely upon the basis that the respondent has no identifiable lawful income to warrant his lifestyle. To mount a successful civil forfeiture claim for fixing under Pt 5 of POCA 2002, there would therefore need to be some evidence of wrongdoing by an athlete under criminal laws such as the UK Gambling Act 2005; the evidence might consist of known connections with gambling syndicates. But because the proceedings are civil in nature and are not designed as an in personam punishment for a criminal act, the evidence has only to point to wrongdoing on the balance of probabilities, rather than the more rigorous "beyond reasonable doubt" test in criminal trials.

[24] *Director of Assets Recovery Agency v Green* [2005] EWHC 3168 (Admin) at [47].

POCA 2002 also provides for a procedure to assist in the difficult task of compiling the evidence necessary to bring a civil recovery action. Section 246 enables the enforcement authority to apply without notice, before or after starting proceedings, for an interim receiving order to detain recoverable (or associated) property in the hands of an interim receiver. Leong has described an interim receiving order as

> "a type of worldwide freezing injunction prohibiting the person to whose property the order applies from dealing with the property, and also requiring him to repatriate property or documents abroad to the UK".[25]

Dayman describes the interim receiver's investigative functions on behalf of the court as "more akin to the function of a reporting judge in civil law jurisdictions".[26] Under s.288 the interim receiver is allowed to examine financial transactions and records over a period of 12 years. The interim receiver's role has been summarised by the High Court as "a court appointed expert to investigate the origin and owner of assets and to report to the court on those assets".[27]

Gale: the facts

The background to the appeal brought by David Gale and his former wife Teresa before the Supreme Court in 2011 was that they had been investigated in the 1990s in Spain, Portugal and the United Kingdom on suspicion of the criminal offences of money laundering, tax evasion and drug trafficking, but there had not been any successful convictions. Mr Gale was in fact acquitted of drug trafficking in Portugal, and proceedings in Spain for the same offence were discontinued after becoming time barred. No criminal charges were brought in England; instead, a civil forfeiture claim was brought against the Gales in England under POCA 2002 Pt 5; at the outset of those proceedings the court appointed a receiver to investigate and take control of the Gales' assets and financial records. At the conclusion of the High Court proceedings, in making a civil forfeiture order it was evident that the judge, Williams J, relied very much on the evidence contained in the receiver's report, which in turn relied on the evidence before the Portuguese court which had earlier acquitted Mr Gale of the criminal charges against him. The receiver concluded that there was no evidence to back up the Gales' assertion that their wealth accrued from legitimate activities but that there was evidence of complex financial dealings indicative of money laundering (a criminal act and therefore "unlawful conduct" under POCA 2002) and concealment.

The outcome of the High Court proceedings made under Pt 5 of POCA 2002, unsuccessfully appealed by the Gales before the Court of Appeal, was that the Gales were ordered to pay £2 million representing the proceeds of tax evasion, drug trafficking and money laundering. The Gales appealed this in the Supreme Court. A second, and subsidiary, issue appealed by the Gales in the Supreme Court, was the Court of Appeal's ruling that the costs of the receiver (totalling approximately £1 million) could be included in the costs order made against the Gales (in civil proceedings in England it is usual for the court to order the loser to pay the legal costs incurred by the successful party).

The Gales argued before the Supreme Court that civil forfeiture orders under Pt 5 of POCA 2002 (i.e. a UWO using the "balance of probabilities" test) was incompatible with art.6(2) of the European Convention on Human Rights to the extent that it allows for the finding of a criminal act on the civil standard of "the balance of probabilities". Mr Gale argued that because the allegations made against him were criminal in nature, then a fair trial, to which he was entitled under art.6, meant that he should enjoy the protection of proof to the criminal standard, i.e. "beyond reasonable doubt". Lord Philips in the Supreme Court paraphrased the Gales' legal submission thus

> "the language of section 241(3) … should [be] 'read down' … so as to accord to it the meaning that the court must decide whether it is proved beyond reasonable doubt that matters alleged to constitute unlawful conduct occurred. Alternatively, they submit that the Court should declare the subsection to be incompatible with the Convention pursuant to section 4 of the Human Rights Act."[28]

Lord Philips, giving the Supreme Court's lead judgment, ruled as follows:

> "If confiscation proceedings do not involve a criminal charge, but are subject to the civil standard of proof, I see no reason in principle why confiscation should not be based on evidence that satisfies the civil standard, notwithstanding that it has proved insufficiently compelling to found a conviction on application of the criminal standard."[29]

With regard to the issue of whether the civil forfeiture proceedings were an abuse of process as they questioned the finding of innocence in the earlier (Portuguese) criminal trial, Williams J. in the High Court had rejected Mr Gale's contention that issue estoppel applied with regard to the criminal proceedings in the Spanish and Portuguese courts, "clearly the criminal law principle of autrefois acquit has no application in civil proceedings".[30] The Supreme Court agreed. Lord Brown commented:

[25] Leong, "Assets Recovery Under the Proceeds of Crime Act 2002", in Young, *Civil Forfeiture of Criminal Property*, Ch.7.
[26] S. Dayman, "Is the Patient Expected to Live? UK Civil Forfeiture in Operation", in Young, *Civil Forfeiture of Criminal Property*, Ch.8, p.229.
[27] *Director of Assets Recovery Agency v Wilson* [2007] N.I.Q.B. 49 at [10].
[28] *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2012] H.R.L.R. 5 at [5].
[29] *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2012] H.R.L.R. 5 at [44].
[30] *Serious Organised Crime Agency v Gale* [2009] EWHC 1015 (QB) at [18].

"contrary to widespread popular misconception, acquittal does not prove the defendant innocent".[31] Lord Philips remarked: "it is perfectly obvious that failure to establish guilt according to the required standard does not demonstrate that the defendant did not commit the criminal act".[32].

The Supreme Court in Gale has therefore upheld earlier decisions in *Walsh v Director of Assets Recovery Agency* and *R. v He & Cheng*[33] and has dismissed criticisms that the civil forfeiture proceedings in POCA 2002 Pt 5, in providing sanctions for criminal behaviour without the safety net of the presumption of innocence until proven otherwise "beyond reasonable doubt", offend against art.6 of the European Convention on Human Rights.

Conclusion

Increasingly, in recent years, not just cricketers, but athletes from a variety of sports, have undoubtedly engaged in match-fixing for financial reward. It has in the main proved beyond the criminal law to charge and punish the cheats, because of the difficulty of obtaining sufficient evidence to prove beyond reasonable doubt that criminal acts have been perpetrated, and so they have gone largely unpunished and they have not been asked to defend their unexplained wealth. There is a clear analogy between money laundering, which the authorities have attacked through civil forfeiture laws, and betting-related corruption in sport. Both crimes often involve organised criminal gangs who can hide the proceeds of their crime and in both cases insufficient evidence of the wrongdoing can be obtained to obtain criminal convictions. Corrupt betting-related fixing in sport is now threatening to assume epidemic proportions. Law enforcement agencies from INTERPOL down now recognise that criminal gangs are often behind the fixing syndicates. Entrapment has proved the most successful tactic in procuring proof of the fixers' guilt (as evidenced in the sort of journalistic "sting" operation made famous by *The News of the World* in the Pakistani cricket case in 2010). But entrapment by investigative journalism cannot alone rid sport of its growing problem. Recently the UK Supreme Court has confirmed that UWO civil forfeiture recovery proceedings, where brought by the Serious Organised Crime Agency, are not criminal proceedings in nature designed to penalise any person and therefore the protections built into criminal proceedings such as the presumption of innocence, and the burden of proof beyond reasonable doubt, do not apply. The prospect of the SOCA, applying POCA 2002, working with the English cricket authorities, or the governing body of any other sport, to investigate Gambling Act 2005 s.42 offences appears a natural extension of INTERPOL's involvement with FIFA. Alternatively, sports governing bodies might prefer to take the law into their own hands and insert UWO sanctions into their Codes of Conduct as advocated in the de Speville Report to the ICC.

[31] *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2012] H.R.L.R. 5 at [115].
[32] *Serious Organised Crime Agency v Gale* [2011] UKSC 49; [2012] H.R.L.R. 5 at [19].
[33] *Walsh v Director of Assets Recovery Agency* [2005] NICA 6; *R. (on the application of the Director of Assets Recovery Agency) v Jia jin He No.2* [2004] EWHC 3021 (Admin.).