

Sections 71 and 72 of the Serious Organised Crime and Police Act 2005: Whither the Common Law?

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Summary: *This article concerns the statutory regime enabling prosecutors to immunise offenders or to give them an undertaking that what they say will never be used to incriminate them. It particularly addresses the implications of this regime in cases of alleged criminal fraud and the issues that should be considered by a defence lawyer acting for a client implicated in this type of crime.*

Introduction

According to the Home Office¹ the principal aim of the measures contained in ss.71 and 72 of the Serious Organised Crime and Police Act 2005 (SOCPA) is to clarify and strengthen antecedent common law provisions concerned with encouraging criminals to assist law enforcement agencies with the investigation and/or prosecution of their erstwhile criminal associates. With such an aim in mind it is submitted that this legislation was passed not just to clarify and strengthen but also to encourage prosecutors to offer immunity deals to criminals.

Both sections were implemented in April 2006. Prior to then the common law permitted a prosecutor to confer immunity from prosecution upon any potential accused in exchange for their agreeing to testify against their associates. This however was subject to a convention that no immunity should be granted without the consent of the Attorney General. Immunising offenders as a precursor to them giving evidence for the Crown was part of the process nicknamed "turning Queen's Evidence".

In *P and Blackburn*² the Court of Appeal described this (at [22]) as a,

"... long standing and an entirely pragmatic convention . . . A price worth paying to achieve the overwhelming and recurring public interest that major criminals in particular, should be caught and prosecuted to conviction."

In a fraud prosecution the best example of a defendant turning Queen's Evidence is Olivier Roux who was the Serious Fraud Office's (SFO's) star prosecution witness

¹ See, e.g. *One Step Ahead*. TSO, 2004. Cm. 6167, para.6.3.2.

² *P and Blackburn* [2007] EWCA Crim 2290; [2008] 2 Cr. App. R. (S.) 5.

in the 1990 Guinness trial of Ernest Saunders and others. Whereas Mr Roux, the then Finance Director of Guinness Plc and architect of the alleged criminal conspiracy, escaped conviction and punishment, the four defendants against whom he gave evidence were, following conviction, imprisoned and heavily fined.

In the area of suspected tax fraud, the common law had recognised the establishment of the "Hansard" procedure by the then Board of Inland Revenue. This procedure permitted the Commissioners to confer an immunity against prosecution for tax fraud and related offences in return for the taxpayer's full co-operation including the payment of a monetary sum. In most Inland Revenue criminal investigations, Hansard was offered. Following the judgment in *Gill*,³ the Hansard procedure was redesigned and became part of HM Revenue and Customs' Code of Practice 9. This broadly has the effect of entitling the investigators to confer an unconditional immunity.

Buttressing a prosecutor's common law discretion to grant immunities, the courts also provided incentives to would-be criminal turncoats in the form of a large discount of sentence. Whilst not immunised by a prosecutor, any defendant who was willing to plead guilty and co-operate (but not necessarily testify) with law enforcement might receive this benefit. In *King*⁴ the Court of Appeal held that in return for information of assistance to the prosecution, an accused should expect "substantial mitigation of what would otherwise be the proper sentence . . . The amount of that mitigation, it seems to us, will vary . . . from about one half to two thirds reduction."

Despite these immunity and leniency practices being entrenched in the common law, the Home Office in its White Paper *One Step Ahead*⁵ published in March 2004 argued that they needed to be enshrined in statute. Its premise was that they were underused and that a statutory codification would increase their usage. The Home Office's unspoken presumption was that offering criminals a deal in return for their assistance was a necessity as more traditional (and less distasteful) means of apprehending criminals, especially those involved in organised gangs, were no longer sufficiently effective.

Hitherto the SOCPA regime does not appear, to put it modestly, to have been embraced by fraud prosecutors. This disinclination is also evident amongst all prosecutors. SFO recent practice suggests that there is no desire to utilise ss.71 or 72 in preference to the common law regime. The usage of these powers by prosecutors seems low, and is probably much lower than the Home Office expected. Why there is such reluctance is considered further below. Nonetheless it is plainly the Government's intention that prosecutors should utilise these sections when an immunity or other "deal" with an offender is contemplated.

Section 71—immunity

Section 71(1) and (2) reads as follows:

"(1) If a specified prosecutor thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to

³ *Gill* [2003] EWCA Crim 2256; [2004] 1 Cr. App. R. 20.

⁴ *King (Michael Shaun)* (1995) 7 Cr. App. R. (S.) 227 CA (Crim Div).

⁵ *One Step Ahead*. TSO, 2004. Cm. 6167.

offer any person immunity from prosecution he may give the person a written notice under this subsection (an 'immunity notice').

- (2) If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice."

In relation to s.71(1) the following observations can be made:

1. Section 71(4) exhaustively defines who is a "specified prosecutor". It includes the SFO and Revenue and Customs Prosecutions Office (RCPO) but curiously excludes the Office of Fair Trading (OFT) and Financial Services Authority (FSA).⁶ It is established that only such a prosecutor can immunise and never the police or another investigating agency. This dichotomy is inapplicable in so far as the SFO is concerned as the case controller is meant to act as investigator and lawyer.
2. There is no statutory limitation upon a prosecutor's discretion as to whether or not to issue an immunity notice. That most vacuous of English words "appropriate" is used. Whilst various agencies have issued internal guidance the CPS is alone in making its guidance publicly available.

In relation to s.71(2) the following observations can be made:

1. The notice constitutes a prohibition of any future prosecution of the offender in respect of offences specified by it. It therefore precludes a prosecution brought, for example, by an aggrieved private prosecutor. It does not however apply to civil proceedings.
2. This prohibition only applies to a prosecution before a court in England and Wales and Northern Ireland.
3. An immunity notice is revocable, its duration subject to conditions set out in it. This is the precursor to s.71(3) which states that "[a]n immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice". Bearing this feature in mind, whilst the statutory term "immunity notice" or immunity will be used in this article, it would nonetheless be more accurate to describe this as a co-operation agreement.

Contrasting section 71 of the Serious Organised Crime and Police Act 2005 with section 190(4) of the Enterprise Act 2002

Section 190 has been in force since June 2003 and was the first statutory immunity programme introduced into our criminal law. Section 190(4) reads as follows:

"(4) Where, for the purpose of the investigation or prosecution of offences under section 188, the OFT gives a person written notice under this subsection, no proceedings for an offence under section 188 that falls within a description specified in the notice may be brought against that person in England and Wales or Northern Ireland except in circumstances specified in the notice."

⁶ The Chancellor has recently suggested that the FSA should be granted these powers. The FSA's omission suggests that it was intended that they be reserved to those who prosecute the most serious crimes. Section 71 however contains no such reservation.

This power to offer conditional immunities is the same as that created by s.71. But for the statutory exclusion created by s.71(7), to the effect that an immunity notice under s.71 cannot be issued in relation to the cartel offence created by s.188 of the 2002 Act, s.71 would render s.190(4) otiose.

Why the need post-SOCPA to maintain two statutory immunity regimes? It is unclear why ensuring that the OFT retains exclusive jurisdiction over immunising for the cartel offence is considered necessary. Criminal cartels are an exemplar of organised crime. It is submitted that this can only be because Parliament viewed the granting of immunities in relation to the cartel offence to be the subject of special considerations which may be irrelevant or inappropriate to any other crime.⁷ Thus the rationale for a s.190 immunity may be inconsistent with that accepted by the common law hitherto (see *P and Blackburn*, above), presented by the Home Office in *One Step Ahead* or in any post-SOCPA guidance issued by another prosecutor.

The OFT's extensive published guidance on the granting of immunities will not therefore be considered in this paper. It should also be noted that the OFT is not a specified prosecutor pursuant to either s.71 or s.72. Furthermore the OFT has not yet used its s.190(4) power.

A consequence of this dichotomy is that as the OFT⁸ can only immunise in relation to the cartel offence, this may not be adequate in relation to preventing future UK criminal proceedings. Despite having a s.190 immunity, an offender in relation to the same or related conduct might still be liable to prosecution by another prosecutor for a different offence, for example under ss.2–4 of the Fraud Act 2006 or for corruption, money laundering or false accounting. In *Werner*⁹ for example, even after W was offered "Hansard" (a promise of non-prosecution in return for co-operation) by the Inland Revenue which was investigating tax fraud, the CPS decided to prosecute him for a similar offence of conspiring to account falsely. A claim of abuse of process and double jeopardy failed. Thus it may be prudent to seek from the OFT at least an assurance that it would discourage such a prosecution. A prosecution brought despite OFT opposition, whilst not offending *autrefois* principles, would be more likely to be viewed by the courts as an example of double jeopardy or executive misconduct and thus an abuse of process.

Issues of concern to the defence lawyer

Overall the process of seeking to negotiate an immunity on behalf of a client is likely to be tortuous and fraught with danger. It must be presumed that the aim of the investigators will be to encourage the client and their lawyer to believe that they are powerless and to reveal nothing about their intentions. Set out below are the principal issues:

1. The lawyer is entitled to ask a specified prosecutor to enter into a s.71 agreement with the lawyer's client. Thus if the lawyer is confident that such an agreement would be in the client's interests and/or fears that another offender will also be seeking a similar deal, the lawyer will wish to

⁷ In its consultation document concerned with the cartel offence, *The Cartel Offence: No-action Letters for Individuals. A Consultation Document*, OFT 503, July 2002, the OFT refers to exercising its powers "in the interests of the economic well-being of the UK".

⁸ And not necessarily just a prosecutor within it.

⁹ *Werner* 1998 WL 1044475, CA (Crim Div).

raise this long before the prosecutor considers charging anyone. Of course such “front-loaded”, proactive conduct may not be possible. The lawyer may not have a client who is willing to accept criminal responsibility at such an early stage. Equally the lawyer may not want to abandon arguments which might prevent a prosecution from ever being launched.

2. In order for the prosecutor to decide whether granting an immunity is appropriate it will in most situations be necessary to know what important information the suspect/client can provide. Whilst the lawyer can indicate this, if this is viewed as insufficient then to avoid compromising the client’s interests by bargaining away their position without securing anything firm from the prosecutor in return, s.72 (see below) should be invoked. There is nothing to preclude using s.72 as a precursor and it will protect clients in terms of preventing their confession of criminal conduct from being admissible. Clients should therefore be unwilling to participate in any “scoping” interview without the protection of s.72. If the investigators insist on an interview under caution for the purpose of scoping, the lawyer should appeal to the prosecutor. The aim of this is to make the refusal by the investigator to consider invoking s.72 appear unreasonable.
3. Whilst it is not mentioned in s.71 as a precondition, the CPS guidance urges its prosecutors to require any potential subject of an immunity to participate in a process it calls “cleansing”. This means that subjects must confess all their past criminal conduct including that committed long ago and despite it having no relevance to offences which are the subject of the proposed immunity. The CPS guidance refers to *P and Blackburn* where the Court of Appeal held that cleansing was “an essential feature”. This claim seems strange when it is not mentioned in s.71. Moreover this reference by the court could be read as being confined to criminality which is potentially the subject of the immunity. It is essential to the credibility of any witnesses who give evidence for the prosecution pursuant to a s.71 deal that they admit their own role (including if appropriate, their dishonesty) in the alleged crimes about which they are to testify. But it can be queried why is it also essential that they also admit, as a precondition to gaining an immunity, crimes committed long ago.

The rationale for cleansing is based upon a presupposition that clients will be asked to testify. However frequently the value of clients to the investigators is the information they can provide about offences and offenders. Thus it is questionable why cleansing should be presented as a sine qua non for immunity in all circumstances. The lawyer should therefore ascertain whether the client is viewed as a potential witness or just an informant.

Chiefly there are three reasons why despite it being wholly advantageous to the authorities, a client should be wary of cleansing. First, it creates a trap for the unwary and forgetful. Clients who omit to mention past conduct may suffer the consequence of having their immunity (or prospect of it) rescinded pursuant to s.71(2) if, as it surely would be, cleansing was stated to be a condition in the notice. Clients’ immunity may not be saved by the fact that they also informed on others’ criminality notwithstanding that investigators used what was imparted and this created a risk of

retribution.¹⁰ Secondly, a demand for a full confession is likely to spawn a demand that clients deliver up and waive their legal privilege over documents in the possession of their existing and previous criminal defence solicitors. Whilst the CPS guidance does not mention this it appears that SOCA investigators routinely insist on this. A universal waiver is a significant risk and privilege once waived is waived forever.

Thirdly, the inevitable outcome of cleansing is that the client has to totally rely upon the supposed good faith of the investigators in what they report to the prosecutor about the client's level of co-operation and the value of the information imparted. There is little protection against a cynical investigator who regards the process as an opportunity to "bleed" the client and then advise the prosecutor either not to issue or to nullify the notice. The process also makes it difficult for the lawyer to establish or maintain meaningful contact with the prosecutor who becomes dependent upon the investigator's report.

Acts taken by investigators and/or prosecutors are amenable to judicial review¹¹ and an application for judicial review if it got leave would impose a duty of disclosure upon the relevant police force and/or prosecuting agency as to why it had been decided not to either enter into a s.71 agreement and/or rescind it. Alternatively if a prosecution of the defendant ensued, an abuse of process application could be made based on a submission of prosecutorial misconduct and/or bad faith. Such a defence could require the prosecution to disclose its reasoning as regards s.71.

4. Clearly the lawyer's forte will lie in relation to the negotiation and drafting of the terms contained in the immunity notice, in particular (a) the assistance which the client will provide to the authorities and (b) the consequent benefits. In relation to (a) this will include whether the client needs to testify, at whose behest and whether there should be a time limit on this. In relation to (b), immunity for which crimes.

As s.71(2) anticipates a revocable contract it is essential that revocation can only validly occur where there has been an undeniable and fundamental breach by the client. The defence lawyer should therefore, unless there is some exceptional reason, seek the use of unequivocal and precise language in the notice.

The lawyer should also keep under review whether a fresh or additional notice needs to be negotiated. The client may confess to crimes not already immunised but which are connected to those which have been immunised. For example, interfering with witnesses, seeking to pervert the course of justice or laundering the proceeds of the crime.

5. If the proposed immunity is only to be granted in respect of some but not all offences for which the client is liable to be prosecuted, the implications of this for a court's confiscation powers under Pt 2 of the Proceeds of Crime Act 2002 (POCA) should be considered. The lawyer should seek

¹⁰ Clients will be eligible for a sentence discount under s.73 if they subsequently plead guilty but the court's view on the discount is likely to be heavily influenced by what the investigators report was the value of the assistance. See, e.g. *P and Blackburn* [2007] EWCA Crim 2290; [2008] 2 Cr. App. R. (S.) 5 at [10].

¹¹ As an analogy see *Boddington v British Transport Police* [1999] 2 A.C. 143 HL.

for the client to be prosecuted in a way which prevents a court from deeming under s.75 of POCA that the client has a “criminal lifestyle”.

6. As fraud and corruption cases almost invariably have an international dimension, consequent interest from foreign law enforcement must be anticipated. An immunity notice does not bind a foreign prosecutor. Thus if clients confess to crimes which are triable in another jurisdiction and the form of their admissions is admissible, there is a risk that this will whet the appetite of a foreign prosecutor to whom these admissions are disclosed. This appetite may only be sated if clients agree to testify before a foreign court against other defendants. A refusal may precipitate an application for extradition as a precursor to a foreign trial. Resisting extradition may be problematic as there is no relevant statutory bar to extradition contained in the Extradition Act 2003.¹²

It is thus essential that negotiations with the prosecutor address the issue of use made by a foreign prosecutor of information provided by the client. Owing to treaty commitments it is unlikely that a UK prosecutor would give any assurance unilaterally. Unfortunately the foreign prosecutor may not be amenable either. In the absence of willingness here the second-best is to seek from the UK prosecutor a promise to seek to dissuade their foreign counterpart from seeking extradition. It could be argued that the purpose of s.71 would be subverted if an immunity notice was in reality of no benefit to the witness.

The defence lawyer should be wary of dealing with the foreign prosecutor directly. This might enable the UK prosecutor to avoid giving any assurances. Secondly, such contact could undermine a later objection to extradition.

7. Is legal aid available for pre-charge s.71 (and s.72) related work? Prior to s.56 of the Criminal Justice and Immigration Act 2008 pre-charge legal aid was not available. This section however makes it available in “prescribed circumstances” during the investigative phase. This section may cater for impoverished clients or those who cannot get access to their funds which are the subject of a pre-charge restraint order. Whether the sums available will be adequate for the lawyer is moot.

Grants of immunity versus decisions not to prosecute

Section 71 does not purport to interfere with the longstanding discretion afforded to any prosecutor who decides that despite there being sufficient evidence to prosecute an individual it is not in the public interest to prosecute.¹³ Paragraphs

¹² The client, for example, may not be able to assert double jeopardy as, in so far as the UK proceedings were concerned, the notice may have been issued prior to any charge. In the absence of a statutory defence in the 2003 Act resort must be made to the common law jurisdiction known as abuse of process. Persuading a court to refuse the application for extradition pursuant to this will be an ambitious task especially if neither the UK nor foreign prosecutors gave any assurance that this would not happen. To succeed here would require an extrapolation of the legal principles concerning “breach of promise” established in *Hamza* [2006] EWCA Crim 2918; [2007] 1 Cr. App. R. 27.

¹³ See the classic statement made in 1951 by the then Attorney General. It is reproduced at para.5.6 of the CPS Code, available at http://www.cps.gov.uk/victims_witnesses/code.html [Accessed January 30, 2009].

5.6–5.11 of the CPS Code in fact require a prosecutor to consider public interest factors in every case where there is sufficient evidence. Paragraphs 5.9 and 5.10 provide examples of these factors. None of these however relates to the public interest factors endorsed by the Court of Appeal in *P and Blackburn* quoted above. Furthermore the Code does not regard this prosecutorial discretion as equivalent to the granting of an immunity; suspects acquire no right not to be prosecuted, they only benefit from a unilateral judgment about the public interest made after the evidence has been gathered. At least in theory, if in the future the prosecutor's view as to the balance of the public interest shifted, suspects could not contend that their prosecution was unlawful because for example there had been a breach of promise or bad faith. It is submitted that the Code does not contemplate or provide any legal foundation for the granting of an immunity.¹⁴

Nonetheless in 2003 the SFO decided that it was lawful for it to exercise its prosecutorial discretion in a *Blackburn*-type scenario and to offer de facto immunities. Furthermore this was done without obtaining the consent of the Attorney General. This was termed the "Witness Accomplice Programme". The programme was an aspect of "Operation Holbein" which mutated into the SFO's biggest prosecution since *Maxwell* a decade previously, *GG Plc*.¹⁵ Pursuant to this initiative a number of individuals whom the SFO suspected were members of an alleged price-fixing conspiracy were informed prior to their interviews under caution that if they told the truth during them and agreed to testify for the prosecution then the Director of the SFO would be minded to hold that the public interest was best served by deciding not to prosecute them. All or most of these suspects reacted to this representation as the SFO hoped and made incriminatory statements both of themselves and of those who were subsequently prosecuted. Invariably they eventually received no-action letters from the Director.

Such a letter is an immunity. It is inconceivable that the Director would be able to disavow its terms and prosecute the recipients.

The programme has not been discarded following the implementation of s.71 in 2006. The SFO is still using it. From this it can be inferred that the common law regime is regarded as preferable to the statutory scheme. This is surprising as, in contrast to the s.71 option, the lawfulness of the SFO's programme is not assured. Had the *GG* case gone to trial the defence would have mounted a major attack upon it.

Would a client be better off being offered a common law immunity or a s.71 one? The answer of course chiefly depends upon what conditions are inserted into either as to what events might lead to the immunity being forfeited.¹⁶ In *GG* no conditions were inserted into the no-action letters (the recipients having already made admissions during interview) and so if the recipients had refused to testify or manifestly given false evidence their immunities would not have been

¹⁴ In *R. (on the application of Pretty) v DPP* [2001] UKHL 61; [2002] 2 Cr. App. R. 1 the House held that the Code did not grant the DPP any power to grant anyone a pardon or dispensation from the criminal law (at [114]).

¹⁵ *GG Plc* [2008] UKHL 17 and *GG Plc (No.2)* [2008] EWCA Crim 3061.

¹⁶ Another factor would be the likelihood of using s.72, if it is offered, as a route to achieving immunity either formally under s.71 or by implication, it being more difficult to prosecute once s.72 has been relied upon.

endangered.¹⁷ Bearing in mind the clear steer of s.71 that immunities should always be conditional, it is probable that a future common law offer of immunity made by the SFO would not be unconditional.

Why are prosecutors reluctant to use section 71?

It is submitted that there are five reasons for this:

1. The cleansing (or debriefing) practice which the court in *P and Blackburn* said was essential is, unless the suspect has no antecedent criminal history, likely to be lengthy and resource-intensive. If the investigators are to demand cleansing then it follows that having received from the suspect their account of past misdeeds they must seek to verify that a full and complete account has been given. This process is likely to be elongated if the suspect's lawyer is assertive and disputes any finding to the effect that their client has intentionally withheld information.
By applying common law provisions cleansing can be avoided.
2. Whilst in fraud investigations/prosecutions it is far less likely that a co-operating witness will be at risk from violent acts of retribution, the police/SFO will nonetheless owe a duty of care of indefinite duration to ensure that witnesses and their families are guarded against such retribution. Thus there may be two conflicting considerations which the prosecutor will have to weigh up—the likely benefit that the co-operating witness can bring to the prosecution against the cost to the investigating agency of fulfilling its duty of care. It may be in many instances that this benefit is outweighed by the cost of fulfilling the duty.
3. Whilst as considered above, the immunity can be revoked for breach of its conditions and the recipient be resentenced pursuant to s.74(2)(a), this only applies if the offender is still serving the sentence, see s.74(3)(a). Thus if the offender either received a non-custodial sentence or has completed it the prosecutor has no opportunity for redress. In a fraud scenario the likelihood of a prosecutor being able to waive a credible stick whilst offering a carrot is therefore much less. In which case, why bother with s.71 and its paraphernalia?
4. If during cleansing offenders admit the commission of offences not covered by the s.71 immunity, they must face prosecution in relation to these. The judgment in *P and Blackburn* records (at [9] and [11]) what happened in that case in this regard, the defendant received a concurrent sentence of imprisonment. Bearing in mind that a concurrent sentence is always likely to be awarded and thus the defendant is unlikely to receive any additional punishment which would negate the discount for co-operation, the benefit of these proceedings with their inherent cost and delay must be open to question. In some instances it may be that the need to prosecute and sentence a co-operating witness for admitted offences may delay the arrest

¹⁷ The only means to have revoked the immunity would have been the Director deciding that the public interest has shifted to the extent that it was now preferable to prosecute. This justification would however have been difficult to make out and prosecuting individuals based upon their self-incriminatory statements made in reliance on a promise of an immunity would have been strewn with legal pitfalls.

and prosecution of major offenders on whom the witness has informed. Again the flexibility of the common law enables a prosecutor to sidestep this potential disadvantage.

5. Despite the statutory basis for immunities, a prosecutor may still be wary of subsequent defence challenges to the process on the ground that improper inducements or threats were made in order to overcome the suspect's initial reluctance to incriminate others. The notoriety heaped onto the "supergrass" experiment in Northern Ireland during the 1980s may still remain a vivid memory.

Section 72—restricted use undertakings

Opportunities for a prosecutor or investigator to offer an assurance to an offender that nothing said by the offender would be used in evidence were very limited under the common law. This was a consequence of the principle that only the court should be the arbiter as to what constituted admissible evidence in criminal proceedings. This emphasis on judicial discretion to be exercised depending upon the circumstances of the case is antipathetic to a rule-based system. Section 72 was however enacted to introduce an element of formality, certainty and protection where a prosecutor desires to receive and an offender is willing to impart information about serious offending. Section 72(3) creates a direct use prohibition on the use of this information unless this is permitted by the wording of the undertaking itself.

Section 72(1)–(3) reads as follows:

- “(1) If a specified prosecutor thinks that for the purposes of the investigation or prosecution of any offence it is appropriate to offer any person an undertaking that information of any description will not be used against the person in any proceedings to which this section applies he may give the person a written notice under this subsection (a ‘restricted use undertaking’).
- (2) This section applies to—
 - (a) criminal proceedings;
 - (b) proceedings under Part 5 of the Proceeds of Crime Act 2002 (c. 29).
- (3) If a person is given a restricted use undertaking the information described in the undertaking must not be used against that person in any proceedings to which this section applies brought in England and Wales or Northern Ireland except in the circumstances specified in the undertaking.”

In relation to these three provisions the observations made above in relation to s.71 apply here. The following observations can additionally be made concerning s.72:

1. The undertaking applies only to that information which is disclosed in reliance upon it. Therefore it would not render inadmissible any document or object discovered as a result of that information having been imparted.
2. The prosecutor may extend the ambit of the undertaking to civil proceedings concerned with proceeds of crime, i.e. civil recovery action and/or cash seizures. Whatever the prosecutor decides as to its ambit will bind any other prosecutor.

3. The prohibition created by s.72(3) will, unless revoked (see s.72(4)¹⁸), apply to confiscation proceedings under Pt 2 of POCA brought against a defendant to whom the undertaking was granted.

As with an immunity notice under s.71, the defence lawyer's attention will be directed to seeking to agree with the prosecutor the wording of an undertaking which provides as much protection or benefit for the client as possible. Section 72(3) obviously envisages that there will never be any unconditional undertakings and it creates a system where multiple permutations are possible. For example a prosecutor may only be willing to agree that the proposed undertaking applies to admissions made in relation to specified offences; that it only applies to extant proceedings and not to any separate trial; or that the client agrees to plead guilty to specified offences.¹⁹ The function of s.72 is thus only to underpin and not prescribe this new terrain of negotiation between prosecution and defence lawyers previously absent from criminal practice.

It is submitted that the wording of s.72 with its emphasis on the information being the subject of a prosecutor's undertaking may cause a cart-and-horse-like difficulty. How can an undertaking be given before the information is known? Inevitably, overcoming this will need a degree of trust and co-operation between the prosecutor and defence lawyer. The latter will probably seek from the former at least an assurance that if the client tells the truth during the forthcoming interview an undertaking will follow with respect to that. In other words, the common law practice of a prosecutor giving a promise will surely have to precede a s.72 undertaking.

In its guidance concerning s.72, the CPS sets out factors which may be relevant to deciding whether to offer an undertaking. The chief difficulty with these factors is that to be utilised they presuppose that the prosecutor/investigator already knows the information which could be provided. A wise defence lawyer, however, is unlikely to be transparent before an undertaking is offered.

In relation to prosecuting an offender based on evidence that was obtained only as a result of information imparted pursuant to an undertaking, the guidance advises that any such prosecution (i.e. a case built on derivative use) should be exceptional and could amount to an abuse.

It is submitted that it is—especially in a fraud investigation—but a short step between an offender obtaining a s.72 undertaking and a s.71, or at least a de facto, immunity. In most fraud cases, despite the prosecution case primarily comprising documentary evidence, a witness is still required to give context and to speak to aspects of the alleged fraudulent transaction that have been obscured by time or concealment. SFO practice in Operation Holbein (see above) demonstrates that its principal aim in offering undertakings was to induce individuals to agree to incriminate others and to give oral evidence at trial. The SFO was not seeking just inadmissible “intelligence”. Secondly, it is unlikely that most fraud suspects would be sufficiently motivated to assist if conviction and threat of imprisonment plus confiscation loomed albeit with a prospect (not a guarantee) of a reduced sentence awarded pursuant to s.73.

¹⁸ “(4) A restricted use undertaking ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the undertaking.”

¹⁹ In relation to any plea negotiations, see Attorney General's Office, *The Introduction of a Plea Negotiation Framework for Fraud Cases in England and Wales: a Consultation* (April 2008).