The advanced algorithms used by this type of technology make it very easy to identify relationships, patterns and trends within a large dataset, which can be troubling if the effect is negative. However, if the algorithms identify normal, that is, legitimate behaviours, as one would hope, they are equally adept at helping to identify the outlying transactions, which for some reason do not totally conform to the norm and therefore warrant closer investigation.

It is also worth considering a more holistic approach to the review of the test results, rather than simply looking at the results of each test in isolation. For example, if the results across each test are ranked according to the entity they relate to (such as a user on the accounting system or a supplier account), they can then be considered in the round. Firms can do this by looking at how that entity 'performs' across all of the tests. This helps identify results that are consistently poorly performing, even if they are not the worst performer in any single test.

An integrated approach

Organisations can achieve significant benefits by looking at all of these approaches in conjunction with one other, as this will allow a much higher level of analysis. If the results from any human-side investigations are added to the mix, businesses will be able to assess the data in a much more informed and complete manner. A review of transactions can help to identify an unusually named party, for example, or there may be a certain date or time when a series of unusual payments were made.

This information can then be used to target searches across the communication data, either by looking for communications relating to that party – or any content discussing it – or by analysing communications at those dates and times, as well as the surrounding time frames. This approach can help draw out findings that can often be opaque otherwise.

Prevention first

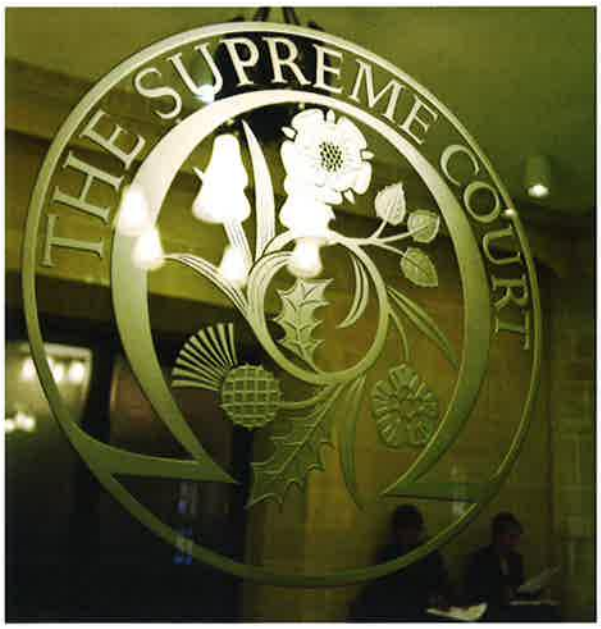
Whether investigations into fraud are undertaken as part of regular internal audits that aim to identify issues before they come to the surface, or conducted in response to particular suspicions, they can help an organisation avoid large fines, bad publicity and the risk of being blacklisted for European tenders. As such, firms should take a preventative approach in order to protect against both reputational and financial damage to their business. They can achieve this goal by implementing systems that address any suspicions before they rise to the surface, yet this is not something that many are doing well at the moment.

■ **Phil Beckett** (+44 (0)20 7015 5379, pbeckett@ProvenLT.com), managing director at Proven Legal Technologies – the corporate forensic investigation and e-disclosure firm.

FEATURE › CRIMINAL CONFISCATION AND RECOVERY

Confiscation orders: the Supreme Court's decision in *Ahmad*

The UK Supreme Court gave judgment in the combined appeals of *Ahmad* and *Fields* [2014] UKSC 36 on 18 June, clarifying the proper approach to be adopted in confiscation proceedings where there is a finding of joint benefit (ie, a number of defendants are found to have jointly obtained property). **Polly Dyer** of QEB Hollis Whiteman reviews the decision.



The Supreme Court held that, where there is a finding of joint benefit, a confiscation order should be made for the whole value of the benefit (as opposed to the benefit being apportioned between the defendants) but should not be enforced to the extent that the sum has been recovered via another confiscation order.

Both *Ahmad* and *Fields* were carousel frauds. In *Ahmad & Ahmed* [2012] 2 Cr. App. R. (S.) 85, the Court of Appeal reduced two confiscation orders of

© Informa UK Ltd 2014

£72 million each (uplifted due to inflation to £92,333,667) to £12,662,822 (uplifted to £16.1 million due to inflation). The appellants had appealed against confiscation orders made under the *Criminal Justice Act 1988* following their convictions for conspiracy to defraud HM Revenue & Customs. This case involved particular criminal conduct. The judge in the Crown Court had found that the benefit was not only the VAT which had been paid out by HMRC as a result of the fraud, but the total amount of money which had passed through bank accounts controlled by the appellants in furtherance of the fraud, concluding that this was property obtained in connection with the commission of the offence. The Court of Appeal held that, to say that, in assessing the benefit to the criminal, the court does not take into account the costs which the criminal incurred in committing the offence is very different from saying that the costs should be added on to the benefit [paragraph 53 of the judgment]. To make a confiscation order which included within the benefit the cost of committing the crime was seen as contrary to the object of the legislation [para 35]. Issues of justice and proportionality were also raised: the Court of Appeal held that such a large discrepancy between the loss of the complainant and the amount of the confiscation order (in this case the loss to HMRC was £12.5 million but the confiscation orders were for £72 million before uplift due to inflation) meant something had gone wrong.

The issue for the Supreme Court was this: when a number of people (all or some of whom are before the court) have committed a crime that resulted in them acquiring property together, what approach should the court adopt and what orders should the court make in confiscation hearings?

The Crown argued that confiscation orders made against each defendant, each order for an amount equal to the value of the benefit obtained, do not breach Article 1 of the First Protocol of the European Convention on Human Rights (A1P1) and are proportionate. On behalf of the *Ahmad* appellants, it was argued that such orders are disproportionate and the Court should consider making joint and several orders and/or dividing the total amount between defendants (ie, they only have to pay £16.1 million between them): "in other words, if, for instance, Mr Ahmad paid £12.6m, then both he and Mr Ahmed would then continue to be liable, but only for £3.5m, and if one or both (between them) then paid the £3.5m, there would be no further liability on either of them" [para 24].

Fields, another case on joint liability, was heard at the same time: three applicants sought the permission of the Supreme Court to appeal against the decision of the Court of Appeal. In *Fields*, each applicant was convicted of fraud and found to have jointly obtained property and services, the value of which (adjusted for inflation) was £1,565,945. Each applicant was found to have sufficient assets in excess of that sum and orders were made against each in the sum of £1,565,945. The applicants submitted in the Supreme Court that such multiple orders which reflect 100% of the value of property jointly obtained are "disproportionate" and therefore unlawful. They also submitted that where defendants jointly obtain property, a court should ascertain each defendant's "beneficial interest" in the property obtained. Therefore, taking a different approach from the appellants in *Ahmad*, the representatives in *Fields* argued that the benefit figure should be apportioned and so the defendants should be found liable for a third each of the total sum [para 25]. The Crown argued, as in *Ahmad*, that the confiscation orders were lawful and involved no breach of the applicants' property rights as guaranteed by A1P1.

"The Supreme Court recognised that it may produce inequality between criminal conspirators if the order is paid by another conspirator, however it held that the losses must lie where they fall."

The Supreme Court unsurprisingly, following the long line of authority, held that each of the appellants was correctly found to have benefited in the full amount: "...where property is obtained as a result of a joint criminal enterprise, it will often be appropriate for a court to hold that each of the conspirators "obtained" the whole of that property. That is the view expressed in May, para 48(6), first sentence (although the word "owns" is probably inappropriate), in Green, para 15, and in Allpress, para 31 (as quoted and approved in Mackle, para 65). However, that will by no means be the correct conclusion in every such case." [para 46]

There is a practical consideration: "...if the court could not proceed on the basis that the conspirators should be treated as having acquired the proceeds of the crime together, so that each of them "obtained" the "property", it would often be impossible to decide what part of the proceeds had been "obtained" by any or all of the defendants. It is one thing for the court to have to decide whether a defendant obtained any property, which is required by the 2002 Act. It is another for the court to have to adjudicate on the respective shares of benefit jointly obtained, which is not required." [para 56]

The Court was careful to specify that the fact that defendants were jointly involved in the commission of a crime does not automatically justify a conclusion that they jointly obtained the resulting property, saying

"Judges in confiscation proceedings should be ready to investigate and make findings as to whether there were separate obtainings... A court should never make a finding that there has been joint obtaining from convenience, or worse, from laziness." [para 51]

The Court also clarified that it is not helpful to use property law concepts of "joint ownership" or "owners in common" when dealing with property obtained through crime; criminals who steal an asset do not become "joint owners" in a legal sense. It is better to use the language of "obtaining". [paras 44–5]

However, the appeals were allowed in part as the Supreme Court was persuaded that the recovery of more money than was obtained by the crime would not be proportionate: "To take the same proceeds twice over would not serve the legitimate aim of the legislation and, even if that were not so, it would be disproportionate. The violation of A1P1 would occur at the time when the state sought to enforce an order for the confiscation of proceeds of crime which have already been paid to the state. The appropriate way of avoiding such a violation would be, as Mr Mitchell has submitted, for the confiscation order made against each defendant to be subject to a condition which would prevent that occurrence." [para 72]

As such, "the confiscation orders made in respect of each defendant should be amended to provide that they can be enforced **only to the extent that the same sum has not been recovered through another confiscation order made in relation to the same joint benefit.** However, the orders should not be amended to apportion the benefit between the respective defendants."

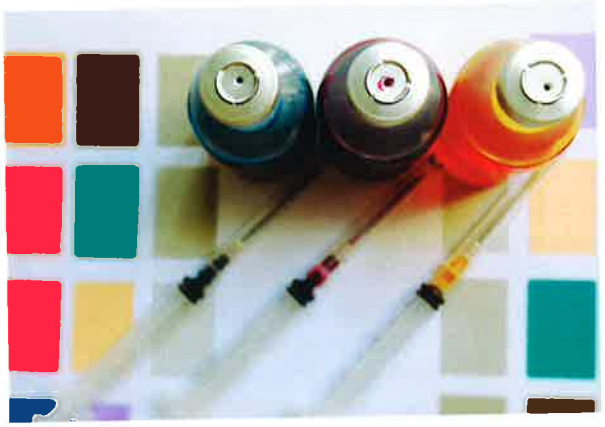
The orders in each case were therefore amended to prevent recovery of more than the same joint benefit. While the judgment will prevent the state from recovering the proceeds of crime multiple times over, it may cause anomalies: consider for example one multi-handed indictment split into three trials. It is unlikely that an application to stay enforcement proceedings in relation to those defendants convicted in trial one, pending the outcome of trial three, will be successful. As such, depending on the realisable assets of the defendants in trial one, those convicted in trials two and three and subject to confiscation proceedings, may find themselves in the advantageous position of the confiscation order having already been paid. The Supreme Court recognised that it may well produce inequality between criminal conspirators if the order is paid by another conspirator. However, this issue was dismissed as an "inherent feature of joint criminality", with the example given of a victim of fraud suing conspirators; the victim would be "entitled to enforce against whichever defendant he most easily could". The Supreme Court held: "the losses must lie where they fall, and there is nothing surprising, let alone wrong, in the criminal courts adopting that approach" [para 73].

■ **Polly Dyer** (+44 (0)20 7933 8855, barristers@qebhw.co.uk) is a barrister at QEB Hollis Whiteman.

FEATURE › DOCUMENT EXAMINATION

Ink spots – advances in pen and print identification

The reprographics industry is continually pushing for better quality imaging at a lower price, with rapid adoption of new inks, papers and printing methods. **Robert Stokes** reports on how forensic document science is innovating to keep pace.



Techniques under development to analyse ink promise significant benefits to document examiners; they will be very welcome. Forensics may have travelled far since handwriting experts relied on just magnifying glasses and experience but it has had to: high-quality inkjet and laser printers now make it increasingly difficult to distinguish between photo-quality frauds and commercially printed, legitimate documents.

The latest forensic document scanners are able to assess variations in inks and toners on printed surfaces, looking for idiosyncratic printing variations and flaws linked to inkjet nozzles. More fundamental chemical and/or physical analysis of inks and toners will flag up further singular characteristics.

© Informa UK Ltd 2014