(Not) getting away with murder

or

Some reflections on the principle of forfeiture as applied to the administration of estates

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Introduction

It is a basic principle of social morality that crime should not pay. A crime is a wrong against society that is sufficiently serious for its commission to generate a punishment that is (hopefully) a deterrent against such behavior. In relatively recent years, criminal courts have had powers to forfeit criminal benefits (to the state) or to require the payment of compensation for losses caused to third parties by such behaviour. And as a matter of policy the legal system has applied a series of rules to private law transactions and events that aim to prevent persons benefiting from their crimes. But these rules do not spring from the same historical roots, and are not consistent in application or effect. The doctrine of illegality as it applies to consensual transactions is pretty much judge made; was a mess; and is now governed by the principles set out in Patel v Mirza [2016] UKSC 42. Watch this space to see how these principles are interpreted in years to come. The doctrine of forfeiture is historically different, based as it was on the principle of escheat, or forfeiture to the Crown of the estates of a convicted felon[1].

[1] Abolished by the Felony Act 1870 (33 & 34 Vict. C. 23)

What does the Forfeiture Rule do?

Unless there are no other beneficiaries (in which case the estate will pass as *bona vacantia*), the Crown no longer benefits from a forfeiture. What is forfeit is not the property, but the wrongdoer's right to claim the property arising on death. And this is not a forfeiture, in the sense of a 'claiming back' by a third party, but a straightforward loss or denial of a right. It does not matter that the benefit would be obtained under the will of the deceased, or on an intestacy where the wrongdoer would benefit by operation of law. It also applies to a *donatio mortis causa*. When the principle applies, it also has the effect of terminating the right of survivorship in jointly owned property as between the wrongdoer and the deceased[2], which is thereafter held as tenants in common.

One point to remember is that the rule prevents the enforcement of rights, not their creation[3]. Where the death of the deceased generates obligations that persons other than the wrongdoer can benefit from, then there is no reason why those rights should not be created, and enforced by the third parties, as in Cleaver v Mutual Reserve Fund [1892] 1 QB 147, where the Defendant Insurers had refused to pay out on Mr. Maybrick's life assurance policy on the basis that he had declared it was to be held on trust for his wife, and Mrs. Maybrick had been convicted of murdering him by poison[4]. The Court of Appeal held that the effect of the forfeiture rule was that the trust was not enforceable, and the estate would hold the proceeds of the policy for the deceased's other relatives as if on an intestacy. Lord Esher MR appears to have taken a slightly jaundiced view of the insurer's motivations:

> "……when people vouch [the forfeiture] rule to excuse themselves from the performance of a contract, in respect of which they have received the full consideration, and when all that remains to be done under the contract is for them to pay money, the application of the rule ought to be narrowly watched, and ought not to be carried a step further than the protection of the public requires."

The forfeiture rule is a pretty blunt instrument. It also often had the effect in practice of disinheriting the children of the murderer[5]. The law was changed in this respect by the Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act 2011. Where a death to which the

[2] See Dunbar v Plant [1997] 4 All ER 289

[3] A point that also arose in Henderson v Wilcox [2015] EWHC 3469 Ch, where the court concluded that a pre-existing interest or right under a discretionary trust where the deceased and the claimant were named beneficiaries was not affected by the forfeiture rule (at 18]).

[4] The case was a sensation at the time. Mrs. Maybrick's death sentence was commuted to life imprisonment. More recently, Mr. Maybrick, a Liverpool merchant, has been mooted as a rather unlikely candidate for Jack the Ripper.

[5] See Re DWS [2001] Ch 568

forfeiture rule applies after 1 February 2012, the killer will be deemed to have predeceased the deceased, with the result that at least in some cases his children would be in line to take his bounty. Of course, if the killer acted so as to ensure that certain parties benefited from an already existing will (for example, to prevent the deceased from carrying out a threat to change it and disinherit the killer's children) then unless the children were party to the unlawful design, they would still benefit.

Where a person unlawfully killed another, the wrongdoer would be prevented by the policy underling the forfeiture principle from making an application under the Inheritance (Provision for Family and Dependents) Act 1975[6]. One can understand that; it might be thought pretty repugnant for a killer to ask a court for 'reasonable maintenance' from the estate of his victim. But on the other hand, the court has a discretion in deciding whether to act (which takes into account 'conduct'[7], and the killing would presumably fall within that). In any event, whatever the true position at common law the Forfeiture Act 1982[8] provided that such claims could still be heard, notwithstanding the unlawful killing. One might think that that would be that. But in Re Royse the court expressed the *obiter* opinion that you could not get around the forfeiture rule this way because the will did make reasonable provision for the claimant; it was only the forfeiture rule precluding recovery that caused the problem. HHJ Norris QC[9] in Re Land [2007] 1 All ER 324 disagreed with this, construing the requirement of a failure to make reasonable provision as one that applied to the will subject to the forfeiture rule. Unsurprisingly perhaps, as the consequence of such a rule would be that a claimant for whom reasonable provision had been made would be barred, whereas one for whom no reasonable provision had been made would not be, and that would be illogical[10].

What is the applicable framework?

The application of the forfeiture principle is a matter for the common law (albeit as we have seen it has been tinkered with by statute[11]), and as far as the common law is concerned there are no

[6] Re Royse [1984] 3 All ER 339.

[7] See section 3(1)(f) *ibid*.

[8] Section 3 *ibid*.:

"**Application for financial provision not affected by the rule.**

(1)The forfeiture rule shall not be taken to preclude any person from making any application under a provision mentioned in subsection (2) below or the making of any order on the application."

[9] As he then was.

[10] *Ibid*., para. [22]. Note that applications under the 1975 and 1982 Acts (see below) have different time limit provisions, and provide for potentially different outcomes – reasonable provision as against reinstatement of (potentially) all of the benefit forfeited.

[11] The Forfeiture Act 1982 refers to the forfeiture rule in a way that makes it clear it is a judge-made concept. Section 1(1) *ibid.* and see the comments of HHJ Cooke in Henderson v Wilcox [2015] EWHC 3469 Ch at [9]

degrees of forfeiture. If it applies, it applies absolutely. On the other hand, there is a statutory scheme of relief from the effects of forfeiture under the Forfeiture Act 1982 which gives the Court a discretion to relieve the effect of a forfeiture.

When does it apply?

Historically, the forfeiture rule applied to cases of murder[12] and manslaughter. Bear in mind that before the Homicide Act 1957 manslaughter existed only as gross negligence or unlawful act manslaughter, where the wrongdoer did not intend to kill or cause grievous bodily harm, but carried out an unlawful act (or omission) from which death resulted. In 1957 this changed because 'diminished responsibility' as basis for manslaughter was introduced[13]. It might be thought that this was done to ensure that morally blameless defendants were not convicted of murder, but the truth seems to be that the government thought that juries were not convicting such defendants of anything because of the mandatory sentence at that time – judicial execution by hanging[14]. Thus, the Act was intended to increase convictions for unlawful killing overall. The distinction between murder and manslaughter remains important in forfeiture cases when one considers relief (see below).

It is now accepted that the rule applies to all cases of manslaughter. In 1914 the Court of Appeal apparently applied it to all cases of manslaughter – I say apparently because the case was an extreme one[15]. However the matter was resolved conclusively in 1997[16]

[12] See In Re Crippen [1911] P 108 – one of the most notorious cases of the great age of the English murder. The deceased, Cora, was murdered by her husband. Before his execution he drafted a will appointing his mistress, Ethel, as his executrix and beneficiary. The hearing was an application to pass over Ethel as entitled to letters of administration of Cora's estate.

[13] It also provided for a defence to murder of provocation, reducing the offence to manslaughter; abolished the doctrine of constructive malice; and reduced the offence relating to suicide pacts to manslaughter – Dunbar v Plant at p.306 per Phillips LJ.

[14] Capital punishment was suspended in 1965 by the Murder (Abolition of Death Penalty) Act 1965 and in broad terms abolished under the provisions of that Act in 1969. Various odd and specific capital offences were abolished as to the capital penalty in the succeeding decades, and capital punishment is an impossibility whilst the UK remains a signatory to the European Convention on Human Rights, as it has been since 1998.

[15] In Re Hall [1914] P.1. Hamilton LJ in terms redolent of a bygone age justified applying the rule in Cleaver (murder) to manslaughter in this way:

> "Why should the legatee be excluded from taking the bounty when he can be hanged, and not be excluded when he can only be sent to penal servitude for life? The distinction seems to me either to rely unduly upon legal classification, or else to encourage what, I am sure, would be very noxious - a sentimental speculation as to the motives and degree of moral guilt."

[16] Dunbar v Plant [1997] 4 All ER 289. See also Re Land [2007] 1 All ER 324 where it was applied to a case of 'motor manslaughter'.

The Courts also had to consider the knotty problem of suicide. On the one hand, suicide is viewed by the law as self-murder or *felo de se*. It is also, canonically, a grave (indeed a mortal[17]) sin. More prosaically, it results in the loss of an economic asset to society. So all of the arguments are against it except possibly that of humanity or relief from suffering. But you might think that this does not matter. What can the law do? Forfeiture in the old sense might be a deterrent ('If you commit suicide we will indirectly punish your relatives'), but under the current (post-1870) doctrine it's pretty pointless. The relevance lies not in the suicide, but those who aid and abet it.

Now, in English law the aider and abettor of a criminal act is liable to be punished as a principal[18]. That principle applies to the forfeiture rule. How could it not? If A, B and C conspire to lure D to a lonely road where C will kill him, A & B are liable as principals in the crime of murder. The forfeiture principle applies to them as much as to C. Indeed one might think it should apply more so were that possible, as C is usually the heavy on piece rate[19] and A & B the fiscal beneficiaries of Ds death. Now imagine the position where Mr. and Mrs. A are recently but unhappily married. Mrs. A has an affair with B, a jealous thug who has a long history of acts of grievous violence against those who he considers deserve it. Mrs. A tells B (untruthfully) of Mr. A's beastliness towards her, and B perhaps unsurprisingly stabs Mr. A to death. If Mrs. A foresaw and intended that, then she would be guilty of incitement to murder[20]. Equally where A gives B a knife knowing what he intends to do with it, that is aiding and abetting[21]. Note that hiding the knife afterwards is what the Americans call being an accessory after the fact; we would call it perverting the course of justice, and the forfeiture rule would not apply to it.

The relevance of this discussion to suicide is that where a suicide pact occurs, the law treats each person as aiding and abetting the suicide of the other. Where one party survives but not the other then the forfeiture rule will apply. Often, the parties are married or star crossed lovers. You might think that the law is being pretty harsh here. What is the purpose of forfeiture? Two people were so miserable they wished to die together. One has failed in his aim and survived alone on Earth. Is that not punishment enough? Perhaps. The real problem is that the law is wary of people who survive suicide pacts in case they are not, or not genuine, suicide pacts. As in the testamentary

[17] In the religious sense of resulting in a loss of one's soul's possibility of passage to heaven, or immortality.
[18] See section 8 Aiders and Abettors Act 1861.
[19] If he sues for his fee, see Patel v Mirza [2016] UKSC 42
[20] Far-fetched? See the recent case of R v Sarah Bramley where the deceased and the lady (former boyfriend and girlfriend) were not married. She pleaded guilty to encouraging the heavy to commit an offence by sending him an intimate photo of herself with her former boyfriend. He (who had previous for violent assault) was convicted of murder.
[21] Section 1(2) Forfeiture Act 1982 states that an aider and abettor is liable to forfeiture. It is submitted that this is declaratory of the common law.

estoppel cases, only the party who benefits from the event remains alive to give evidence about it[22]. So the forfeiture rule applies[23] (subject to relief – see below).

How do you establish whether the forfeiture rule applies?

Ordinarily the work will be substantially done for you, with a criminal conviction. But that is not necessary, or necessarily the case. Indeed the (successful) suicide pact cases are those where there will not be a conviction to rely upon – see Macmillan Cancer Support v Hays [2017] EWHC 3610[24]. As was decided in Re Crippen *supra* the principle bars the representative of the wrongdoer from enforcing the rights flowing from the deceased's death, and in a 'successful' suicide pact case both parties would (a) be dead and (b) have committed the act of aiding and abetting the suicide of the other. In these cases the coroner may do the heavy lifting after the initial police investigation, and return a verdict of unlawful killing.

A conviction is, counter-intuitively, not conclusive proof of the offence in a subsequent civil proceeding, but it may be adduced as evidence of responsibility for an unlawful killing – see Hollington v Hewthorne [1943] KB 587 overruling contrary *dicta* in In Re Crippen *supra* ('The convenience of the decision is obvious, but we cannot agree that the authorities support it'); and section 8 Civil Evidence Act 1965.

If there has been an acquittal, that is not even relevant evidence of anything; although it will normally give the parties pause before they bring a civil claim based on unlawful killing.

If there has not been a criminal conviction, in a civil case the party asserting unlawful killing bears the burden of proving it.

The standard of proof is the civil standard, not the criminal standard of proof. However, a court will take into account the relative unlikelihood of a person committed an unlawful killing in deciding whether the event has been proven – Re Dellow's Will Trusts [1964] 1 All ER 771. Plainly, allegations are rarely if ever graver than in an assertion of homicide.

[22] See Re Gonin [1979] Ch 16 at 32 (Walton J): "Now it is common sense that all claims against the estate of a deceased person which had not been put forward whilst they were still living fall to be scrutinised with considerable care, for the obvious reason that the other party to the agreement is in the nature of things unable to give his or her version of events."

[23] This was decided in Beresford v Royal Insurance Co. [1937] 2 KB 197, a suicide pact case. At this date the survivor of a suicide pact would have been guilty of murder.

[24] The husband left a note for the coroner explaining exactly what he had done.

How do you disapply the forfeiture rule?

The statutory test is contained in section 2(2) Forfeiture Act 1982:

> "(2) The court shall not make an order under this section modifying or excluding the effect of the forfeiture rule in any case unless it is satisfied that, having regard to the conduct of the offender and of the deceased and to such other circumstances as appear to the court to be material, the justice of the case requires the effect of the rule to be so modified or excluded in that case."

This is a discretionary power, and there is a time limit of three months from conviction[25]. It is not extendable, and time it appears is not suspended if there is a pending appeal.

Critically:

(1) The Act defines the forfeiture rule as:

> "….. the rule of public policy which in certain circumstances precludes a person who has unlawfully killed another from acquiring a benefit in consequence of the killing."[26]

It does not define the forfeiture rule as applying in all cases of unlawful killing; only those 'in certain circumstances' which are not further defined.

(2) It does expressly include those who aid, abet, counsel or procure unlawful killing as within its ambit.[27]

(3) Those who murder are expressly excluded from the operation of the relief provisions of the Act[28]. Given that English law does not recognize a defence of mercy killing or euthanasia[29], this is capable of drawing a dividing line between relief and no-relief cases which might not lie where public sentiment would put it.

The principles on which the court acts were set out by Phillips LJ[30] in Dunbar v Plant. Having concluded that the trial judge was wrong to balance justice between the claimant and the family who would take on intestacy, said:

> "The first, and paramount consideration, must be whether the culpability attending the beneficiary's criminal conduct was such as to justify the application of the forfeiture rule

[25] Section 2(3) *ibid.*
[26] Section 1(1) *ibid.*
[27] Section 1(2) *ibid.*
[28] Section 5 *ibid.*
[29] See the case of R v Inglis [2010] EWCA Crim 2637 at [37] per Lord Judge CJ: "….the law of murder does not distinguish between murder committed for malevolent reasons and murder motivated by familial love. Subject to well established partial defences, like provocation or diminished responsibility, mercy killing is murder."
[30] With whom Hirst LJ agreed. Mummery LJ expressed a slightly different view; Phillips LJ's view represents the law.

> at all. The question of the extent to which the criminal should be blamed for committing the crime is a familiar one for the sentencing judge in the criminal jurisdiction, but not one that the judge exercising a civil law jurisdiction welcomes as the test for determining entitlement to property. I have already given my reasons for suggesting that it is likely to be appropriate to relieve the unsuccessful party to a suicide pact of all effect of the forfeiture rule. Each case must be assessed on its own facts."

For my part, this seems to me to be a plea to sentiment. How sympathetic should we be to the claimant? In Dalton v Latham [2003] EWHC 797 (Ch) Patten J made clear that sympathy for the claimant is not the guiding factor, but it will inevitably be a large part of the narrative that a claimant will seek to relate.

We can consider some of the cases that have followed on from Dunbar v Plant.

Re Land Deceased [2007] 1 All ER 324 was a grim manslaughter by gross neglect case where a son was convicted and sentenced to four years for failing to get help to assist his aged, domineering, bed-ridden mother who died in her own squalor at their home. Although the judge granted relief under the 1975 Act (the 1982 application being out of time) it seems fairly clear that he regarded the sentence as punishment enough[31].

Meeking v Meeking [2013] All ER (D) 250. This was a 'motor manslaughter' case where the claimant was the wife of the deceased; they had a drunken argument whilst he was driving them home. She operated the handbrake and he was killed in the crash. The Judge (HHJ Horowitz QC) found that the degree of blameworthiness coupled with genuine remorse brought relief into play. He then looked at the nature of the relationship between the deceased and the claimant and all of the other circumstances and granted full relief. The interesting point about this case was that it was a second marriage for both, and the children of the first marriage (who would benefit on forfeiture) ran the argument that the claimant was a gold-digger who made the deceased's life a misery. This is a high-risk strategy and if it fails the likelihood is that the court will swing hard in favour of the claimant.

Chadwick v Collinson [2014] EWHC 3055. A loving but paranoid husband stabbed his wife and 6 year-old son to death. The Judge (HHJ Pelling QC) refused relief. The relevant factors were the severity and duration of the attack; the fact that the claimant had some control over his acts; and that the deceased's (and the Claimant's) assets had all derived from the deceased's mother. This seems to me a difficult case that turns on the medical expert's evidence. He said that the sole

[31] See at [26] – [27]

cause of the claimant's actions was 'the fact that he was suffering from a severe psychotic mental illness'. But he also said that the claimant had some control over his actions, and that his actions were purposeful. He responded to written questions agreeing that the claimant had significant control over his actions, including *how he decided to act*. The judge concluded that 'the evidence that is available does not establish that the abnormality from which the claimant was suffering caused the deceased to kill either the deceased or his son'[32]. In my view the expert blundered. The only basis on which the judge could have been led to the conclusion he was, was that the claimant was a nasty thug whose behavior was worsened by his psychosis. But that was not the case here at all. Perhaps the true problem was that the expert was not called to clear matters up.

Henderson v Wilcox [2015] EWHC 3469 arose from a conviction for manslaughter by a 62 year old son on his 87 year old mother. The relationship was very close, the claimant having lived at home throughout his life and never had a girlfriend. The deceased was over-protective. In recent years, social services had been concerned that he had been assaulting the deceased. The deceased made limited allegations only. She died as a result of a sustained assault in the house including multiple fractures, punctured lung, brain damage and internal bleeding. The claimant was diagnosed as having 'a combination of moderate depressive episode, mild learning disability and an autistic spectrum disorder'[33]. His plea to manslaughter was on the basis that he did not have an intention to kill, not diminished responsibility. He was sentenced to a hospital order. HHJ Cooke refused to grant relief, noting the length of time the assaults took place; lies told to social services; and relative awareness of wrongdoing.

Macmillan Cancer Support v Hayes [2017] EWCH 3110 (Ch) concerned a suicide pact between a husband and wife in their 80s. She was demented; he suffered from terminal cancer. He killed his wife and then committed suicide. She left a will leaving everything to him if he survived, otherwise to charities and friends. He left a will leaving everything to the same charities and friends. The effect of forfeiture was that she would be treated as dying intestate, and her estate would pass to distant relatives. The merits, as between Claimants (charities) and relatives (who did not oppose the application) were plain. The effect of the forfeiture rule here would be to thwart the wife's wishes. The Judge (HHJ Raeside QC) also considered 'blameworthiness' and considered that the circumstances (a loving couple driven by circumstances to end it together) indicated that relief should be granted. This is very understandable; but the problem surely remains that the husband's act was a mercy killing, which is murder, not manslaughter. The technical answer seems to be that section 5 of the 1982 Act bars claims for relief where a claimant

[32] at [29]
[33] at [45]

'stands convicted of murder'. Here the husband was never convicted. But the purpose of section 5 is I would suggest to give absolute primacy to the criminal court's decision. The same policy should apply where the chancery court concludes that a murder has been committed. One practical answer may be that the if the chancery court considers that the husband 'may' have been able to rely on a defence of diminished responsibility[34] then it should find that his offence was that of manslaughter; but this conflicts with the authorities on burden and standard of proof. The technical position is I think that in a civil court diminished responsibility would have to be proven by the wrongdoer (or the person seeking relief) on the balance of probabilities. In truth, even judges are human. The astute ones will cut the wrongdoer all of the legal slack, and then if so minded find against them on the facts.

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[34] Given the sympathy of juries, not unlikely. In R v Ingram (*supra*) the Court of Appeal expressed surprise that diminished responsibility had not been run as a defence at trial. Even the unlikeliest cases can succeed. In Grey v Barr [1970] 2 QB 2626 Salmon LJ said that he was surprised that the claimant was acquitted of murder in In Re Hall [1914] P.1, she having shot her lover four or five times as he lay in bed, "…..The only surprising thing about the case is that she was acquitted of murder, apparently for no reason, except, perhaps, that she was defended by Mr. Marshall Hall". That is one way to get away with manslaughter.