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Money Laundering bulletin

The monthly briefing service for anti-laundering specialists

North and South – English and Scots case law

According to recently published figures the number of convictions for money laundering offences in England and Wales has reached a plateau of around 1,250 a year (House of Lords Library Note, 14 March 2011), writes ***Jonathan Fisher QC****. Although figures for conviction rates have not been published, research undertaken under the auspices of the Ministry of Justice has shown that the conviction rate for money laundering offences (recorded as proceeds of criminal conduct offences) is now around 64% (Thomas, 'Are Juries Fair?', February 2010, figure 3.10). Extrapolating the figures, this means that money laundering offences must be charged in around 1,950 cases a year. It will be interesting to see whether the acquittal rate, presently running at somewhere in the region of 36%, rises during the next twelve months as the impact of three appellate decisions, two south of the border and one in Scotland, starts to take effect.*

Geary

The first case, *R v Geary* [2010] EWCA Crim 1925, involved a question that arose in connection with *section 328* of the *Proceeds of Crime Act 2002* (POCA). This offence, it will be remembered, criminalises conduct when a person becomes concerned in an arrangement which facilitates the acquisition, use, retention or control of criminal property for or on behalf of another person. The Court of Appeal (Criminal Division) was asked to consider for the purposes of this section whether the arrangement referred to property that had already become criminal property by the time when the arrangement to "acquire, retain, use or control" the property was made, or whether the arrangement could extend to property that was originally legitimate but became criminal property by virtue of the arrangement which was made. The Court of Appeal answered the question by holding that for the purposes of committing an offence under *section 328* the property must be criminal property by the time when the arrangement was made.

The facts of the case involved a bank employee who had diverted monies from a trading account at the bank to accounts operated by his accomplices. The bank employee did not realise that the monies were criminal property, thinking instead that the monies had been legitimately obtained. This was because one of his accomplices had told him that he had wanted the monies diverted to different bank accounts in order to hide them from his wife from whom he was about to separate and would subsequently divorce. The prosecution alleged that the monies had already become criminal property by the time that the bank employee handled them, since their origin derived from the proceeds of a fraud which the accomplices had perpetrated. But as the bank employee pointed out, this line of thinking was flawed because so far as he was concerned, at the time when he handled the monies he neither knew nor suspected they were the proceeds of fraud. In this connection, the definition of "criminal property" comes into sharp focus. Pursuant to *section 340(3)* of POCA, property is criminal property for the purposes of the legislation only where it is derived from criminal activity and the person alleged to have committed the money laundering offence knows or suspects that it is so.

Against this background, it was perhaps no surprise that the Court of Appeal quashed the conviction. In a strong expression of opinion, Lord Justice Moore-Bick made clear that in relation to *sections 327* to *329*: "the natural meaning of the statutory language is that… the property in question must have become criminal property as a result of some conduct which occurred prior to the act which is alleged to constitute the offence… [It is]… in the interests of legal certainty that legislation of this kind should be interpreted in accordance with its ordinary and natural meaning" (judgment, paragraph 36).

This is not to say that the bank employee was not guilty of a money laundering offence. He could not be convicted of an offence prohibiting his involvement in an arrangement to money launder the proceeds of crime contrary to *section 328*, but at a later stage, when

he handled the money (as opposed to merely agreeing to handle the money) he fell foul of *section 327* of POCA, since at the moment of handling he became guilty of transferring property, which, on the basis of the story he believed about hiding the monies from his accomplice's wife, he suspected to be the proceeds of criminal property. It was not the fact that property had derived from fraudulent activity which rendered it criminal property in the bank employee's hands. Rather, it was the fact that he suspected the monies were being hidden from his accomplice's wife, in order to frustrate the course of justice in ancillary relief proceedings that were likely to take place. As Lord Justice Moore-Bick explained: "… on the assumption that the purpose for which the money was transferred… involved perverting the course of justice, so that it became criminal property in his hands, [D], who knew the purpose for which it had been transferred to him, did know or suspect that he was then dealing with criminal property… In our view it would have been more satisfactory all round if the Crown had taken a little more time to consider the implications of [D's] account and… sought to amend the indictment..." (judgment, paragraphs 39, 40).

Tangentially, it has to be said that the distinction drawn by Lord Justice Moore-Bick between *section 328* on the one hand, and *sections 327* and *329* on the other, is not entirely satisfactory. In due course I expect the leading academic commentators to attack this aspect of the judgment as unsatisfactory. Apart from anything else, it is positing that the two limbs of the definition of criminal property in *section 340(3)* can be satisfied by reference to different types of criminality – eg, the property was derived from fraudulent conduct but the money launderer falls within the terms of definition, not because he knows or suspects that the money was derived from fraudulent activity but rather because he believes a "cock and bull" story about the accomplice concealing the monies from his wife who is likely to commence ancillary relief proceedings against him in due course.

Akhtar

The facts of the second case, *R v Akhtar* [2011] EWCA Crim 146, are easier to follow and involved a factual scenario which is familiar to many practising solicitors and criminal barristers. The case involved a classic mortgage fraud whereby Mr Akhtar introduced clients to a mortgage broker for a fee. Mr Akhtar produced false income statements and employer references for the clients in order to obtain the mortgage, and he was duly charged with committing an offence contrary to *section 328* of POCA on the basis that he had been concerned in an arrangement (ie, making a false mortgage application) that facilitated the acquisition of criminal property (the mortgage sum) by or on behalf of another. Mr Akhtar pleaded guilty but then appealed to the Court of Appeal (Criminal Division) out of time, contending that, following the line of reasoning in *Geary*, there was no criminal property in existence at the time when he made the false mortgage application. The prosecution sought to support the conviction by arguing that when Mr Akhtar entered into the arrangement he knew he was facilitating the acquisition of criminal property for another person, and the property was acquired pursuant to this arrangement. But the prosecution argument was doomed to fail, for, as the Court had pointed out in *Geary*, it was an inescapable fact of the case that at the time when Mr Akhtar made the fraudulent application, there was no criminal property in existence. The mortgage funds became criminal property at the time when the arrangement achieved its objective, which was when the mortgage company sent out the funds to the client, and not at the time when the arrangement to make a fraudulent mortgage application was made in the first place. As Lord Justice Elias commented pithily: "Property is not criminal property because the wrongdoer intends that it should be so" (judgment, paragraph 20).

Like the bank employee in *Geary*, Mr Akhar was guilty of committing a serious criminal offence, but not the one with which he had been charged. It was common ground between the prosecution and the defence that Mr Akhtar was guilty of obtaining a money transfer by deception contrary to *section 15A* of the *Theft Act 1968* as amended, now covered by *section 2* of the *Fraud Act 2006* (fraud by false representation). The prosecution blundered by not charging Mr Akhtar with this offence, choosing instead to deploy the money laundering offence because it thought it would be easier to prove. The Court of Appeal (Criminal Division) was not amused and declined to help the prosecution climb out of the pit which it had dug for itself: "The fact that [Mr Akhtar] is very likely to have been convicted under the alternative section is not of course a reason for not quashing this conviction" – per Lord Justice Elias, (judgment, paragraph 24).

Sarwar

The third case comes from north of the border, and again the circumstances will be instantly recognisable

by criminal practitioners who prosecute and defend large scale VAT fraud cases in the Crown Court. The case of *R v Sarwar* [2011] HCJAC 13, determined by the Appeal Court, High Court of Justiciary in Scotland, involved an MTIC fraud. Mr Sarwar was alleged to have converted criminal property to the total value of UK£1.2 million in a short time frame between 24 February 2003 and 25 April 2003 contrary to *section 327* of POCA. The monies had been received from six companies and paid into Mr Sarwar's company's account. There were subsequent onward transfers to third parties and some cash withdrawals. Since there was no evidence that Mr Sarwal knew or had personal dealings with those responsible for organising the MTIC fraud, the prosecution charged him with money laundering on the basis that he must have suspected the monies derived from MTIC fraud. However, the evidence of Mr Sarwar's awareness of his involvement in MTIC fraud was wholly circumstantial, and the issue for the Appeal Court was whether there was sufficient evidence from which it was possible to safely infer that Mr Sarwar knew or suspected that the monies constituted or represented a person's benefit from criminal conduct. As Lord Justice General (Lord Hamilton) explained, echoing England's Court of Appeal (Criminal Division) in *Geary* and *Akhtar*: "Property is criminal property if, but only if, the alleged offender knows or suspects that it constitutes or represents a person's benefit from criminal conduct" (judgment, paragraph 32).

The Appeal Court was firmly of the view that there was no evidence adduced in the case to this effect: "There was no evidence that the appellant knew, or had had any personal dealings with, Asif Ahmed (or any person so describing himself) or any other person involved in the MTIC fraud at any point prior to the monies representing the criminal property being first paid into United's bank account. There was accordingly no basis on which it was, or could be, claimed that the laundering of the proceeds of crime through United was a pre-arranged exercise in which the appellant was complicit" – per Lord Justice General (Lord Hamilton), judgment, paragraph 34.

The Appeal Court was also decidedly unimpressed with the way in which the prosecuting authority had acted in this case. In a passage which should resonate in the ears of prosecutors from John O'Groats to Lands End, the Lord Justice General (Lord Hamilton) scolded the prosecuting authority for their perceived ineptitude: "Central… to any successful prosecution of the present type is proof… that the property in question is criminal property, that is, that the accused knew or suspected that it constituted or represented a benefit from criminal conduct. Before such a prosecution is mounted it should be clear that there is a proper evidential basis upon which such personal knowledge or suspicion can be brought home against the prospective accused. While we are not privy to the whole material available to the prosecutors in this case, our impression… is that no proper analysis was conducted by the prosecution of the elements of the offences which had to be proved, with the consequence that… all failed to focus on the critical issue of the appellant's personal knowledge or suspicion with regard to the monies paid to United on behalf of Asif Ahmed" (judgment, paragraph 47).

Conclusions

It is interesting to note that differently constituted Courts in *Geary*, *Akhtar* and *Sarwal* have spoken with one voice and clarified that the reach of the money laundering offences in Part 7 of POCA has its limits. Whether these cases presage a new judicial approach to the anti-money laundering legislation, restricting its use and encouraging the charging of more predicate criminal offences in the more traditional way, remains to be seen. Either way, it is incumbent upon prosecuting authorities to consider very carefully the quality of evidence that is available before launching a prosecution for a money laundering offence. If the predicate offence cannot be proved, the prosecution will need to produce compelling evidence from which the criminal origin of the property must have been inferred by the offending handler. If the evidence falls short of establishing not only that the property was derived from criminal conduct but also that the defendant knew or suspected this was so, the defendant will be acquitted of a money laundering charge. In the case of the *section 328* offence, the prosecution must be able to establish these key aspects at the time when the defendant became concerned in the arrangement. Proof of *ex post facto* criminality and/or awareness of criminality will not be sufficient.

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