

## MONEY LAUNDERING

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### Offences on the fringes of fraud - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

Money laundering is being taken increasingly seriously both by the prosecution authorities and the Courts. The new Serious Organised Crime Agency (SOCA) is now up and running and investigating laundering cases. SOCA's strategic plan for 2006-2007 proclaims a number of priorities which include increasing "the amount of criminal assets recovered and increase the proportion of cases in which the proceeds of crime are pursued." If anyone is in any doubt about how serious SOCA is about money laundering then they will only have to remind themselves of the announcement earlier this year that SOCA is taking over the functions of the Asset Recovery Agency. Part 7 of Proceeds of Crime Act 2002 (POCA) contains the Act's money laundering offences.

#### TYPES OF MONEY LAUNDERING

Money laundering is simply the 'cleaning' or disguising the origins of the proceeds of crime. Money laundering schemes range from the straightforward and simple to the sophisticated, involving chains of several companies and possibly offshore accounts. The CPS guidance for prosecutors on this issue envisages that there are basically 2 types of money-laundering. Firstly "own proceeds" or "self-laundering", this is where an offender simply acts to launder the proceeds of his own offending. Secondly, there is laundering by a person other than the author of the principle offence. These 2 types of laundering can be charged on a stand alone indictment or may be secondary counts where the principal offence is also charged.

#### LAUNDERING CHARGES UNDER POCA AND 'CRIMINAL PROPERTY'

There are three main offences created by POCA which carry penalties of up to 14 years imprisonment. They are s327 - concealing, disguising, converting or transferring criminal property, or removing it from the jurisdiction. This is one offence which can be committed in the five different ways listed. It is perhaps the easiest way for the Crown to proceed on 'self-laundering' charges. Section 328; is entering into, or becoming concerned in an arrangement to facilitate the acquisition, retention, use or control by, or on behalf of another person, of criminal property knowing or suspecting that the property is criminal property. That offence can cover a wide range of evils but it can be seen how it would be used in cases where the launderer is not said to be the principal offender in the criminal conduct. Section 329 is the offence of acquiring,

using or having possession of criminal property. Again, this can cover a whole range of situations but will often be used to prosecute an 'end user'; i.e. the person who buys a car, a house etc from a criminal.

There are exceptions to all 3 charges where the person concerned makes an "authorised disclosure" to the relevant authorities but this is really to protect banks and other businesses from committing what would otherwise be an offence when dealing with a criminal's money. The Act is clear that certain business, are under a duty to inform the police of any customer they believe is laundering criminal cash through their business. Many professionals have fallen foul of the Act in one way or another.

#### WHAT IS 'CRIMINAL PROPERTY'?

It can be seen then that the lynchpin of the 3 offences is the notion of 'criminal property'. The prosecution have to prove that the property, whether it is cash, a house, a car or whatever it is is 'criminal property'. This is defined at s340(3) as property which represents a benefit from criminal conduct, either directly or indirectly, in whole or in part, so long as the launderer 'knows or suspects' that the property represents such a benefit. The Crown has to show that the launderer committed the relevant act (i.e. transfer, concealing etc) knowing or suspecting that the property derived from criminal conduct.

#### UNDECLARED INCOME- IS IT CRIMINAL PROPERTY ?

In R v IK [2007] EWCA Crim 491, 8/3/07 the question for the Court was whether the proceeds of cheating the revenue could be 'criminal property'. In a nutshell a legitimate trader had earned legitimate money undertaking a legitimate business (a shop). However, the allegation was that not all the income was declared - thus cheating the revenue. The Crown prosecuted a money laundering offence but the trial Judge ruled that there was no 'criminal property' - the money did not come from crime. Following a prosecution appeal the Court of Appeal found that the undeclared income could in part 'represent' the proceeds of crime, as that undeclared amount would be representative of the 'benefit'. Thus applying the statute properly that undeclared income could at that point be criminal property.

## **HOW DO THE PROSECUTION PROVE THE EXISTENCE OF ‘CRIMINAL PROPERTY’?**

So as to prove any of the above 3 offences the Crown have to prove that the property was derived from criminal conduct. How do they do that?

Of course it all depends on the facts of the case; if the money laundering is a secondary count to the principal crime alleged in count 1, then the focus for all sides is to concentrate on count 1.

If though the alleged money launderer is not included in count 1, or the original criminal activity was committed by someone else convicted in an earlier case; or even where there is no convicted principal the case for the Crown on money laundering becomes more problematic. The Crown will first of all want to prove a link between the principal criminal, the drug trafficker for example, and the launderer. Under the three offences the Crown have to show that not only that actual property derived from crime, but it must also be proven that the suspect ‘knew or suspected’ that the property represented benefit from crime. When the prosecution is unable to show the commission of the underlying criminal offence then that task becomes more difficult and the Crown will then usually have to rely on circumstantial evidence to try and prove that the money was criminal property.

## **KNOWING OR SUSPECTING DEFENCE**

The same often applies where a particular profit making crime can be proven to have been committed by someone else; then the only issue for the jury, in the money laundering trial, will be what was in the alleged launderer’s mind - did he/she ‘know or suspect’?

In *R v Da Silva* [2006] EWCA Crim 1654, 11/7/06 the Court of Appeal considered a trial Judge’s direction to the jury on the word ‘suspicion’. Generally there should be no jury direction on what it means but in law ‘suspecting’ means that “there is a possibility, which is more than fanciful that the relevant facts exist. A vague feeling of unease would suffice.”

## **CIRCUMSTANTIAL EVIDENCE**

Of course the circumstantial evidence which the prosecution may bring to Court can be quite damning at first sight, e.g. large sums of cash, contaminated notes, lies in interview and a lack of commercial sense in some transactions linked possibly with connections to anyone accused or convicted of a principal offence. However, though the power of circumstantial evidence should never be underestimated, the fact is that the defence may, either through cross-examination or through the Defendant’s evidence, show that there are other ‘co-existing circumstances’ which explain the issues and can go to weaken the prosecution’s inference.

The Judge may be persuaded that the case is a suitable one for direction to the jury on circumstantial evidence. This simply means that the Judge will remind the jury that, as a matter of law, that it should distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Juries are often told that speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them and that is an un-supportable basis for a conviction.

## **EXPERT EVIDENCE AND DEALING WITH THE INFERENCES**

Rebutting inferences therefore can be a very significant part of the job of defending and must get early attention. It may lead to the instruction of an expert, for example a Forensic Accountant. It may be that an accountant or auditor with a particular knowledge of some business area can help a Defendant show, for example, that it is not unusual for significant cash flow to come from a bar, or a mini-cab businesses - all cash only businesses or that certain losses appeared to fall outside the indictable period or the Defendant’s work shift. The expert may be able to help rebuttal by comparing with other like businesses in the area and/or show the existence of a reasonable audit trail. Of course there may be a lack of a proper audit trail etc; experts will not always be able to help but in the right circumstances such evidence can make the Crown’s case look like speculation.

It is especially important in money laundering cases to keep an eye on the basic ingredients of the offence and if it is a ‘suspicion’ case seek to get rebutting evidence, and in complex cases ensure that full disclosure has been given of all the accounts and audit trails etc and an expert for the defence considered. One thing is for sure; given the authorities emphasis on money laundering, an increasing amount of this publication’s readership are likely to fall into POCA’s net in the months and years to come.

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