

FINANCIAL OFFENCES

Defending in Money-Laundering & Fraud cases - An article by Aziz Rahman, Solicitor and Jonathan Lennon, Barrister

In this article we attempt to address some of the issues that often arise when a Defendant is charged with a 'financial offence'; e.g. conspiracy to defraud or cheat, fraudulent trading, false accounting, tax or duty evasion, MTIC (or Carousel) frauds and the like. There is not the space here to look at each specific offence - instead we have made some general points about defending this type of case. Of course no short article like this can ever cover the multitude of variables that arise in this broad spectrum of offences, but there are things that both Defendants and their defenders can bear in mind at an early stage of the case.

EXPERTS

Very broadly speaking the prosecution have to prove that a Defendant acted, or omitted to act, in some way and that he did so with the guilty state of mind required by the offence; e.g. in a money-laundering case that a trader took cash from a drug dealer and exchanged it for a lower figure in the form of a cheque, knowing full well that the money was derived from the proceeds of crime; the act and the state of mind - what lawyers call respectively the *actus reus* and *mens rea*. Very often in these type of cases the act itself - the *actus reus*, is not denied but the Defendant denies having the requisite *mens rea*; whether that state of mind be knowledge, or reasonable suspicion etc etc. Ultimately, for the jury, this boils down to 'was the Defendant acting honestly or not?' - to answer that question the jury can look not just to the background that the prosecution present to them but also a fuller picture presented with the aid of experts.

Broadly speaking, defenders in financial allegation cases will look at patterns of behaviour of the Defendant and of his business practices. The prosecution will be bound to concentrate on the suspicious transactions it identifies within the indictment period, but the defence may be able to show similar transactions that the prosecution cannot challenge that go some way to support the case that a transaction was not as suspicious as now seems to others. It may be that an accountant, or auditor with a particular knowledge of some business area, can help a Defendant explain to the jury that what appears odd, or commercially risky, may be perfectly acceptable in a particular line of business or in a particular context. The authors are currently engaged in a significant money-laundering case where a 'cultural expert' (a consultant anthropologist) has been instructed to help explain to the jury cultural aspects of money-lending, business deals and Halwala banking

between certain south Indian communities.

FORENSIC ACCOUNTANTS

In the case of forensic accountants it is worthwhile for solicitor and counsel to appreciate at an early stage what the issues are for the accountant to concentrate on. The temptation may be to simply instruct an accountant and pass him the prosecution Case Summary along with the papers and a vague outline of the defence case and ask him or her to 'have a look'. That is not the right approach. The lawyers, and the Defendant, should understand what the accountant is being asked to do. His role may be critical and he or she should have his energies concentrated as far as possible at critical areas. It may be, for example, that a man who appears to be trying to split monies between a number of bank accounts before withdrawing it can be demonstrated by the accountant, historically, to have done more or less the same thing over a very long time - thus taking the sting out of the punch. An accountant may also be able to give persuasive evidence that a business was, or appeared, profitable, or going in the right direction, and was not just a VAT number being used in a missing-trader fraud, or a shell company processing the proceeds of crime. Audit trails may be poor, but armed with the right banking records and purchase invoices etc an accountant may be able to help present a case that the venture was, or could have been, commercially successful and was by no means the obvious scam the prosecution make out.

FORENSIC COMPUTING AND HANDWRITING EXPERTS

Other experts in these sorts of cases include handwriting experts and sometimes even a forensic computing expert. It is common these days for these types of cases to rely on thousands, if not millions of documents. To try and control the size of the case investigators will sometimes limit the searches of seized computers to all activity that took place on a certain day or days. Such information can be produced fairly easily but deleted files, if recoverable at all, may be difficult to attach a date and time to as the files are likely to be fragmented. Then either the prosecution or the defence might be looking at the other activity of the computer - e.g. the sending of e-mails to see whether the Defendant, or some others, were also using the computer around a particular time.

PREPARATORY HEARINGS

Certain cases are deemed so complex or difficult that a 'preparatory hearing' should take place first. In fraud type cases this is likely to be under s7 of the Criminal Justice Act 1987 but could equally be held under s29 of the Criminal Procedure and Investigations Act 1996. These hearings are designed to deal with disputes of law ahead of the trial. One peculiarity with them is that some rulings from these hearings can be taken, by either side, to the Court of Appeal before the start of the trial. Indeed in one case that the authors were involved in the Judge declared a preparatory hearing under s29 of the 1996 Act, and when the prosecution lost the argument they took the matter to the Court of Appeal; the case in the end went all the way to the House of Lords before the trial started (*R v H & C* [2004] 1 ALL ER 1269). The advantage of this is that a Defendant facing a particularly damning piece of evidence, but with an argument for exclusion under s78 of the Police and Criminal Evidence Act 1984, can argue to have the matter excluded, and if he fails try again at the Court of Appeal before facing a jury. However, the Court of Appeal last year decided that disclosure rulings could not be considered by the Appeal Court pre-trial; that would have to wait until after any conviction; *R v H* (Interlocutory Application: Disclosure); *Times Law Reports* 1/8/06.

DEFENCE CASE STATEMENTS

Under the Criminal Procedure and Investigations Act 1996, the defence have to serve a Defence Statement upon the Court and the prosecution. This will trigger further disclosure from the prosecution depending on what issues are disclosed by the Defence Statement. At this stage the defence team must have full instructions from the Defendant. This is because if there is any suggestion that there is to be an abuse of process application, e.g. because a part of the case is that the Defendant has been entrapped, or set up by an informer etc, then the particulars of the Defence Statement must be drafted with great care and attention. The skill comes in preserving a Defendant's instructions in the event of such an application failing; i.e. a defence of, 'I didn't know the transaction was fraudulent, and anyway I was encouraged by an agent provocateur into taking part in the deal'. Such a defence can appear like a Defendant trying to have his cake and eat it, which is why the Defence Statement must be crafted with great care so as not to give the impression to the Judge that the defence looks like a try on or desperate attempt to get off the hook.

WITNESSES

As mentioned above sometimes this type of case will turn on the jury's impression of the Defendant's honesty. It may boil down to the jury considering whether a Defendant has been a little entrepreneurial and simply got himself in a jam or, alternatively, they might think he is a chancer who has been caught out. Of course calling char-

acter witnesses can help; either people who can vouch for a Defendant's personal integrity or better, someone in business who themselves stand out as honest and forthright, and are prepared to say the same about a Defendant and his business practices. The practical problems are that for someone in business calling colleagues or past employees/employers up to ask them to come to Court and give evidence is embarrassing, and could lead to those people learning of the accusation that a Defendant had otherwise managed to keep quiet. Advice should be taken at an early stage about these difficult decisions - of course it always has to be borne in mind that if a Defendant puts his character in issue then any bad character he has could go before the jury - sometimes this could include previous acquittals or even an earlier bankruptcy. It all depends on the facts of the case but bearing in mind that if the particular case is likely to come down to whether the jury think a Defendant is an honest John or not, then these decisions must be considered early and very carefully.

In conclusion, it is a fact that the prosecution always appear to put an enormous amount of time and resources into investigating and prosecuting complex financial cases. They must be met head on and the defence up to full speed as quickly as possible, no matter how straightforward the issues at first appear to be. This is because the Courts will always want to have a hands on management of long or complex trials and will want to lay down strict timetables for the lawyers at any early stage - thus as always, early preparation is the key.

AUTHORS

Jonathan Lennon is a Barrister specialising in serious and complex criminal defence cases and Prison Law at 23 Essex Street Chambers in London. He is former co-editor of the *Prison Law Reports*.

Aziz Rahman is a Solicitor - Advocate and Partner at the leading Criminal Defence firm Rahman Ravelli Solicitors, specialising in Human Rights, Financial Crime and Large Scale Conspiracies/Serious crime. Rahman Ravelli are members of the Specialist Fraud Panel.

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CONTACT US

Rahman Ravelli Solicitors
Saracen House, 10 Pellon Lane, Halifax, HX1 5SP
DX 16001 Hx1
Tel: 01422 346666 (24HR)
Fax: 01422 430526

enquiries@rahmanravelli.co.uk

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