Money Laundering Keeping it clean…

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Part 7 of Proceeds of Crime Act 2002 (POCA) contains the Act's money laundering offences. The provisions have kept pro-active criminal lawyers (defence and prosecution) busy for years. Money laundering used to be a fairly well understood concept but, it has to be said, that as prosecutors got more and more used to the statutory framework so the multitude of scenarios which could lead to a money laundering charge appeared to grow and grow. Mercifully, the Court of Appeal has, in more recent times, begun to put a brake on some of these advances putting a little more common-sense back into the process of deciding whether a particular situation could amount to money-laundering or not.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0) 121 827 7985

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500

Fax +44 (0)1422 430 526
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Laundering Charges Under POCA and 'Criminal Property'

There are three main money laundering offences created by POCA - they all 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 - i.e. laundering the proceeds of one's own criminal activity. **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 businesses, are under a duty to inform the authorities 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'

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that the property represents such a benefit. The Crown thus 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.

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. The case was followed in
R v William & Ors [2013] EWCA Crim 1262
- the "criminal property", as defined by s340, was the entirety of the undeclared turnover, not merely the tax due – even if only the 'benefit' was the tax that should have been properly due.

How do the prosecution prove the existence of 'criminal property'?

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? 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 defendant as launderer. Under the three offences the Crown have to show that not only that the money derived from

crime, but also that the suspect 'knew or suspected' it was.

Where the prosecution is unable to show or explain to the jury what the exact underlying criminal offence was, 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 is 'criminal property'. The same often applies were a particular 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 defendant's mind - did he/she 'know or suspect'?

In
R v Anwoir [2008] 2 Cr. App. R 36
the Court of Appeal found that in that sort of case the prosecution had two ways of proving that the property was 'criminal property'. Firstly, by showing that it derived from a specific 'kind or kinds' of crime; e.g. fraud, drug-trafficking etc. Secondly, that from the circumstances the ***"irresistible inference"*** can be drawn by the jury that it can only be derived from crime.

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 of suffice."*** Of course the circumstantial evidence which the prosecution may bring to Court can be quite damming at first sight, e.g. large sums of cash, contaminated notes, lies in interview or a lack of commercial sense in some transactions, linked possibly with connections to someone convicted of the 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

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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.

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 the business concerned can help a defendant show, for example, that it is not unusual for significant cash flow to come from the sort of business concerned or that certain losses appeared to fall outside the indictable period. The expert may be able to help with the 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 certainly not be the answer every time but may be able to help in the right circumstances and make the Crown's case look like speculation.

Conspiracies

In

R v Saik [2007] 1 A.C. 18

the House of Lords considered allegations of conspiracy to money launder under the old, pre-POCA, law. The Court found an in-built tension because a conspiracy allegation requires a ***knowing*** agreement to commit an offence, whereas the actual offence itself (i.e. not a conspiracy) could be committed by the defendant merely suspecting that the property he was dealing with derived from the proceeds of crime. The conviction in that case was quashed. The case seems to have been accepted as applying equally to POCA cases - you cannot after all agree to have a suspicion, you either know or you don't know in a conspiracy case.

Attempts

London Office
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B1 2JB
+44 (0) 121 827 7985

Northern Office
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This is another area where there has been some recent return to common-sense. In R v Pace and Rogers [2014] EWCA Crim 186 (18/2/14) the principal issue before the Court of Appeal was the mental element required for an attempt to money launder. Thames Valley police sent undercover officers into scrap metal yards to sell power-cable, lead flashing, even a brass war memorial plaque all purportedly stolen. None of the items were in fact stolen. The defendants were convicted of an attempt to convert criminal property - s327(1)(c). The Crown's case was that though there could be no knowledge that the goods were stolen - since they were not - there could be a 'suspicion' which is all the Act required. The Court of Appeal thought it odd that a man could not be guilty, under these circumstances, of actually laundering, but could be guilty of attempting it (para 64) and, following the case of R v Montilla [2005] 1 Cr. App. R 26, found that for an offence of converting criminal property to be made out the property had actually to be 'criminal'.

"Arrangements"

Section 328 has produced some interesting case-law – but again it is all really common-sense, or the checking of a prosecution tendency to depart from common-sense. In R v Geary [2011] 1 WLR 1634 the Court of Appeal considered that the natural and ordinary meaning of 'arrangement' - to which it referred must be one which related to property which was 'criminal property' ***at the time the arrangement began to operate upon it***. It did not extend to property which was originally legitimate but became 'criminal' only as a result of the carrying out of the arrangement. In that case G was handling money which was going to be hidden from a spouse in a divorce case and could, at that point, have become criminal property. The case was more recently approved in the Supreme Court in R v GH [2015] 2 Cr. App. R. 12.

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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.

Jonathan Lennon is a Barrister specialising in serious and complex criminal defence cases at 33 Chancery Lane Chambers, London. He has extensive experience in all aspects of financial and serious crime and the Proceeds of Crime Act 2002. He is ranked by both Legal 500 Chambers & Ptnrs & is recognised in C&P's specialist POCA and Financial Crime sections; 'he is phenomenal and is work rate is astonishing' (2015).

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 and have been ranked by Legal 500 as an 'exceptional' firm with Aziz Rahman being described as 'top class''. The firm is also ranked in Chambers & Partners. Rahman Ravelli are a Top Tier and Band 1 firm.