

A round up of recent developments

David Winch, July 2006

This article presents a brief round up of recent developments - and an indication of some expected future developments - in relation to financial crime, money laundering and proceeds of crime.

The government fraud review

The final report of the Government Fraud Review has now been published.

This meaty report makes numerous recommendations which are open for consultation until 27 October.

The report attempts to take a holistic view of fraud and countering fraud. Recommendations range across fraud awareness and prevention, measurement and reporting of fraud, a national fraud strategy, investigation and prosecution of fraud, plea bargains, fraud trials and sentencing, and compensation for victims of fraud.

There is an emphasis on co-operation and co-ordination between the public and private sectors, both of whom stand to benefit from fraud reduction.

The report concludes that: "The main benefits of implementing the recommendations will be a reduction in fraud and the harm it does to the economy and society, an improvement in the way victims are compensated, and improved confidence in the criminal justice system".

An interim report had earlier concluded that investigative resources for dealing with fraud are fragmented and the police response to fraud is both small and declining.

Let us hope the report leads to some action.

The report is available from www.lslo.gov.uk/fraud_review.htm.

New legal decisions on the meaning of "suspicion"

There have been two important decisions of the Court of Appeal recently on the meaning of "suspicion" in relation to money laundering.

The first, *R v Mrs Hilda Gondwe Da Silva* [2006] EWCA Crim 1654, concerned a criminal case of alleged money laundering. The question arose as to whether Mrs da Silva **suspected** that her husband was engaged in, or had benefited from criminal conduct.

In brief, payments of "wages" were made by a company in response to time sheets submitted dishonestly by Mrs da Silva's husband in respect of non-existent employees. Some of these wages were banked in an account held by Mrs da Silva and then withdrawn from it.

Mrs da Silva was appealing against her conviction for facilitating the retention or control by, or on behalf of, her husband of the proceeds of his crime knowing or suspecting that he was, or had been, engaged in criminal conduct or had benefited from crime.

Mrs da Silva was charged under section 93A(1)(a) Criminal Justice Act 1988. If committed today, the offence would be prosecuted under section 328 Proceeds of Crime Act 2002, which has similar wording.

The Court of Appeal held that: "It seems to us that the essential element in the word "suspect" and its affiliates, in this context, is that the defendant must think that there is **a possibility, which is more than fanciful, that the relevant facts exist**. A vague feeling of unease would not suffice. But the statute does not require the suspicion to be "clear" or "firmly grounded and targeted on specific facts", or based upon "reasonable grounds". "

The Court added that: "using words such as "inkling" or "fleeting thought" is liable to mislead". In particular they considered that a person who **temporarily** held a suspicion but **honestly** dismissed it from their mind upon further consideration should not be liable to be convicted.

The second case, K Ltd v National Westminster Bank Plc [2006] EWCA Civ 1039, was a civil case again relating to suspicion and money laundering.

Essentially the bank failed to make a payment in relation to the purchase of mobile phones when instructed to do so by its customer on 22 August 2005 because the bank suspected that the funds in the account, and hence the payment, might be related to crime (presumably carousel fraud). The bank reported its suspicions to the authorities and awaited consent (which was received on 15 September 2005).

The Court referred to the da Silva case and adopted the same definition of "suspicion" in this civil case as had been used in the criminal case.

With regard to the position of the bank employee who first formed the suspicion, the Court held: "The existence of suspicion is a subjective fact. There is no legal requirement that there should be reasonable grounds for the suspicion. The relevant bank employee either suspects or he does not. If he does suspect, he must (either himself or through the Bank's Nominated Officer) inform the authorities".

In our view, these two cases will provide valuable assistance in relation to the interpretation of the money laundering provisions of the Proceeds of Crime Act 2002.

Consultation on new powers against organised and financial crime

Perhaps because of the Parliamentary recess, the House of Commons rose on 25 July and is not due to reconvene until 9 October, we have had a rash of government pronouncements recently.

Amongst these is a Home Office consultation paper on New Powers Against Organised And Financial Crime. This is open for consultation until 17 October.

The proposals in the consultation paper are designed to isolate those in crime organisations, particularly those involved in drug trafficking, illegal immigration, identity fraud and money laundering.

The proposals outlined in the paper include:

- creating a new 'prevention order' that would impose conditions on the movements and transactions of those suspected of organised crime,
- facilitating the sharing of data on suspected fraudsters between public and private agencies, and
- strengthening current laws and introducing new offences for encouraging or assisting criminal activity.

The proposed 'prevention orders' would be civil orders against individuals or organisations which would be designed to impose conditions which would make it more difficult for the subject of the order to carry out or facilitate future crimes. Such orders would be imposed by a court working to the civil standard of proof (that is, on the balance of probabilities) and so could be used against persons or organisations who could not be successfully prosecuted.

In relation to data sharing the consultation paper comments that: "It has become increasingly clear from discussions with our stakeholders that data sharing with other parts of the public sector is highly patchy, while sharing across the public-private divide is rarely even attempted."

The consultation paper picks up proposals of the Law Commission in relation to persons encouraging or assisting crime, and also foreshadows further amendments to the Proceeds of Crime Act 2002, including amendments to the consent regime in relation to money laundering reports to SOCA.

The consultation paper can be downloaded from <http://www.homeoffice.gov.uk/about-us/news/organised-crime-consultation?version=1>.

Cash seizure limit reduced

Under section 294 Proceeds of Crime Act 2002 a police or customs officer may seize "cash" (which for this purpose includes notes, coins, postal orders, cheques and travellers cheques) which he has reasonable grounds to suspect may be proceeds of any crime or intended for use in crime.

When this section was first introduced it applied only to cash finds of £10,000 or more. This limit was reduced to £5,000 in 2004. The limit was further reduced to £1,000 with effect from 31 July 2006.

Nigeria off FATF blacklist

Nigeria has been removed from the list of non-cooperating countries and territories maintained by the international Financial Action Task Force.

This leaves Myanmar (formerly Burma) as the only country remaining on the list.

The legacy of Al Capone

HM Revenue and Customs is to set up a new Criminal Taxes Unit aimed at disrupting criminal activity by imposing tax charges. In cases of serious crime the new unit will instigate and advise upon criminal prosecution opportunities using tax evasion and cheat charges.

Sir David Varney, chairman of HMR&C, said: "It will use every method of taxing and penalising suspected criminals, taking away their profits made from crime. The new Criminal Taxes Unit will aim to ensure that suspected criminals who have gained from their criminal activity are made to pay their fair share of tax."

It will be remembered that the notorious American gangster Al Capone was eventually imprisoned on charges of tax evasion in 1931. It seems that 75 years later HM Revenue and Customs are preparing to adopt the idea. The new unit is expected to become operational later this year.

Fraud Bill

The Attorney General, Lord Goldsmith, recently described fraud as "an area of crime which is second only to drug trafficking in causing harm to the economy and society".

One might expect, therefore, that the House of Commons would have been a cauldron of feverish excitement when the Second Reading of the Fraud Bill came before it on 12 June. In the event, of the almost 650 MPs, barely 15 turned up for the debate. Row after row of empty benches filled the chamber. However the Bill, first introduced into Parliament in May 2005, continues to make steady but slow progress towards becoming law. The Bill has now been approved on Second Reading and in Committee and so requires only to pass through the Report Stage and Third Reading before receiving the Royal Assent.

There is currently no legal definition of "fraud" in the UK. The offences which are often described as fraud have, until now, been set out principally in the Theft Acts 1968 and 1978. These Acts describe carefully defined offences which involve obtaining a benefit, in various ways, by deception. However the Acts define these offences so carefully that it has sometimes

been the case that clearly dishonest behaviour does not quite fall within any of the defined offences, with the result that no prosecution can succeed.

An important ingredient of the old offences was that the victim had to have been deceived. But if a villain dishonestly obtains money out of a cash machine can it be said that the machine has been 'deceived'? Or suppose someone climbs over a wall into a football ground to watch a match without paying - who has been 'deceived'?

The new offences focus on the dishonest conduct of the offender rather than the deception of the victim. They are expressed as a general offence of fraud which has three, more broadly defined, ways of being committed. These are by false representation, by failing to disclose information and by abuse of position. The new Act will also create new offences of obtaining services dishonestly; of possessing, making and supplying articles for use in frauds; and of fraudulent trading as a sole trader or through a partnership. Fraudulent trading through a company is already an offence.

It is hoped that the new law will make prosecution of offenders easier and extend the law to cover newer forms of fraud. The Bill, which comprises only 16 sections and three schedules, can be seen at www.publications.parliament.uk/pa/cm200506/cmbills/166/06166.i-i.html.

Explanatory notes on the Bill are to be found at www.publications.parliament.uk/pa/cm200506/cmbills/166/en/index_166.htm.

The Bill is expected to become law later this year.

Money laundering videos

David Winch has recently contributed to video / DVD updates produced by the Accountancy Channel and the Law Channel. The June issues include a 20 minute interview on money laundering risks for accountants and a five minute item for lawyers on the Lander Report and recent developments affecting the money laundering reporting regime.

Further details may be obtained from the Einstein Network www.einstein-network.com.

Financial reporting orders

Legislation, in Chapter 3 of Part 2 of the Serious Organised Crime and Police Act 2005, enabling a court to make a Financial Reporting Order came into force recently in England and Wales.

A financial Reporting Order (FRO) may be made by a Magistrates Court or Crown Court when sentencing or otherwise dealing with a person convicted of a trigger offence, but only if the court is satisfied that the risk of that person committing another trigger offence is high enough to justify the making of the order. Trigger offences are, broadly speaking, Theft Act offences or offences listed in Schedule 2 of the Proceeds of Crime Act 2002.

The effect of an FRO is to require, from that day forward until the expiry of the order, the convicted person to make regular reports of specified financial information and to attach specified documents to his reports. The reports must be supplied within a specified period to a specified person. In each case 'specified' means specified in the court order.

The idea is that these reports will alert the authorities to indications that the person has commenced to re-offend. We wait to see how effective FROs will be in practice.

VAT carousel fraud

HM Revenue and Customs has issued a briefing paper concerning planned new arrangements intended to counter VAT carousel fraud, or Missing Trader Intra-Community VAT fraud as it is more correctly described.

The plans involve certain types of goods, including mobile phones, becoming subject to reverse charging for VAT purposes. In effect the purchaser of such goods (rather than the supplier) will be required to account for the VAT on the transaction.

The purchaser will therefore pay to the supplier only the VAT exclusive amount and will account for the VAT (which would previously have been paid to the supplier) to HM Revenue and Customs. As a result the supplier will no longer be in a position to 'disappear' with the VAT and thereby defraud the authorities.

It remains to be seen how effective these new arrangements will be in countering carousel fraud and how complex they will be for bona fide traders to operate.

The new scheme is expected to come into operation this Autumn.

Money Laundering Regulations 2007

Following the introduction of the Third EU Money Laundering Directive it is expected that new money laundering regulations will be introduced in 2007.

The new regulations are expected to provide for the monitoring of all organisations active in the money laundering 'regulated sector', which includes businesses offering estate agency services (which are not currently monitored for compliance with the 2003 regulations).

At the same time the new regulations will deal more extensively with issues such as ascertaining the beneficial ownership of assets and dealing with politically exposed persons.

Public consultation on the new regulations is expected to open later this year.

The crime Olympics

The BBC recently reported a significant increase in recorded thefts of construction and agricultural machinery. Apparently excavators come in handy for ripping cash machines out of walls or ramming security vans. Over 1,100 excavators were reported stolen in 2005.

The construction industry is braced for an increase in such crimes once building work relating to the 2012 Olympics gets underway. It will be, an industry source commented, "a chance for all parties involved to raise their game".

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