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Welcome to this newsletter which aims to provide you with interesting news and useful information on money laundering and related topics.

PLEA BARGAINING INTRODUCED FOR CERTAIN FRAUD CASES

On 5 May 2009 new guidelines come into operation introducing "plea agreements" into England and Wales for cases of serious and complex fraud. These plea agreements will be made between prosecution and defence following "plea discussions" initiated by the prosecution. The government has been keen to avoid using the expression "plea bargaining", as used in the United States, and even the term "plea negotiation" has apparently now been ditched.

As long ago as 1978 the then Attorney General, Lord Silkin, established a working party to review the arrangements for the investigation and prosecution of fraud. This was followed some years later by the appointment of the Roskill Commission whose controversial report, published in 1986, included the recommendation for non-jury trials in certain fraud cases. Although that recommendation has never been implemented the influence of other recommendations, for example a requirement on the defence to disclose prior to trial the outline of their case, can be seen in more recent amendments to the criminal justice system. But government is still, 30 years later, grappling with fundamental issues revolving around the investigation and prosecution of fraud.

The introduction of plea agreements follows a consultation exercise on the topic. The idea was warmly welcomed by some respondents to the consultation, particularly the Serious Fraud Office and the Financial Services Authority. However a number of respondents expressed serious reservations, including the Fraud Advisory Panel and the Criminal Bar Association.

The intention is that in cases of serious or complex fraud prosecutors should approach the legal representatives of the accused to enter into "plea discussions", either before or after the suspect has been charged, with a view to reaching a "plea agreement".

The plea agreement would cover the charges to which the suspect agrees to plead guilty and a statement of the facts relevant to the offences. The agreement, when submitted to the court, would be accompanied by a joint submission from prosecution and defence including relevant information such as aggravating and mitigating factors in the case. The submission would indicate an agreed suggested sentence including, where appropriate, proposed compensation and confiscation orders to be made by the court. In other words, the prosecution

and defence will submit to the court the entire 'package' which the court will be invited to adopt in dealing with the offender.

However, it is central to this arrangement that the court would be under no obligation whatsoever to adopt the 'package' jointly proposed by prosecution and defence.

It follows that a defendant who makes a plea agreement can be given no guarantees as to the sentence he will actually receive when the matter comes to court. That may render such agreements unattractive to defendants.

Added to this there may be a conflict between the plea agreement which has been reached and the court's duties, for example its duties in relation to confiscation under Proceeds of Crime Act 2002 and earlier legislation. This was an issue raised in responses to the consultation, but which the government appears to have brushed aside.

It will be very interesting to see how plea agreements fare in practice over the coming months and years!

PROVING YOU HAVE NO 'HIDDEN ASSETS'

In the context of confiscation proceedings one of the greatest dangers to a defendant is that the prosecutor will allege the existence of 'hidden assets'. In the nature of things the prosecutor cannot be expected to identify those allegedly hidden assets - precisely because (he asserts) they have been hidden from him.

The burden is then placed upon the defendant to show that these unspecified assets do not exist. A tricky task! Unsurprisingly prosecutors have had striking success in cases of alleged hidden assets, such as the case of **R v Barnham [2005] EWCA Crim 1049** - which was upheld in the European Court of Human Rights in September last year.

The consequence is that the defendant's 'available amount' becomes incapable of quantification and the court is virtually obliged to make a confiscation order against the defendant in the full amount of his alleged 'benefit'.

But now a defendant, ably represented by Jonathan Fisher QC, a well known specialist in the field, has actually been able to satisfy a court, on appeal, that he has no hidden assets. The case is **R v McMillan-Smith [2009] EWCA Crim 732**. Mr McMillan-Smith had been convicted, along with two co-defendants, of conspiracy to produce cannabis. In confiscation a 'benefit' figure of just under £2 million was indicated, being £1.5 million proceeds of the conspiracy and a further sum, just short of £0.5 million, by operation of the statutory assumptions in relation to the defendant's personal financial affairs. Although this defendant's share of the proceeds of the conspiracy was 32.5%, the entire sum had been obtained jointly by the conspirators and so the entire £1.5 million fell to be included within the figure of 'benefit' obtained by Mr McMillan-Smith.

At the Crown Court confiscation hearing Mr McMillan-Smith gave no evidence as to his available amount on the basis of the legal advice he received at the time.

He failed to deal with allegations from the prosecutor that he had hidden assets. The judge made a confiscation order in the sum of £273,000, which figure included the judge's estimate of the defendant's hidden assets based on the information available concerning the conduct of the conspiracy.

Both sides appealed the confiscation order - and, in a sense, both sides won!

The Court of Appeal agreed that, as the defendant had completely failed to satisfy the judge regarding his available amount, the judge in the Crown Court ought to have made a confiscation order in the sum of the 'benefit' of just under £2 million.

However, in the light of the erroneous legal advice on which the defendant had relied at the time of the original confiscation hearing, the Court of Appeal (most unusually) agreed to hear evidence from Mr McMillan-Smith regarding his assets. That evidence enabled the Court of Appeal to satisfy itself, on the balance of probabilities, that the defendant had no hidden assets. The confiscation order would therefore be made in the amount of Mr McMillan-Smith's known assets of just £215,000.

This case is one which will be carefully studied by lawyers dealing with confiscation cases involving allegations of hidden assets.

A BENEFIT FRAUD CASE

A relatively simple case came my way last month. Sally, an unemployed single mother with three children, had been claiming Income Support for several years. In June 2005 Pete, who was the father of two of her children, moved in to live with her. Pete was employed full-time and in consequence Sally then became ineligible for Income Support. But she failed to notify the authorities of her change in circumstances.

In December 2007 she was arrested and charged with Benefit Fraud. The matter came for trial this month and I had been asked to confirm the prosecution's figure of Income Support claimed, Sally's entitlement to Income Support in the period from June 2005 to December 2007 (a simple enough task - the answer is 'nil') and, more importantly, what her and Pete's entitlement to Tax Credits would have been on the true facts.

I was able to show that, whilst the Income Support overpaid was £25,680, Sally and Pete would have been entitled to Tax Credits of £13,556 over the same period on the true facts. Taking this mitigating factor into account the Judge passed a six month sentence which was suspended for two years. Much to Sally's relief she did not receive an immediate custodial sentence.

LET'S MAKE A 110% EFFORT HERE !

I recently learned where all this percentage-effort-inflation began. You know the sort of thing, where you are urged to make a 110% effort to achieve something - or even a 200% effort!

It seems that 25 years ago when the ice-dancing couple Jayne Torvill and Christopher Dean were preparing for the Olympics - in which they won gold - they said they were determined to make "nothing less than a 101% effort", and so began the inflation of percentages beyond the 100% maximum.

Wouldn't you have thought that a couple of ice-dancers would have recognised a slippery slope when they were on one!

If you require any assistance or have any queries concerning issues related to forensic accountancy, proceeds of crime or money laundering contact d.winch@AccountingEvidence.com or visit our website www.AccountingEvidence.com.

Kind regards

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