

Money Laundering *bulletin*

The monthly briefing service for anti-laundering specialists

Twin peaks – leading cases in 2010

There have been two cases of significant interest to practitioners in the field of criminal litigation and money laundering compliance this year, write **Peter Binning** and **Charles Elton** of Corker Binning. The first, in February, was the case of *Shah v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31; [2010] Bus LR 1514 about the remedies available to a customer faced with a bank failing to carry out instructions and the second, in July, was the case of *R v Geary* [2010] EWCA Crim 1925, in which the Court of Appeal gave some useful guidance on the interpretation of “criminal property” for the purposes of “arrangements” under section 328 of the Proceeds of Crime Act 2002 (POCA).

Defining the scope of ‘criminal property’ for the purposes of Part 7 of POCA 2002

The issue before the Court of Appeal in *R v Geary* [2010] EWCA Crim 1925 was the scope of the words “criminal property” in the context of section 328 POCA.

Section 328(1) reads: “A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person.”

The issue before the court was whether, for the purposes of section 328, property could be construed as “criminal property” if it was only rendered so by the very “arrangement” itself.

In *Geary*, H sought to launder with G money acquired through fraudulent means. G was to hold the money for a short while, spend some of it and then return to H the goods bought and the balance. H lied to G about the provenance of the money, spinning G the yarn that the purpose of the arrangement was to conceal H’s matrimonial assets from his soon-to-be-ex-wife. G entered the arrangement on this premise. The basis of G’s guilty plea at trial formed the subject of his appeal. G asserted that the mental element of the offence had not been satisfied, because he did not

know or suspect that he was dealing with ‘criminal’ property. It is important to remember, as Moore-Bick LJ made clear at the beginning of his judgment, that the issue in the case was the mens rea, even if much of the argument centred on the actus reus.

The Crown’s case was that the mental requirement was satisfied since G had knowingly entered a conspiracy to pervert the course of justice and/or defraud H’s wife, thereby giving the money, in effect, a second layer of criminality. Alternatively, the Crown argued that, developing the conspiracy line of thought, the money became criminal property (for the purposes of G’s mental state) when the money was first handed to G and the offence was satisfied only subsequently when G returned it to H.

The Court favoured the appellant’s argument, thus opting for a narrow interpretation of section 328. The rationale was that the natural and ordinary meaning of the section led to the conclusion that, for the offence to be complete, the property in question must *already* have become criminal property *before* the arrangement begins to operate on it: “In each case the natural meaning of the statutory language is that in each case the property in question must have become criminal property as a result of some conduct which occurred prior to the act which is alleged to constitute the offence.”

The corollary effect of the Court’s strict approach to section 328 was that G’s defence was that he had intended to commit a different crime. No doubt therefore there will be some who think that the Court should have decided on policy grounds to take a more expansive view of “criminal property”.

Militating against a policy decision are the Court’s obiter remarks about the Crown’s argument that G could have been properly charged with an offence of converting or transferring criminal property contrary to section 327(1)(c) or (d). The difficulty with these comments is that they operate on the basis that the money G used and returned to H became “criminal

property” when H first gave it to him: an argument expressly rejected by the Court deciding the principal matter of the ambit of *section 328*.

The Court has come in for further criticism from the Law Society, which, in a recent online publication, suggested that the Court had failed in its attempt not to stray from the provisions in the statute. The substance of the Law Society’s critique is that the Court, at paragraph 15, erroneously created an extra limb for the mental element of an offence under *section 328*: “There are two aspects to the mental element of the offence [...]: first, the defendant must intentionally or recklessly enter into an arrangement which facilitates the acquisition, retention etc. of criminal property by or on behalf of another person; second, he must know or suspect that the arrangement will have that effect.”

The Law Society make the point that the intention/recklessness criterion, although a constituent element of the offence under international law, was deliberately removed from the draft Bill. [1] This goes further to highlight the imbalance between the gold-plated approach taken by the UK government to anti-money laundering legislation compared to many other countries, including most of the European Union (EU) and the USA.

Challenging a Suspicious Activity Report

If a bank knows or suspects that a transaction request concerns criminal property, it must disclose a suspicious activity report (SAR) to the authorities; otherwise, criminal liability under *sections 328* and *330* may be incurred. There is an inevitable delay while the authorities perform their background checks. In *Shah and another v HSBC Private Bank (UK) Ltd* [2010] EWCA Civ 31; [2010] Bus LR 1514, the appellant had lost c. US\$638.5m as a result of the delays that resulted from the bank making *section 338* disclosures to SOCA. The problem was exacerbated by the fact that the appellant had to be kept largely in the dark of the reason behind the delays, given the stringency of the ‘tipping-off’ provisions.

Following *Shah*, there are three mechanisms by which the customer can seek redress from the bank making a disclosure:

- Challenging whether there was a basis for the bank’s suspicion in the first place;
- Alleging breach of duty by the bank in not making disclosure as soon as reasonably possible.
- Alleging the bank breached its duty as agent to keep its principal informed.

In relation to challenging the basis for the suspicion, the Court of Appeal reversed the trial judge’s finding that the customer might need to adduce evidence of bad faith on the part of the bank if he is to avoid the prospect of summary judgment. The Court reasoned that the burden is on the bank to demonstrate its suspicion, and there is no reason why the customer should not be able to put the bank to proof on that. The Court went on to say that the evidence provided by HSBC in *Shah* would not have sufficed for these purposes, the bank having provided a witness statement on behalf of the bank’s solicitor, who attested to the bank’s general disclosure policy and the mere fact that a relevant suspicion had been held.

The overall intention behind the decision in *Shah* was to deter banks from making unnecessary disclosures out of an excess of caution. The extent to which the deterrence will adjust bank behaviour is unclear, as Professor Stanton [2] has observed: “...the view was that a stage would be reached in the proceedings at which the customer was entitled to information about the handling of his affairs. No indication was given as to the extent of the duty...”

Stanton is of the view that the decision will have limited effect for three reasons; first, the low threshold set out for proving suspicion in *R v Da Silva* [2006] EWCA Crim 1654; [2007] 1 WLR 303, where it was held that the suspicion need not be based on reasonable grounds; second, the risk of attracting criminal liability in the event of non-disclosure will continue to weigh heavily on the banks; third, it will be hard for a customer to prove that the breach of a professional duty of care is attributable to the institution’s delay as opposed to the effect of the statute. Thus, while banks may make more effort in terms of documenting their statutory compliance, it does not follow that there will be a substantive change in banks’ decision-making processes.

Still, before reaching the conclusion that financial institutions in the UK have, in effect, to borrow from Longmore LJ in *Shah*, ‘carte blanche’ to do as they please, it should be recognised that, in terms of money laundering at least, Britain’s financial sector is amongst the most tightly regulated anywhere. This can be discerned from the paper [3] recently published by the Financial Action Task Force (FATF). The paper refers, for instance, to a possible extension to Recommendation 13 so that private sector banks would have to report transactions where there was a suspicion of tax crime. The first point is that, in the UK at least, such a transaction is already covered by

current reporting requirements. The second point is that the UK not only adopts Recommendation 13 almost verbatim already but also attaches the possibility of a penal sanction. Moreover, the Recommendation only goes so far as to say that the “financial institution... should be required, directly by law or regulation, to report promptly its suspicions to the financial intelligence unit.” No requirement to impose a criminal penalty for failure to report is made.

Self reporting and Suspicious Activity Reports

In case it was ever unclear, the Serious Fraud Office (SFO) has now published guidance, which states in no uncertain terms that a SAR on its own does not amount to a self report for their purposes. Thus, in the event of a corporate making a SAR about the receipt of funds, which it suspects may be the proceeds of a corruptly obtained contract, this would not be sufficient to count in the corporate’s favour as far as the SFO is concerned. They will assume that the corporate has chosen not to self report. [4]

This guidance must be considered when advising on matters relating to other agencies from HM Revenue & Customs to the Financial Services Authority (FSA). If there is a potential problem with any aspect of a transaction but for whatever reason a decision is taken not to self report in spite of a SAR being filed, care is needed both with the drafting of the SAR as well as any communication that may be made short of a self report to the relevant enforcement agency.

Other developments

It was not a surprise that the Supreme Court declined to restrict the ability of the FSA to prosecute money laundering cases. In the case of *R v Rollins* [2010] UKSC 39, the court held that the FSA had always been able to bring any prosecution subject to statutory restrictions and conditions, and provided that it was permitted to do so by its memorandum and articles of association. Another similar challenge had met the same fate at an earlier stage in the appeals process and we must now wait to see whether the government decide to make the sweeping changes they have spoken of and form a new Economic Crime Authority to take over all prosecutions for serious fraud and related matters. As things stand, any major change involving substantial investment looks very unlikely.

Notes

1. See eg, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.XI.1990 article 6; UN Convention against Transnational Organised Crime 2000 article 6.
2. Professor of Law, Bristol University, Professional Negligence Case Comment 2010, 26(1) 56-59.
3. ‘The Review of the Standards – Preparation for the 4th Round of Mutual Evaluations (October 2010), www.fatf-gafi.org/dataoecd/3/30/46266717.pdf
4. www.sfo.gov.uk/victims/corporate-victims/should-i-self-report-directly-to-the-sfo-.aspx

Peter Binning (+44 (0)20 7427 0106, pb@corkerbinning.com) is a partner and *Charles Elton* (+44 (0)20 7353 6000, ce@corkerbinning.com) a paralegal at Corker Binning in London.

Editor: Timon Molloy • Tel: 020 7017 4214 • Email: timon.molloy@informa.com

Editorial board: Jonathan Fisher QC – Member and Financial Crime Team Leader, 23 Essex Street • Denis O’Connor – Director, Association for Financial Markets in Europe • Adriana van der Goes-Juric – Chair, Anti Money Laundering Professionals Forum

Production editor: Frida Fischer

Sales: Mike Ellicott • Tel: +44 (0) 20 7017 5392 • Email: mike.ellicott@informa.com

Renewals: Helen James • Tel: +44 (0) 20 7017 5268 • Email: helen.james@informa.com

Subscription orders and back issues: Please contact us on 020 7017 5532 or fax 020 7017 4781.

For further information on other finance titles produced by Informa Law, please phone 020 7017 4108.

Printed by Premier Print Group

ISSN 1462-141X

© 2010 Informa UK Ltd

Published 10 times a year by Informa Law, Telephone House, 69-77 Paul Street, London EC2A 4LQ. Tel 020 7017 5000. Fax 020 7017 4601. <http://www.informa.com>

Copyright While we want you to make the best use of *Money Laundering Bulletin*, we also need to protect our copyright. We would remind you that copying is illegal.

However, please contact us directly should you have any special requirements.

While all reasonable care has been taken in the preparation of this publication, **no liability is accepted by the publishers nor by any of the authors of the contents of the publication, for any loss or damage caused to any person relying on any statement or omission in the publication.** All rights reserved; no part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electrical, mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher.

Informa UK Ltd. Registered Office: Mortimer House, 37/41 Mortimer Street, London, W1T 3JH.

Registered in England and Wales No 1072954.

This newsletter is printed on paper from sustainable forests.

informa
law & regulation
an informa business