Money laundering cases: prosecutions

In the second of his two-part series, John Binns asks the question: is a prosecution inevitable?

Given the seriousness with which the Proceeds of Crime Act 2002 (POCA) treats money laundering offences (with maximum sentences of 14 years for the main offences), it may seem inevitable that where the authorities have sufficient evidence to prosecute, they will do so (absent seriously compelling public interest factors against).

It must be remembered, however, that the concept of money laundering under POCA is sufficiently broad that there are necessarily huge numbers of cases where relatively low-level crime (such as shoplifting, low-value benefit fraud and some drugs offences) is dealt with by way of simple or conditional cautions, and the laundering that (technically speaking) may have taken place is either included in that outcome, or not pursued at all.

Similarly, where a prosecution is brought for a predicate offence, charges of laundering (against the offender or others) may either not be brought at all (for instance, where the laundering charge adds nothing to the overall criminality), or discontinued later (the typical example of the latter being laundering charges against a spouse or partner, which fall away when the main target pleads guilty to the predicate offence).

Regulatory proceedings
In many cases, too, it must also be noted that the actions of regulated-sector individuals or businesses will be dealt with by their supervising agencies (such as the Financial Conduct Authority or HM Revenue and Customs), even those that amount to offences under POCA (perhaps possessing on the basis of suspicion alone, or failing to report where there were objective reasons to suspect) as well as the money laundering regulations.

Civil recovery
Those circumstances aside, the only other viable alternative to prosecution (in appropriate cases) will be to pursue relevant assets by way of civil recovery under Part 5 of POCA. This may be done because the evidence is judged not to meet the standard required in a criminal case (the issues being narrower, and the standard lower, in the civil context), or as a pragmatic method of achieving a just outcome in appropriate cases, perhaps after negotiation with the potential defendant.

Deferred prosecution agreements
While not strictly an alternative to prosecution, the relatively new procedure of Deferred Prosecution Agreements (DPAs) under the Crime and Courts Act 2013 is another method (for corporate defendants only) of achieving a just outcome without a conviction, and again, may be negotiated with the potential defendant in appropriate cases. While the examples so far have mainly been in large scale bribery cases, money laundering is one of the offences for which the Act allows a DPA to be considered.

The typical issues
In many ways the issues in a prosecution for money laundering are the same as those that arise in any criminal case. From the prosecution's point of view, the aim is to present sufficient admissible evidence to prove each element of the offence or offences concerned, while complying with its obligations to disclose relevant unused material to the defence. From the defence's point of view, the aim is simply to stop that occurring, either by legal argument (such as an application to dismiss or stay) or by a challenge to the asserted facts of the case.

In a prosecution for one of the main money laundering offences (under sections 327, 328 of 329 of POCA, or a conspiracy to commit such an offence), the issues that are likely to be key to the case are:

- whether the property in question can be shown to represent the proceeds of crime (which can be proved either directly, or by inviting an inference from the circumstances in which the property was handled); and
- whether the defendant had the requisite knowledge or suspicion that this was so.

In an arrangements case (under section 328 of POCA) there may be additional issues about the defendant's involvement in such arrangements and what they were intended to do. In a conspiracy case, the extent of the defendant's knowledge will need to be greater.

Disclosure

If the nature of the defendant's challenge (if any) is not clear from his interview or interviews under caution, then it should become clear when he submits his compulsory defence statement. In any event, the disclosure officer and the prosecuting lawyer will need to consider carefully the relevance of all material held to those core issues, with a view to disclosing, for instance, any material that tends to suggest either that the property had a legitimate source or was being handled in a legitimate way, or that the defendant had an honest belief that this was so.

Parallel proceedings

It will not be unusual for criminal proceedings, particularly dealing with charges of money laundering, to be accompanied by ongoing civil proceedings. Insofar as there is an overlap between the subject matter of civil recovery proceedings on one hand and criminal proceedings on the other, it will be often be appropriate (given, in particular, the risk of self-incrimination on the part of the defendant/s) to adjourn the former pending the conclusion of the latter. However, consideration may be given to obtaining freezing orders to prevent the dissipation of assets and to applying for the appointment of receivers to preserve their value.

While self-incrimination considerations may prompt resistance from defendants to the use of unexplained wealth orders, production orders and disclosure orders, in each case there are specific provisions to prevent the information or material provided being used in criminal proceedings (with certain exceptions). Rightly or wrongly, the legislation clearly contemplates the use of such powers to gather intelligence (rather than evidence) against suspects and defendants, with no restriction on their use even while criminal proceedings are ongoing.

Sentencing guidelines

The Sentencing Council has published guidelines applicable to bribery, fraud, and money laundering . A prosecutor will need to have regard to these when making representations about the seriousness of the alleged offence for the purposes of bail and mode of trial, as well as following conviction. Broadly speaking, the guidelines take account of both the amount of money involved in the laundering, and the extent of the defendant's role in it (for instance his seniority or otherwise where he was one of a group, and the sophistication or otherwise of the method used).

Sentencing issues

A handful of cases each year reach the Court of Appeal and form a growing body of judicial comment on the range of proportionate sentences for the primary money laundering offences, in which two issues recur with some regularity.

The first is whether, when a defendant is convicted of both money laundering and its predicate offence, the resulting sentences should be consecutive to or concurrent with each other (the broad answer to which seems to be that it depends on the extent to which the laundering adds significantly to the overall criminality).

The second is, where the predicate offence is known but has been committed by someone else, the extent to which the maximum sentences and any applicable guidelines for that predicate offence should be considered when sentencing the launderer. The broad answer seems to be a very rough compromise in which a serious predicate offence, for instance, drug trafficking, can raise the bar for sentencing significantly, though not so much that it reaches the same territory as the predicate offence itself.

Confiscation

One consequence of a defendant being convicted of any acquisitive offence is that the court will have to consider making a confiscation order. In cases where the statutory assumptions of 'criminal lifestyle' apply (which will include most money laundering cases), the calculation of his benefit will take into account years' worth of 'general criminal conduct', but in other cases the court will need to quantify the defendant's benefit from the particular offence with which he has been convicted.

This may present a particular issue for a defendant convicted of acquiring or possessing criminal property, who may technically have 'obtained' the total value of that property in connection with his offence, although in most cases he will then have passed it on (minus a commission, perhaps) to someone else.

The law on confiscation is complex and ever evolving, and at present the position seems to turn unsatisfactorily on two questions. The first question is whether the extent of the defendant's role in relation to the property was such that he could be said to have 'obtained' it. The second question is the subjective and inherently unpredictable one of whether the outcome of that enquiry (in the context of the confiscation process as a whole) would amount to a disproportionate interference with the defendant's property rights.

Ancillary orders

In addition to confiscation, the court may also be invited to consider other ancillary orders, for instance to disqualify the defendant from acting as a director of a company, or to require them to provide regular reports on their financial affairs, for a specified period.

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