Briefing

BURGES SALMON

Fraud and White Collar Crime

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Turning criminal: Supreme Court considers when property becomes "criminal" for purposes of POCA 2002

Synopsis

The Supreme Court recently considered in *R v GH* [2015] UKSC 24 the law relating to prosecutions for money laundering.

The issues were:

- **for an offence to be committed under The Proceeds of Crime Act 2002 must criminal property exist when a defendant enters into or becomes concerned in a money laundering arrangement?**
- **when criminal property exists and, in particular, whether a money laundering arrangement could itself make clean money criminal?**

These questions are especially important to banks and financial institutions who need to know the extent of their money laundering reporting obligations. If, for example, a money laundering arrangement itself can make clean property criminal, does a bank need to report a suspicion that clean money might be used for an illegal purpose?

We review below the arrangement offence under the Proceeds of Crime Act 2002, the Supreme Court's judgment **in *R v GH* [2015] UKSC 24** and practical reminders for businesses on their money laundering obligations.

The arrangement offence

The Proceeds of Crime Act 2002 (the "Act") provides in summary that:

- a person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates the acquisition, retention, use or control of criminal property by or on behalf of another person (section 328(1)); and
- property is criminal property if: (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or part and whether directly or indirectly), and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit (section 340(3)).

Must criminal property exist before the defendant enters into or becomes concerned in an arrangement?

In *R v GH* [2015] UKSC 24, a fraudster had set up fraudulent websites pretending to offer cut-price motor insurance. The defendant had opened bank accounts for the fraudster to channel the proceeds. The accounts were opened just before the websites went live i.e. when no fraud had yet taken place. Money from unsuspecting members of the public was subsequently paid into the bank accounts for non-existent motor insurance.

The defendant argued that he could not be guilty of money laundering as, at the time he entered into the arrangement (i.e. opened the bank account for the fraudster), no criminal property existed.

The Supreme Court disagreed and held that it did not matter whether criminal property existed when the defendant entered the prohibited arrangement with the fraudster and bank. The offence is committed when the accounts begin to operate on the criminal property (i.e. when the dirty money was paid into the bank account) and the defendant knew or suspected that the money was criminal property.

What is criminal property?

Having identified the relevant point in time, the next question considered was whether the money paid into the bank account was "criminal property" under the Act. If it was criminal property, what made it criminal property?

The Supreme Court held that the money paid into the bank account by the public was criminal property. The Court decided that the money became criminal property on being paid into the bank account because, at that point, the public had been defrauded by the fraudster's websites.

This was distinct from the proposition that paying the money into the account could by itself turn the money into criminal property. The Supreme Court made it clear that criminal property must exist from criminal conduct separate to the money laundering offence. Money laundering needs dirty money; the "laundering" of clean money for illegal purposes will not constitute a money laundering offence under the Act.

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Practical recommendations

This case underlines the breadth of the reporting obligations of banks and other businesses operating in the regulated sector. The defendant was found guilty of money laundering despite opening the bank account before any criminal property existed.

Therefore, it is important that institutions in the regulated sector remember:

- Reporting obligations arise if you know or suspect, or have reasonable grounds for knowing and suspecting, that another person is engaged in money laundering;
- The threshold for 'genuine suspicion' is a low one. Suspicion must be more than "a vague feeling of unease" but the law does not require the suspicion to be 'clear' or 'firmly grounded and targeted on specific facts';
- Avoid tipping off the customer of any suspicions, putative or actual;
- The Serious Crime Act 2015 will protect a person from civil liability when reporting suspicions of money laundering and declining or delaying compliance with customer instructions. This is explained fully in our briefing **'Seriously helpful: Serious Crime Act 2015 provides protection from civil liability'.**

Contact

If you have any questions on the above or anti-money laundering and fraud and white-collar crime more generally, please contact David Hall or Thomas Webb.

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