

HARRY TRAVERS

BCL BURTON COPELAND SOLICITORS

IBC TAX INVESTIGATIONS CONFERENCE – 25 MAY 2010

CURRENT ISSUES IN HMRC CRIMINAL INVESTIGATIONS & PROSECUTIONS

TOPIC ONE: SELECTIVE CRIMINAL INVESTIGATION POLICY - OPAQUE AND UNFAIR?

The selective investigation policy

The remarkable feature about tax fraud, as opposed to the other types of fraud, is that, by and large, whereas a person committing any other type of serious fraud in England or Wales is likely to be prosecuted, that is not the case with tax fraud. HMRC have two distinct tracks for dealing with tax fraud, one of which is to conduct a criminal investigation into the suspected offender with a view to prosecution by the RCPO; the other, which is far more commonly employed, is to investigate the individual's suspected tax fraud using Code of Practice 9, concerning the civil investigation into "cases of suspected serious Fraud".

The former Inland Revenue's selective prosecution policy was carefully scrutinised by an independent inquiry, namely the 1983 report of the Committee on Enforcement Powers of the Revenue Departments under the Chairmanship of Lord Keith (The Keith Report), and was also judicially approved in *R v IRC, ex p Mead* [1993] 1 All ER 772. The policy has been subject to considerable change since then, and has not been considered again by an independent inquiry or the courts.

The policy of selecting a small number of suspected direct tax frauds for criminal investigation with a view to prosecution and dealing with the rest using COP 9 was based on criteria for criminal prosecution that were, before 1999, referred to as the "*indicia of heinousness*".

The theory behind the "*indicia*" was that the only fair criterion of selectivity was seriousness; and therefore the only question was how to identify really serious frauds, as seriousness could not only be judged only in terms of the size of the fraud. For example, if an accountant or solicitor were guilty of tax fraud that in itself might be serious enough to warrant prosecution, even if the amounts defrauded were not that great.

In this way the whole debate was about what constituted really serious fraud. It was in this context that both the Keith Report and the Court of Appeal approved the published *indicia of heinousness*.

Unfair selection policy

The current policy adopted by HMRC is very different in theory and application from that approved by Keith and in *Mead*. Indeed, it is extremely difficult for an outsider to discern what policy HMRC actually utilises in selecting cases for criminal investigation. Furthermore, it is not apparent that those whose conduct is more “heinous” are more likely to be prosecuted than those whose conduct has been less serious.

If one examines HMRC’s conviction statistics between 2000 and 2005, there appears to be a disproportionate number of prosecutions for alleged tax credit frauds, and in 2005, there were more “Grabiner”/miscellaneous prosecutions than prosecutions for any other category of offence other than tax credit fraud (see below). This does not seem to support the view that only the most heinous cases are prosecuted, let alone that a serious tax fraudster is more likely to be prosecuted than a less serious tax fraudster.

This focus on less serious offences can probably be traced to the National Audit Office Report dated 26 February 2003, which stated that the Inland Revenue should increase the number of prosecutions they conducted.

At this point in time, the so-called Grabiner offence had just been introduced. This was a new either way offence of the fraudulent evasion of income tax contrary to Finance Act 2000, s 144.

The background to this is that in March 2000, Lord Grabiner QC produced the report he had been commissioned to write on the informal, or hidden, economy. One of his recommendations was the establishment of “*a new statutory offence of fraudulently evading income tax, which would be tried in a magistrates’ court*”.

By and large the report was aimed at the prosecution for tax evasion where there were parallel prosecutions for benefit offences arising out of the same facts. For example, paragraph 6 of the report recommended co-operative investigations between government departments to detect both tax-evading employers and their benefit-defrauding employees.

The Grabiner Report itself did not analyse the then published prosecution policy of the Inland Revenue *at all*.

The first successful prosecution for the new offence was against Mark Michael Brown, a part-time cab driver, who did not inform the Inland Revenue of his part-time work. He was given a 12-month conditional discharge at the magistrates’ court. The amount of tax evaded was £2,428.99.

This was clearly a non-serious case when compared to the entirety of COP 9 cases; but it quickly established what was clearly going on. What was happening was that having been stung by the

National Audit Office Report to prosecute more cases, they started using the Grabiner offence on a massive scale to improve the figures. This meant that despite a published prosecution policy to prosecute the most serious cases, they diverted from that policy without saying so. They started prosecuting non serious cases, and didn't say they were doing it.

And the reason of course they didn't say they were doing it is precisely because, as they well knew, it wasn't fair.

The most recent of HMRC's pronouncements regarding its criminal investigation policy was in April 2005. It started with the affirmation that "*Criminal investigation will be reserved for cases where HMRC needs to send a strong deterrent message*", and in my view this represented the first expression of a subtle shift in policy, which became a little less subtle in its execution. By saying they would prosecute where they wanted to send a clear deterrent message, that meant that if they wanted to, for example, prosecute taxi drivers for relatively tiny frauds, to send a strong deterrent message to the taxi driving community, they were going to start doing so: no matter that they were less serious cases whilst more serious cases were getting COP 9. And this, I am afraid, still appears to be their position.

It is also clear, in my view, that there was a deliberate watering down of the categories of "seriousness", so that a challenge to the unfairness of the policy in the courts could not be augmented by an argument that the policy was in breach of the policy that had been published.

An example of this is the fact that the initial seven factors put forward before the Keith Committee had been expanded to twelve factors leading to prosecution by April 2005. The types of professionals targeted in the initial seven factors were taxation advisers, with specific mention of accountants being made. By 2005, the policy wording had mutated into anyone who "*holds a position of authority*", with specific mention being made of "*advisors, accountants, solicitors, and others acting in a professional capacity*".

The difficulty is that now there appears to be a policy of prosecuting anyone they feel like prosecuting. Although the policy doesn't make this explicit, it is no longer the cases that the criterion of selectivity is seriousness.

And they won't even publish the figures so that we can see which cases they are prosecuting and consider the policy's fairness. During a recent meeting on 8 March 2010 at the Tax Investigation Practitioners Group, HMRC stated that they failed to see the benefit of producing statistics of prosecutions.

The fundamental question is whether when you have a policy of selective prosecution, there is any other fair criterion of selectivity other than seriousness. If there isn't, as it was in the 80's and 90's, as I

have said, the only question is, how do you determine seriousness? But now it seems very clear to me that they are not using seriousness as the criterion, it is “whether they want to send a clear deterrent message” which frankly could mean anything.

As I said at the beginning of this section, in the early eighties both the Keith committee and the Court of Appeal agreed that seriousness was a proper criterion of selectivity and thus thought that the criteria of selectivity were fair.

If those same bodies were asked to consider the fairness of the current policy today, would they come to the same conclusion and say it was fair? It follows from what I have said above that the answer to the question is pretty clearly “no”.

Challenging a decision to prosecute

Can someone who is being prosecuted for a “less serious” fraud whilst “more serious” frauds are not being prosecuted make a challenge in the Courts?

Stuart-Smith LJ said in *Mead* that a decision to prosecute “*by the prosecuting authority is in theory susceptible to judicial review, albeit the circumstances in which such jurisdiction could be successfully invoked will be rare in the extreme*”.

That was in 1993 when the Court was examining an Inland Revenue policy that contained fairly well-defined categories of ‘heinousness’. A comparison of that policy, as set out before the Keith Committee in 1983, and the 2005 policy, reveals how “rare in the extreme” a successful challenge to a decision to prosecute by the Revenue, on the basis that it had not followed its stated prosecution policy, would be.

The chance of successfully judicially reviewing a decision to investigate criminally and prosecute is therefore negligible given the immense improbability of a taxpayer being able to persuade a court that HMRC had failed to follow its own settled policy or had acted perversely. Indeed, in *Mead*, Popplewell J said that he could envisage “*no situation in practice which could give rise to a remedy by way of judicial review which could not equally be treated as an abuse of its process*”.

It should be said however that just because a decision to investigate criminally rather than issue COP 9 isn’t judicially reviewable does not mean that unfairness in making that decision cannot be utilised to the advantage of the person being investigated. On the contrary, it may potentially be key in seeking to persuade HMRC to cease investigating criminally and move to a civil code.

This of course is one of the key roles of the defence solicitor in criminal investigation cases, and one which I shall be addressing in much more detail in the talk.

- TOPIC TWO: THE FALL-OUT FROM OPERATION RIZE:**
- **POSSIBLE AMENDMENTS TO COP 9**
 - **WILL THE “IMMUNITY” BE CHANGED?**
 - **WHAT VALUE COP 9 PROTECTION WHEN POLICE MAY PROSECUTE LAUNDERING ALLEGED PROCEEDS OF TAX FRAUD, AND SEIZE CASH?**

When is an immunity not an immunity?

The essence of the current addition of Code of Practice 9 is that the Code itself states that:-

“Where the Commissioners decide to investigate using the civil investigation of fraud procedure they will not seek a prosecution for the tax fraud which is the subject of that investigation.”

It is important to note that the moment this is issued, HMRC cannot seek to prosecute the tax fraud which is the subject of the investigation.

If HMRC did decide to prosecute the predicate tax fraud, it is generally considered that the prosecution will be subject to challenge as an abuse of the process of the Court, certainly if the promise that there would be no prosecution had been relied on in any way by the person under investigation.

It is for this reason that Code of Practice 9 “protection” is usually referred to as an immunity, although it is not strictly an immunity in the sense that, for example the Serious and Organised Crime Agency (“SOCA”) can grant an immunity under the Serious Organised Crime & Police Act 2005 s.71, or the Office of Fair Trading can grant an immunity under the Enterprise Act 2002 s.190(4).

It is an “effective” immunity in the sense that if there is a prosecution, it is highly likely that the defendant could apply successfully to have it stayed as an abuse of process of the Court.

The current version of COP 9 has been with us for approximately five years and has only been changed in one respect. Before April 2009, there was a question mark as to whether there was “effective” immunity post the issuance of COP 9, but before the report was submitted.

This was mainly because of the following sentence in the 2005 - 2009 COP 9 which said:-

“You must stop any irregularities immediately. Your disclosure report and subsequent returns must reflect the current position. If we discover that the irregularities have continued during the course of the investigation, this may be reflected in the level of penalties”.

The implication of this was that if the criminal conduct continued during the course of the investigation

there would only be higher penalties and still could not be a prosecution.

The new version of COP 9 on page 4 says instead:-

“You must stop any irregularities immediately. Your disclosure report and subsequent returns must reflect the current position. If we continue that the irregularities have continued during the course of the investigation this may result in criminal action in relation to what you have done since be given this Code of Practice, or a higher level of penalty”.

The historical context is still relevant because it should be recalled what COP 9 was all about prior to 2005.

As everyone will recall, before 2005, there was only effective immunity if people made a full disclosure under COP 9, and if they did not make a full disclosure they could be prosecuted for the predicate tax offence.

Now they can only be prosecuted for the false declaration itself – in other words the statement which always accompanies COP 9 reports that the report represents a full disclosure. This means that if someone refuses point blank to co-operate with COP 9 at all, but has not made a false declaration, once they have COP 9 protection, they *cannot* be prosecuted for the predicate offence. Prior to 2005 they could be.

Originally, the “immunity” that was offered was not even stated explicitly in the old code of practice.

Everybody will recall that it was known as “Hansard”, following a comment made by the then Chancellor of the Exchequer to the House of Commons in 1944. All the previous policy said was that:-

1. *“The board may accept a money settlement instead of instituting criminal proceedings in respect of fraud alleged to have been committed by a taxpayer.*
2. *They can give no undertaking that they will accept a money settlement and refrain from instituting criminal proceedings even if the case is won and which the taxpayer had made a full confession and has given full facilities for investigations of facts. They reserve to themselves for the full discretion in all cases as to the course they pursue.*
3. *But in considering whether to accept a money settlement or to institute criminal proceedings, it is their practice to be influenced by the fact that the taxpayer has made a full confession and has given full facilities to get investigation into his affairs and from examination of such books, papers, documents or information as the Board*

may consider necessary".

In practice, however, it was well known that when a taxpayer did in fact make a full disclosure, he was not in fact prosecuted.

It will be recalled that the crucial case of *R v Gill & Gill* [2003] EWCA Crim 2256 changed the position. The essence of the *ratio decidendi* of the case was that if there was *any* possibility of a prosecution for the predicate tax fraud offence, under the Police & Criminal Evidence Act 1984 Code of Practice C, a caution *had* to be given.

This meant that the Revenue were left with two choices.

Either they could amend Code of Practice 9 so that the criminal caution was given. In other words, because there was a possibility of a prosecution for the predicate tax offence, the taxpayer at the beginning of the Hansard process had to be given the criminal caution i.e. "*You do not have to say anything but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence.*"

The other option was to remove the possibility of there being a prosecution for the predicate tax fraud.

Perhaps in typical fashion, HMRC choose both options.

First of all they decided that they wanted to maintain the threat of prosecution for the predicate tax offence and therefore they decided that COP 9 needed to be amended so that the caution was administered.

This meant also that all Hansard interviews were tape recorded. As many here will recollect, that caused huge consternation among firms of accountants who did tax investigation work as it was feared that the criminal solicitors would prise their way into what is still clearly a "lucrative" area of the market.

In fairness, it is clear that there were some problems, and of course some clients quite understandably took the words of the caution seriously and said nothing in the Hansard interview. Given that the position under Hansard was that there was no pre-interview disclosure of what the Revenue's concerns was, this did not lead to a fruitful interview, let alone a fruitful report.

So then after two years of taped interviews, the Revenue choose the second option which was to remove the threat of prosecution for the predicate tax offence so that the caution did not have to be administered and the interview did not have to be taped. This of course is where we are now.

It is worth saying however that there is a persistent concern that now that the threat of prosecution for the predicate tax offence has been removed, as it had to be following the Court of Appeal's judgment in *Gill & Gill*, there is not a sufficient incentive for taxpayers to "come clean" and make a full disclosure under the Hansard process.

The post script is that it is understood that the Revenue are now looking very closely again at Code of Practice 9 and that whether it might still be possible to maintain a threat of prosecution for the predicate tax offence without administering a caution, despite *Gill and Gill*.

My clear view is that this is not possible. If there is any possibility of prosecution for the predicate tax offence, then the Court of Appeal has said that the criminal caution has to be administered.

Despite the fact that I have conveyed my views to HMRC, it seems that there is still a distinct possibility that the Revenue will try to revert to some sort of "criminal underpin" in the way outlined above.

The fall out from Operation Rize

It will be recalled from the above that the essential element of the "effective" immunity is that once somebody had come clean under Code of Practice 9, they could not be prosecuted for the predicate tax offence. Over ten years ago there was widespread consternation following the case of *R v W* that this might not hold true, and the Revenue were quick to dampen any speculation that anyone could be prosecuted once they had come clean under Hansard.

Operation Rize changes all that.

Operation Rize involved the obtaining of a search warrant in 2008 to search nearly 7,000 safe deposit boxes across London.

The Metropolitan Police obtained the warrant ostensibly to find evidence of criminal conduct on the part of the directors and senior management of the company which ran the facilities. Of course, once the Metropolitan Police managed to get the warrant and search the boxes, they were in nirvana.

6,717 boxes were opened and 3,608 boxes had items inside them.

There were large quantities of cash in many of the boxes and the presence of such large amounts of cash was clearly enough to obtain further search warrants. For example, the mere fact of there being £200,000 would be enough to persuade a Magistrate to issue a search warrant to search the home and office premises of the individual who had such a large amount of cash in his box.

Following this, the police were clearly minded to pursue prosecutions for money laundering the proceeds of tax fraud and that clearly trespassed on HMRC's toes.

It will be recalled that s.328 of POCA criminalises the person:-

"...if he enters into or becomes concerned in an arrangement which he knows or suspects to facilitate (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person."

There is a defence of course of an authorised disclose is made to SOCA or other authorised officer.

S.340 defines "criminal property" as property if (a) it constitutes the persons 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.

Many police officers and prosecutors take the view that s.340(6) has the effect that legitimately earned monies on which tax should have been but has not been paid is criminal property.

S.340(6) says:-

"If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage".

I do not think that that issue is free from doubt, but in any event, the police certainly have taken the view that it does apply, therefore in theory they take the view that someone can be prosecuted for money laundering if, for example, they had £200,000 in cash in a safety deposit box.

That is indeed the approach that the Metropolitan Police have taken in relation to Operation Rize, and there are cases which are still going on through the Courts on this.

In one particular case in which I was involved the police even wanted to prosecute when the person involved had already been given COP 9 protection.

The effect of that would be that despite the fact that the person had immunity for the predicate tax offence, he could still be prosecuted for money laundering the "proceeds" of the tax fraud. Bearing in mind the width of POCA s.328, and also bearing in mind that s.327 and 329 of POCA are also very wide, with s.327 criminalising the mere "transfer" of criminal property, there was obviously a very real concern that COP 9 protection for the predicate tax offence would be rendered nugatory if the police are able to prosecute for money laundering the proceeds of the tax fraud.

There is a further concern which is that the police may also seek to go for cash seizure under POCA 2002, although in my view it is even more dubious as to whether legitimately earned money on which tax is not been paid can be subject to cash forfeiture.

If one wants to know the reason for this apparent sudden interest in tax fraud on the part of the Metropolitan Police, in my view one need go no further than the Asset Recovery Incentivisation Scheme (ARIS) which was introduced to allow investigating authorities to recoup some of the costs of a prosecution by being awarded a percentage of the eventual confiscation order.

Allocations are based on each agency's contribution to the total value of remittances from cash forfeiture orders, confiscation orders, and civil recovery. At present, according to a Home Office Report issued in July 2009, more than 50% of all asset recovery receipts are returned to frontline agencies, split between the investigation, prosecution and enforcement agencies.

In a particular case which I have just mentioned, I was fortunately able to persuade the police to back off and that they could not successfully have prosecuted the individual for money laundering the proceeds of tax fraud where the tax fraud itself had been subject to effective immunity under COP 9.

The lessons to be learned, in my opinion, are that to make Code of Practice 9 immunity effective, there also needs to be an immunity from a prosecution for money laundering the proceeds of the predicate tax fraud. This immunity also needs to cover cash seizure of the proceeds of the tax fraud - otherwise there is a possibility that the police will seize it and it will not be available for settlement with HMRC.

TOPIC THREE: WAS OPERATION RIZE LAWFUL IN THE FIRST PLACE?

As set out above, on the 2nd and 3rd of June 2008, officers from the Metropolitan Police Economic and Specialist Crime Command (SCD6) conducted a search of almost 7000 safety deposit boxes in operation that was named "Operation Rize." In total, 6717 boxes were opened and searched of which 3608 had items inside.

The search warrants for the various premises were authorised by the Crown Court pursuant to section 352 of the Proceeds of Crime Act 2002.

The police apparently had significant evidence that a number of persons who rented safety deposit boxes had used them to store property representing the benefit of criminal conduct, including substantial amounts of cash. Their search and seizure demonstrated that this was correct in a number of cases. It is equally clear that there were thousands of safety deposit boxes that did not contain any such property.

In many cases, the police retained a significant amount of material without any basis to allege that they were relevant to any offence, and the burden was often unfairly placed on individuals to demonstrate that the material should be returned.

Was the raid lawful?

It is arguable that the conduct of Operation Rize was unlawful in several respects:

1. The search warrant itself was potentially flawed

If the warrant was flawed, all aspects of the subsequent search would have been unlawful because the police officers would not have been on the premises lawfully.

The Police stated that the warrants had been issued under the Proceeds of Crime Act 2002 and claimed that the “authority of a warrant extends to the opening of all safe deposit boxes”.

However, the statutory regime only permits the police to seek such a warrant if it is not an appropriate case in which to make use of the alternative, less draconian, production order procedure. This latter procedure gives greater recognition to the rights of the individuals affected by, amongst other things, placing a time limit on the period during which the police may retain the property. The police have claimed that their operation would have been seriously prejudiced had they not obtained the immediate access afforded by a warrant.

The warrant itself authorised police officers to enter and search premises and seize and retain material found which was likely to be of substantial value (whether by itself or taken with the other material) to a money laundering investigation being conducted by the Metropolitan Police Service into whether the owners or employees of the safe-deposit centres had committed money laundering offences relating to the operation of safe deposit box facilities.

Two points are notable. Firstly, this does no more than parrot the words of the statutory section and, secondly, it gives no particulars whatsoever of the material sought other than to state that it should be relevant to the investigation.

2. The warrant itself was potentially unlawfully issued in several respects, namely:

- The search provisions of the Proceeds of Crime Act are subject to the requirements of sections 15 and 16 of the earlier Police and Criminal Evidence Act 1984. These provisions, together with long-standing precedent, require that a search warrant shall identify, so far as is practicable, the articles or persons to be sought and, when executing the warrant, the officers may only search to the extent required for the

purpose for which the warrant was issued.

The warrant merely refers to material which is likely to be of substantial value to a money laundering investigation. When the police approach a judge in order to obtain a warrant, they present an Information which sets out in full detail the basis on which the application is being made, and the evidence in support of it.

In this instance the police publicised the fact that they presented the judge with a 400 page Information, which, however has not been made public.

On the basis of material that has been made public however, it appears clear that the police were in a position to particularise in the warrant such items as substantial quantities of cash, guns and drugs. It is a glaring omission that they did not do so when the police themselves boasted of the amount of evidence they had as to the criminal property stored within the safety deposit boxes.

- There was also a fatal flaw in the logic of the whole application. The warrant was directed specifically and exclusively at the individuals who were the subject of the money laundering investigation (namely the owners/operators of the safety deposit boxes).

The contents of the safety deposit boxes were only evidence against those individuals if there was a proper basis to assert that they knew or suspected the contents of the safety deposit boxes, or knew or suspected the criminal activities of certain customers.

Neither the police nor any other source provided evidence that set out reasonable grounds for suspecting that the owners and/operators of the safety deposit centres had knowledge or suspicions of either the contents of individual boxes or the activities of their registered users.

Indeed, it would be contrary to the essential confidentiality that underpins the use of such safety deposit boxes if the proprietors were aware of such things.

Instead, the police merely alleged that the owners and operators of the safety deposit centres failed to comply with the FSA guidelines. It is a very substantial step from a failure to comply with the Registry guidelines to assuming knowledge or suspicion that the safety deposit boxes contained criminal property.

The police stated when seeking to obtain the warrant that 80 to 90% of a sample of

boxes contained property derived from crime and therefore a strong inference could be drawn as to the knowledge of the owners and/or operators of the safety deposit centres.

It seems possible, however, that the judge was misled because the figures published in March 2009 by the police painted a very different picture.

Those figures stated that 70% of the safety deposit box registered users had the contents of their boxes returned to them. This left only 30% for all of those persons who either had not had their contents returned to them yet, were still under investigation, had not yet contacted the police, or were the subject of criminal proceedings.

Indeed, the police themselves publicised and placed great reliance on the extent to which they conducted their investigations prior to obtaining the warrant. They stressed that it was the culmination of a lengthy operation, expending significant resources, in the course of which they identified specific clients of the safety deposit box centres who were known to be engaged in criminal activity and who were using the safety deposit boxes to store items connected with their offending, including cash.

The point is, of course, that this lengthy investigation provided evidence against some customers of the safety deposit centre and none at all against others. The police were therefore in a position to specify individual customers who had engaged in criminal activities and, no doubt, who they reasonably believed had property derived from criminal activity in their possession and stored in the safety deposit boxes.

If the material being sought cannot be specified in an application there must be reasonable grounds for believing that there is material on the premises which falls within section 353(6), (7) or (8). In the case of a money laundering investigation, subsection (8) applies and it requires that there is material which relates to the person specified in the application, which is likely to be of substantial value to the investigation. This could not logically be the case in this instance as the material in the safety deposit boxes did not relate to the person specified in the application (i.e. the three individuals named on the warrant), and nor was it likely to be of substantial value to the investigation into the owners and/or operators of the safety deposit centres.

- 3. The Police searched boxes in respect of which they had no prior evidence or reasonable cause to believe contained property representing the benefit of criminal conduct.**

Even if the warrant as a whole was not unlawful, the use of the warrant in respect of safety deposit boxes for which the police had no specific information giving them reasonable cause to suspect that they contained property connected with criminal activity may well have been unlawful.

- 4. The removal of boxes for the purpose of sifting their contents was potentially unlawful.**

The police have to justify the subsequent removal of the safety deposit boxes from the premises in cases where their initial search has given no cause for reasonable suspicion that they contained property derived from criminal activity.

In some cases they attempted to do this by claiming they were exercising their separate powers of seizure under Part 2 of the Criminal Justice and Police Act 2001. These provisions were enacted in order to meet the difficulty that police encountered when they searched premises that contained a large quantity of documentation that required to be examined elsewhere or, possibly, contained legally privileged material that needed to be removed for examination by independent counsel.

The legislation anticipates some examination of the material at the scene before removal in order to make a preliminary determination of relevance because there is specific provision for legally privileged documents to be excluded. In many cases however, boxes appear to have been removed without any attempt at examination.

- 5. The continued detention of material without evidence that the material was relevant to any offence is also potentially unlawful.**

In many instances, in order to have their material returned, individuals have had to prove to the police's satisfaction that the property was innocent. This is contrary to the normal principles upon which English law operates. The issue of a reverse burden of proof is a controversial one even when imposed by the authority of Parliament.

TOPIC FOUR: TRANSFER OF FUNDS FROM LIECHTENSTEIN TO MAKE USE OF THE LDF
COULD THIS FALL FOUL OF POCA 2002?

The Liechtenstein Disclosure Facility

As is now well known, LDF is an amnesty for UK individuals who have accounts in Liechtenstein and who have not complied with their tax obligations.

Under the LDF, tax is only collected for ten years (i.e. income must be declared and tax paid in relation to tax years starting on or after 1 April 1999) and the penalty is ordinarily limited to 10%. This is in contrast to the New Disclosure Opportunity, under which tax is collected for 20 years.

Those already under investigation by HMRC for serious tax fraud are not able to take advantage of the LDF, if the person has been formally notified by HMRC that an investigation has commenced.

For others who have yet to disclose however, it has been seen as a chance to switch funds from an offshore jurisdiction to Liechtenstein in order to take advantage of its beneficial terms.

Example scenario

A client informs a tax advisor that they have diverted trading income from their business between 1990 and 2000. The tax advisor informs the client that if they were to make a disclosure under the NDO, their liability would be around £500,000. The advisor states that their liability under the LDF however is around half that. The client asks for a disclosure to be prepared under the LDF. He says that he is going to open an account in Liechtenstein. When he provides the details, the tax advisor notifies HMRC of the intention to disclose under the LDF.

Issues arising out of the scenario

Four questions arise:

1. Can advising a client about the LDF constitute a prohibited act under POCA 2002?

Can the giving of advice alone, ever constitute a prohibited act for the purposes of one of the principal money laundering offences (under sections 327, 328 and 329 of POCA)? In particular, can the process of receiving instructions from a client, and discussing with the client and advising on the client's tax affairs and the options open to the client, constitute an arrangement under section 328?

The word 'arrangement' is not defined in Part 7 of POCA and there is no clear authority on what the term means. There are, however, good grounds for the view that giving advice cannot constitute an arrangement:

- The wording of section 328, including the use of the present tense in relation to the effect of an arrangement, suggests that an arrangement must be in existence and have a facilitating effect in the terms of section 328, that is in relation to acquisition, retention, use or control of criminal property.

The *actus reus* of the offence – entering into or becoming concerned in an arrangement – needs to be considered as a whole. In the context of section 328, an arrangement must be some sort of practical agreement, which may be contained in or evidenced by a formal legal contract, relating to the acquisition, retention, use or control of property. To enter into such an arrangement or contract is to be a party to it. It is difficult to see how the phrase “enters into” can apply to anyone other than the parties to such an arrangement. The alternative phrase “becomes concerned in” suggests some wider degree of involvement, but is uncertain in its scope. Who may be “concerned in” an arrangement other than the parties to an arrangement is unclear, but the phrase might well cover lawyers, accountants or agents when they carry out transactions or take steps to implement the terms of an arrangement.

The arrangement under section 328 is an arrangement which a person “knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property”. It follows from this that the arrangement must be one that does, in fact, facilitate the acquisition, retention, use or control of criminal property. It is, of course, possible to *suspect* – incorrectly – that something is the case; it is not logically possible to *know* that which is not the case. One can neither know nor suspect that a certain arrangement has a particular effect or result unless and until that arrangement actually exists.

It is important to note the use of the present tense in “facilitates”. An arrangement under section 328 is an existing arrangement with practical effects and is more than merely a plan or agreement to do something in the future. The ‘arrangement’ is the end-product of a process of discussion and negotiation, whether or not in a formal context and whether or not involving lawyers or other professional advisors. The phrases “enters into” and “becomes concerned in” only make sense in terms of an arrangement that exists, an arrangement that has in fact been concluded or substantially concluded.

- Part 10 of the judgement of the Court of Appeal in the case of *Bowman v Fels* deals with “linguistic considerations” in relation to what constitutes an arrangement. Paragraph 68, in particular, supports a reading of section 328 which limits any arrangement offence so that it can only be committed where a facilitating arrangement is already in existence.

Unfortunately, the Court of Appeal - in paragraph 69 - raised but did not resolve the question of whether earlier acts could provide a basis for criminal liability under section 328 (and even refer to the giving of advice). Paragraph 69 is not helpful and raises potential concerns without any explanation of an underlying rationale.

- There are also more general arguments in favour of a limited interpretation of “arrangement” in terms of established legal principles:
 - the requirement, under both common law and the European Convention on Human Rights, for certainty in criminal offences;
 - the principle of adopting a narrow construction of any term which creates criminal liability; and
 - the argument of public policy that a wider interpretation would seriously undermine the right of access to independent legal advice.

2. What might constitute a section 328 arrangement in this context?

An arrangement to open a particular bank account could constitute an arrangement under section 328 if the arrangement to do so would facilitate “the acquisition, retention, use or control of criminal property”.

If a money launderer (X), simply opens a new account and transfers criminal property into it, there is no offence under section 328 because there is no arrangement “by or on behalf of another person”. X would, however, be committing an offence under section 327 of POCA (the transfer of criminal property).

If a lawyer, accountant or other agent (Y), agrees with X to open an account for X and transfer criminal property into it, this would constitute an arrangement under section 328, subject to the specific arguments below arising from the particular circumstances of a transfer to take advantage of the LDF.

If the purpose for which Y agrees that a Liechtenstein account should be opened is in order to take advantage of the LDF, and Y becomes concerned in the arrangement actually to open that account for that reason, then on a purposive interpretation of the section, there would be

no offence committed by Y. The whole purpose of the arrangement is to reach a legal settlement with the tax authorities which will involve X in handing over criminal property and relinquishing possession, control and ownership of it to HMRC.

On this view, there would be no arrangement within the terms of section 328. There is clearly no acquisition of criminal property involved and any element of retention, use and control of criminal property is purely temporary: the purpose of the arrangement is precisely to relinquish retention, use and control of the criminal property.

The situation is less straightforward, however, where tax fraud has been committed prior to April 1999. At that point, it seems fairly clear to me that the transfer of property to Lichtenstein will involve the transfer of criminal property and therefore the arrangement to transfer that property will be an arrangement which the intermediary knows or suspects facilitates the "acquisition, retention, use or control of criminal property".

That is because at the point that the money is transferred into Lichtenstein, it is criminal property because of POCA s.340(6) which states:-

"If a person obtains a pecuniary advantage as a result of or in connection with conduct, he is to be taken to obtain as a result of or in connection with the conduct a sum of money equal to the value of the pecuniary advantage".

The intention is to take advantage of the LDF and therefore retain the criminal property, and it is for that reason that in my view an advisor who is involved in making the practical arrangements for the transfer of funds to Lichtenstein could potentially be committing an offence under POCA s.328.

Of course, if a disclosure is made to SOCA then that is a complete defence to a prosecution and therefore the best advice I can give is that a disclosure ought to be made to SOCA before the transfer of the funds to Lichtenstein.

Many advisors are very much concerned not to do this because clearly once the report is made to SOCA, it is likely that SOCA will notify HMRC, and then HMRC could start an investigation into the person and notify him that he is under investigation, so that he would not be able to take advantage of LDF.

There have been some discussions with HMRC about this, and it has been said that in those situations HMRC would not in fact take any action to commence an investigation or notify the person that he is under an investigation, so that LDF could still be used. There has not however been any formal indication that this is the approach that HMRC will take.

In fairness, however, it should also be stated that HMRC have not indicated formally that they expect to see a money laundering report either. The best I can say, if a report is not made, is that on the basis that HMRC know that people are transferring funds to Lichtenstein to take advantage of LDF, it might be seen as being abusive if they were to prosecute such a transfer when no notification had been given. The matter is not, in my opinion, free from doubt however.

3. Would an arrangement to take advantage of the LDF constitute “consensual resolution in a litigious context”?

There is a further important line of argument under which it could be said that there would be no unlawful arrangement within the terms of section 328. This argument relies on the judgement of the Court of Appeal in *Bowman v Fels* and on the conclusion reached by the Court that not only is section 328 “*not intended to cover or affect the ordinary conduct of litigation by legal professionals*”, but that - in addition - “*...it seems implausible to suggest that it was intended to apply to legal professionals negotiating or implementing a consensual resolution of issues in a litigious context.*”

Whether an arrangement involving consensual resolution of some dispute involving money or property would be outside the scope of the criminal provisions in section 328 depends on whether or not the arrangement can be said to be part of a consensual resolution in a litigious context. On this, the guidance of the Court is that: “*The 2002 Act makes it clear that the distinction is between situations where there are existing or contemplated legal proceedings and other situations*”.

The LDF situation must be a borderline one, but one could argue that in any situation in which a person liable to tax is seeking to achieve a settlement with HMRC over unpaid tax from previous tax years, legal proceedings are never less than “contemplated”. Indeed, the LDF document (at paragraph 9 of Schedule 7) makes specific reference to and implicitly acknowledges that a criminal tax investigation and proceedings are contemplated unless the relevant person makes a full, accurate and unprompted disclosure to HMRC under the disclosure facility.

In the case of *Bowman v Fels*, the Court of Appeal was concerned with the role of lawyers concerned in litigation. It is unclear whether the Court’s guidance on consensual resolution of disputes would be limited to the role of legal professionals reaching such a settlement in a litigious context or whether it would extend to other relevant professionals, such as tax advisers. In the interests of consistency and in order to encourage the “valuable alternative”

of consensual resolution of disputes, it is reasonable to suggest that it should be extended in this way.

Harry Travers

BCL Burton Copeland Solicitors

25 May 2010