It’ll all come out in the wash
20 May 2011, Rachel Barnes

Shortly after the Proceeds of Crime Act 2002 came into effect, great concern was expressed in these pages about section 328 of the act. The act is concerned with money laundering. Section 328 makes it an offence to enter an arrangement knowing, or suspecting, that the acquisition of criminal property is involved. Criminal property is widely defined to include any form of property, including money, that constitutes or represents a benefit from criminal conduct.

The concern was that someone who facilitates a payment under a construction contract (for example, a consultant who certifies work for payment) may unwittingly be entering into such an arrangement if the payment could be shown to constitute, in whole or in part, a benefit from criminal conduct. Examples given were where the contractor had employed illegal immigrant labour, there had been non-compliance with health and safety legislation, or a company had not registered appropriately for tax purposes and been paid gross. It was said that in such situations the criminal property could include the money that is saved in evaded tax or social security contributions. It could also include the money that has been recovered under the building contract in connection with excess profits, illegally worked hours or illegal employment. Other examples given were loaded tenders that might be used fraudulently, dodgy invoices used to support payment applications, or dishonest representations of the quantity of work done.

So it was feared that valuers, certifiers, mediators, adjudicators or clients who considered that an application for payment might be tainted in any of these ways but who failed to report their suspicions could, apart from anything else, be committing an offence under section 328. They would also have faced the real possibility of a jail sentence of up to 14 years.

It may therefore be a relief to learn of two recent decisions of the Court of Appeal, where the court held that, for section 328 to apply, the property in question must already be criminal property before becoming subject to the arrangement in question.

In the case of R vs Geary, on 30 July 2010, the defendant admitted receiving and harbouring in his bank account for a while a sum of money belonging to a friend. The defendant knew or believed that the purpose of this arrangement was to keep the money safe from the claims of the friend’s wife in matrimonial proceedings. The Court of Appeal held that the defendant was not guilty of an offence under section 328, because the money was not criminal property at the time it was received into his account.

This year, in the case of R vs Amir/Akhtar (27 January), the defendant, who owned a mortgage business, had knowingly submitted false mortgage applications to mortgage brokers on behalf of clients. The deceptions included false statements as to a client's income, supported by a false employer’s reference. The defendant’s conviction of an offence under section 328 was quashed. The court reached the same conclusion as in R vs Geary on the scope of section 328. When the defendant entered into arrangements with the mortgage broker and carried them into effect, he was not facilitating the acquisition of criminal property. This was because at the time the property did not constitute “criminal property” that was owned by the mortgage company. The definition of criminal property does not embrace property that a person intends to acquire by criminal conduct.

In another case, in 2008, paying a bribe was held not to be an offence under section 328, because paying a bribe is not an arrangement that facilitates the acquisition of what is already criminal property. Property, it was said, cannot be criminal property until it has been acquired by means of criminal conduct.

Therefore, in the examples above of arrangements for making payments under construction contracts, the money in question would only become criminal property - at the earliest - when it came into the hands of the person applying for it; that is, only after it has been certified and paid.
Of course, a person who knowingly participates in facilitating a payment being obtained or retained by fraud or other illegality may well be guilty of some other criminal offence.

These decisions should therefore afford relief to those in the construction industry who may have been concerned about section 328 unless of course, one of these days, the Supreme Court says something different.

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