

PRESS CUTTING

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Tax dogers beware

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Over the last few months it has come to light that tax authorities throughout Europe are looking for new ways to attack those guilty of tax evasion. This article looks at how the English Courts are likely to react to the purchase by HM Revenue and Customs of stolen bank records from a bank in Liechtenstein, one of the most secretive tax havens in the world, as well as some recent developments.

BACKGROUND

It has come to light recently that both HM Revenue and Customs and the German tax authorities have purchased the bank records of a large number of individuals holding bank accounts at the LGT Bank in Lichtenstein. The British authorities have reportedly paid £100,000 for the information and the German Authorities €5 million. It is alleged that the records have been purchased from an ex-employee of the bank who is a convicted fraudster who has reportedly previously tried to blackmail the Liechtenstein government.

Liechtenstein is listed by the Organisation for Economic Co-operation and Development together with Andorra and Monaco as the only three tax havens on its blacklist of "uncooperative tax havens". The news will have sent shockwaves through those who seek to avoid taxation in their home countries as well as fraudsters seeking to hide the fruits of their frauds as Liechtenstein was seen as one of the last remaining bastions of banking secrecy.

It has been reported that approximately 100 accounts of British individuals are being investigated with HM Revenue and Customs hoping to recover approximately £100 million of unpaid tax. Individuals in Britain face jail sentences of up to 7 years and a fine up to the amount tax that should have been paid if found guilty of tax evasion. In Germany it is reported that approximately 750 accounts are being investigated and the head of the German Post Office as well as four politicians have already been questioned. Finally in a new twist Germany has offered to share the information it has bought with any other country for nothing and countries as far a field as the United States and Australia have shown an interest in reviewing the stolen information.

But the question remains how are the courts in England going to react if proceedings are issued using the stolen information?

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ENGLISH CRIMINAL LAW

As long ago as 1861 the traditional English view was expressed by Crompton J in *R v Leatham* when he stated that "It matters not how you get it if you steal it even, it would be admissible in evidence". Therefore it has been long held under English common law that evidence obtained by illegal means can be used in criminal cases. This was again recognised more recently by the House of Lords in *R v Khan* where Lord Nolan stated that "as a matter of English Law, evidence which is obtained improperly or even unlawfully remains admissible". Therefore save for two exceptions in England, as a matter of law, illegally obtained information is admissible. The two exceptions are a reference to an admissible confession of guilt or the commission of an act of contempt of court. Therefore as a general statement under common law the evidence obtained by HM Revenue and Customs is admissible in English courts.

Section 78 of the Police and Criminal Evidence Act (1984) has now clarified the position originally set out under common law and now provides the judiciary with a statutory discretion. Section 78 states as follows:

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

It seems unlikely that the judiciary would seek to use its discretion in any case brought relating to the stolen information. In *R v Quinn* Lord Lane CJ stated

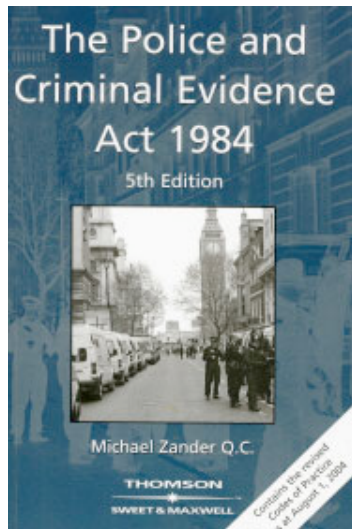
"The function of a judge is therefore to protect the fairness of the proceedings and normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before it, but proceedings may become unfair if, for example, one side is allowed to adduce relevant evidence which, for one reason or another the other side cannot properly challenge or meet, or where there has been an abuse of process, eg because evidence has been obtained in deliberate breach of procedures laid down in an official code of practice"

Therefore the discretion to allow the use of illegally obtained evidence used by the courts previously under common law has been continued under the new statutory framework. For example in *R v Christou* evidence obtained when the police operated a jewellers shop to secure evidence of theft was admissible.

Finally consideration needs to be given as to whether the right to a fair trial under article 6 of European Convention on Human Rights will lead to the illegally obtained evidence being inadmissible. In *R v P* Lord Hobhouse stated that article 6 does not entitle a defendant

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“to have unlawfully obtained evidence excluded just because it was so obtained. What he is entitled to is an opportunity to challenge its use and admission upon the fairness of trial as is provided for by section 78”.

Therefore it appears highly likely that if and when HM Revenue and Customs chooses to bring proceedings against any individual and wishes to use some of the material it has obtained from Lichtenstein then the court will rule that the material is admissible even though it was allegedly obtained through illegal means.

CIVIL PROCEEDINGS

Prior to the introduction of the Civil Procedure Rules the courts had no discretion to exclude evidence on the grounds that it was unlawfully obtained in civil cases. However since the introduction of the Civil Procedure Rules the courts have had a general discretion to exclude evidence in civil proceedings. Rule 32.1 of the Civil Procedure Rules states as follows:

“(1) The court may control the evidence by giving directions as to –

- (a) the issues on which it requires evidence;
- (b) the nature of the evidence which it requires to decide those issues; and
- (c) the way in which the evidence is to be placed before the court.

(2) The court may use its power under this rule to exclude evidence that would otherwise be admissible....”

However the discretion is to be exercised in a fundamentally different way to that in criminal proceedings as the overriding of the Civil Procedure Rules must be taken into consideration and in particular the requirements that the courts should so far as practicable ensure that the parties are on an equal footing and ensure that the case is dealt with fairly. Therefore the court has wide powers which it can use in considering if it should allow illegally obtained evidence to be used in civil proceedings. In *Jones v University of Warwick* the Court of

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Appeal was required to decide between two conflicting public interests – achieving justice in the present case and considering the effect in general of allowing the illegally obtained evidence to be used. In this case in which the Claimant was claiming damages for personal injury from her employer for injury to her right hand and it was alleged she was suffering continuing disability an insurance company hired a private investigator to gain entry to the Claimant's house posing as a market researcher and used a hidden camera to film the Claimant which the Defendant's expert having viewed the film was the opinion that she had entirely satisfactory function in her right hand. The Court of Appeal held that the behavior was not so outrageous that the evidence should not be allowed to be used.

This position was confirmed in the case of *Ian Franes (Liquidator of Arab News network Limited) v Somar Al Assad & Others* where the Court held that the gathering of evidence by illegal means has not in general led to its exclusion under the English law of evidence. He Court said that where such evidence is of central importance such as involving impersonation or deception, it should be informed on any without notice application.



Therefore in the present case there is a strong prospect that the civil courts would allow HMCR to make use of the illegally obtained evidence in any civil proceedings. Hence HMCR will be able to take steps against any individuals who are implicated through this evidence including obtaining freezing injunctions against the individuals' assets either in the United Kingdom or worldwide and/or obtaining disclosure orders against third parties such as banks to trace the assets of any of the individuals. This is extremely important as given the current regime in Lichtenstein it is highly unlikely that the HMCR will be able to take any steps against any assets which still remain in the accounts identified in the records (in particular as it is likely that these assets will have already been removed).

DATA PROTECTION ISSUES

It is of course a crime under section 55(1) of the Data Protection Act (1998) to obtain the personal data of another person without that person's permission. However in the case of the investigators from HM Revenue and Customs they are protected by section 55(2) of the Data Protection Act which states as follows:

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“Subsection (1) does not apply to a person who shows –

(a) that the obtaining, disclosing or procuring –

(i) was necessary for the purpose of preventing or detecting crime, or

(ii) was required or authorised by or under any enactment, by any rule of law or by the order of the court

Therefore in this case the investigators from HM Revenue and Customs are exempt from the relevant provisions of the Data Protection Act as they are acting to detect a crime. However the Data Protection Act should always be considered when considering taking similar steps as in this case for use in civil proceedings.

RECENT DEVELOPMENTS

The revelations involving LGT appear to have acted as a catalyst towards greater cooperation between various countries.

On the previous occasion when Germany obtained information from a whistleblower relating to Liechtenstein bank accounts in 2000 Germany offered to share the information with about a dozen other countries, all of which turned down the opportunity to have access to the information. On this occasion numerous countries have accepted the offer from Germany to provide copies of the information to them.

Investigations into LGT have focussed on at least 15,000 customers holding in excess of £100 billion invested by a variety of anonymous vehicles. About 50 countries consider that their citizens have undisclosed assets in LGT, led by Germany. The result is that Liechtenstein has reached a tax fraud agreement with the EU and is considering bilateral tax treaties providing for the exchange of information. It is also revising its banking laws as well as the law governing foundations; but this may not extend to relaxing the laws regarding the confidentiality provisions for confidentiality.



The attack on tax havens is not limited to Liechtenstein.

In the UK, HM Revenue & Customs is seeking to target approximately 25 foreign banks to reveal information about customers who are UK citizens with offshore accounts in the same way that it targeted domestic banks in the past by requiring them to disclose details of UK based customers with offshore bank accounts.

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In the US, UBS has agreed that it will no longer allow US residents to put money into its Swiss bank accounts. It is reported to have held 19,000 accounts worth \$18 billion of undeclared assets. A Senate subcommittee has estimated that the US Treasury loses about \$100 billion annually from offshore tax abuses .

Jersey has also agreed to exchange tax information with Germany, the US and Holland .

CONCLUSION

The events of recent months have sent shock waves through the offshore banking industry. Raids have taken place in Germany in efforts to seize hundreds of millions of euros in unpaid taxes. HM Revenue and Customs has shown that, like many countries, it is now prepared to obtain information from dubious sources to help with its investigations as well as use the full range of its extensive powers to obtain information from banks regarding customers with offshore accounts.

It remains to be seen if this is the beginning of the end of the thorny issue which the US Internal Revenue Service admitted in 2006 to having "acute and growing difficulties" in uncovering illegal offshore arrangements. "They often involve other sovereign jurisdictions over which we have little or no control and with taxpayers that are often difficult to identify".

Concerns remain that a number of countries will not take steps to reform their secrecy laws unless their competitors do so at the same time. One can hope that the pressure of this episode may help to break this circle and make the life of an international criminal even more difficult.



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