

# Another Abuse of Process

**T**here may be no better example of the need for the new, independent prosecution body for revenue and customs matters than the decision of Mr Justice Crane on 26 May 2005, staying criminal proceedings brought against Mr Uddin and four others. The proceedings were stayed because of a serious abuse of process by the prosecution arm of HM Customs & Excise (as was), surrounding its failure to disclose highly relevant information to the defence. That decision followed Mr Justice Pontius' ruling earlier that month that there had been a serious abuse of process by HMCE in a similar case, *R v Lewis and others*. *The Independent* estimated that the costs of these bungled trials will run to £65 million and that knock-on consequences for other prosecutions may increase the figure to £100 million.

Crane J gave his reasoned decision on 24 June and was highly critical of the actions of individual officers and solicitors involved – and concluded that senior officers of HMCE had lied to the Court. But Crane J also referred to failures, at an institutional level, in providing the right training and guidance to the investigations arm.

The new prosecution body, Revenue & Customs Prosecution Office (RCPO), came into being in April this year. It was set up on the recommendation of Mr Justice Butterfield, following his enquiry into the high-profile collapse of prosecutions brought in the 'London City Bond' diversion fraud cases. One of the reasons for the creation of the new body was to reinforce the independence of prosecutors from investigators, in order to ensure, in particular, that the investigators observe due process. One of the particular complaints in the London City Bond cases was that the investigations arm had failed to make material disclosures. The Butterfield Report concluded that the failures in relation to disclosure stemmed from

*Jason Collins and Ben Cooper, McGrigors, discuss the recent collapse of yet another Customs & Excise case*

systemic weaknesses, in particular a culture of 'excessive secrecy', with information closely guarded and only disseminated on a 'need-to-know' basis. It is disappointing (but not surprising) to see that lessons have not yet been learned from the Butterfield Report. What is most disappointing is that the failures by HMCE to observe due process have resulted in alleged fraudsters walking free without trial. It is hoped that the advent of RCPO may consign these experiences to history.

#### **The facts of *R v Uddin***

The investigation and prosecution of Uddin and his co-defendants was led by

States to be carried out, effectively, free of VAT. Having acquired VAT-free goods from a trader in another EU Member State, the fraudster then sells the goods in the UK, where he is required to charge VAT. Instead of accounting to the Commissioners for the VAT, the fraudster disappears with the money and becomes a 'missing trader'. A particular strain of the fraud, known as 'carousel fraud', occurs where the goods are subsequently traded between a number of other parties in the UK (who are typically unaware that a fraud has taken place) until they are exported back out of the UK with the intention of returning them to their

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Brian Turner and Andrew Biker. Turner was the Senior Investigating Officer and Biker was the prosecuting solicitor. The operation was code-named 'Operation Venison' and resulted in Uddin and his co-defendants being charged with various offences of fraud in connection with the purchase and sale of mobile telephone handsets.

The fraud is commonly known as Missing Trader Intra-Community fraud and exploits the fact that the system of VAT requires transactions between traders located in different EU Member

original EU owner. Uddin and his co-defendants were alleged to have conspired to create such carousels repeatedly during the course of 2000/2001. The fraud was calculated to have deprived the exchequer of more than £100 million of VAT.

#### **Due process**

When an individual is faced with action by the might of the state, it is imperative, especially in connection with criminal prosecutions, that due process is followed. Failure to uphold this –

particularly where the authorities have behaved improperly – would undermine public confidence in the criminal justice system and bring it into disrepute. An integral part of due process is that a defendant must be provided with all relevant information in the hands of the prosecution. This principle is set down in the Criminal Procedure and Investigations Act 1996, ss 3 and 7, which require the prosecution to disclose, subject to any ‘public interest immunity’ claim, prosecution material which ‘in the prosecutor’s opinion might undermine the case of the prosecution’ (primary disclosure) or ‘might be reasonably expected to assist the accused’s defence’ (secondary disclosure). The reason for this is clear: the prosecution cannot be allowed to put forward a selective case to bolster its chance of securing a conviction.

Central to the prosecution’s case in *R v Uddin* were paper files which had been uplifted from Hawk Precision Logistics Ltd (Hawk). Hawk was the freight forwarder which had handled the goods for the co-defendants. In late 2001 witness statements were taken from key employees of Hawk, in order to explain Hawk’s business process, including its document creation and storage processes, and to exhibit the Hawk files. The evidence contained in the statements was not of vital importance to the prosecution, since it did not in itself suggest that the defendants were engaged in a fraud; the statements were important to the prosecution mainly for the purpose of ensuring that the Hawk files were admissible in evidence. Without witnesses to produce the documents there was a risk that the documents would not be admissible or, if admissible, that they would be of limited evidential value. The Hawk statements and exhibits were disclosed to the defence in 2001 – with no indication that the witnesses were anything other than ‘witnesses of truth’.

More than two years later, on 19 January 2004, at a preliminary hearing for pre-trial submissions on admissibility, prosecuting Counsel disclosed to the Court that the Commissioners had recently come into possession of material which undermined the reliability of the Hawk employees as witnesses of truth and indicated that they would no longer be calling them.

At the insistence of their own Counsel, HMCE was asked to identify the material relevant to the giving away of the Hawk witnesses so that this could be provided to the Court and the defence.



**Jason Collins**

Some of the initial material provided to prosecution Counsel led them to have concerns about the accuracy of the statement they had made to the Court when giving away the Hawk witnesses. Their concerns were notified to the Court and the defence, who were informed that HMCE was undertaking a trawl of its files in order to ensure that full disclosure had or would be made. It transpired from this exercise that the statement made in the giving away of the Hawk witnesses had indeed been misleading. HMCE’s concern about the reliability of Hawk witnesses was not at all ‘recent’. The Commissioners, as a body, had in fact had concerns going back to 2001 as to whether Hawk was itself involved in MTIC fraud. The defendants applied for an order staying the prosecution as a result of an abuse of process.

#### **The findings of fact**

It is a settled view of the law that, at least for criminal justice purposes, the Crown is indivisible and that the case officers on a prosecution must ensure that they have identified and disclosed all relevant information, whether that information is held by the Commissioners or by other public authorities. It was clear that over the period from 2001 to 2003 various officers in different teams in the Commissioners had formed views at differing times as to the unreliability of the Hawk witnesses. One of the problems identified by Crane J was that there was a lack of internal coordination which would have picked up these concerns centrally. The internal manuals did not specifically require officers to talk to each



**Ben Cooper**

other or to call for information held by other departments.

But Crane J found that any self-respecting senior officer with particular concerns about a witness would naturally feel the need to consult with and enquire of colleagues in other parts of the service. Of more concern to Crane J, therefore, was the question as to when the case officers dealing with *R v Uddin* had themselves first formed suspicions about Hawk and, more particularly, why had there been a delay in disclosing those concerns to the Court.

During the course of 2003 the concerns held by different parts of the Commissioners were starting to converge. In mid-2003 the case officers dealing with another, unconnected prosecution (Operation Expire) took the view that they could no longer rely on Hawk witnesses and disclosed this to the defence in that case in September 2003. This giving away of the witnesses was fairly widely known within the service but Crane J accepted that it was not known by Turner and Biker.

However, Turner became aware of relevant information in relation to Hawk in September 2003. This was as a result of an operation started in June 2003 by the German authorities, who had initiated telephone surveillance of a German trader, Mobile World. A corresponding UK operation was commenced on 30 June 2003 under the code-name Operation Toppling. Turner was also the Senior Investigating Officer on this operation. During the course of this operation the German authorities intercepted conversations between employees of Mobile World and Hawk which clearly

showed that the Hawk employees were engaged in a conspiracy to defraud. Turner learned of the damaging intercepts in September 2003. He failed, however, to act.

At around the same time, the case officers on another unconnected operation (Operation Entrée) became aware of the intercept material. They quickly understood that they would have to give the Hawk witnesses away as being unreliable and that they would need to disclose the reasons for doing so to the defence, including providing details of the intercepts. They appreciated, however, that if they were to do this, the integrity of the ongoing intercept operation in Operation Toppling was at risk. They therefore consulted with the Policy unit of HMCE as to which operation should take priority. It was decided to stay Operation Entrée in order to protect Operation Toppling.

Meanwhile, internal meetings were taking place and e-mails were being sent between Biker and Turner and the other case officers in Operation Venison, in which the subject of the intercepts and whether the Hawk witnesses could be relied on was discussed. The Venison team even attended three conferences with Counsel in this period and a preliminary hearing at the Court – but did not raise any concerns about Hawk. It was not until 24 November 2003, some two months after Turner had become aware of the intercepts, that the question as to the reliability of Hawk witnesses was first raised with prosecution Counsel. Counsel were not told of the existence of the intercepts until much later and were not given instructions to give the Hawk witnesses away until 19 January 2004.

#### **HMCE conduct**

Before dealing with Crane J's reasons for why the defendants succeeded in their abuse of process application, it is worth noting his comments about the way in which the Venison team had conducted themselves during the course of the abuse hearing. Crane J was, in particular, highly critical of the fact that, on top of the failures to disclose in relation to the substantive proceedings, there were also failures to disclose in relation to the determination of the abuse application, with relevant material appearing regularly throughout the hearing. During cross-examination both Turner and Biker admitted to not having checked for further relevant material even when the non-disclosure issue surfaced, claiming that they had not looked because nobody had

told them to do so. Crane J found this excuse astonishing and, after a further request to Biker resulted in yet more material being disclosed, prosecution Counsel undertook a damage limitation exercise by (successfully) requesting leave for a search to be conducted of Biker's desk. Crane J went on to express very serious concerns about the failures in relation to disclosure and questioned whether, even after all of these events, disclosure was now complete and that the Commissioners fully understand their duties of disclosure.

#### **The decision**

HMCE accepted that there had been an inexcusable delay in announcing their decision to abandon the Hawk witnesses. They also accepted that there were serious failures of disclosure, misinterpretations of the law and sheer incompetence. However, the prosecution did not accept the defendants' claims that they had deliberately misled the court or manipulated the court process.

contacted. He also found that HMCE had been influenced by a desire to ensure that there were no issues with the admissibility of the Hawk files and that giving away the Hawk witnesses ran the risk of seriously undermining the prosecution's case.

Crane J was astonished by the fact that no senior officer was able to give a plausible explanation as to what had happened between September 2003 and January 2004. He described this as a 'gaping hole' in the evidence. It led him to conclude that senior officers knew more than they were prepared to tell the Court – that the officers told the Court what they thought the Court should know, and not the truth.

#### **Conclusion**

The failures to disclose the Hawk information are all the more striking when it is appreciated that the withholding of information occurred in the period immediately following the release of the Butterfield Report. It is astonishing that there should be such

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Crane J disagreed. He found it disturbing that no credible explanations were put forward as to why it had taken so long for the decision to be made to give away the witnesses. Turner and Biker's evidence was that they either could not remember, or it was put down simply to a lack of activity for reasons such as a heavy case-load or illness. Crane J did not accept that it was incompetence or overwork which led to the delay. As a result of the fact that none of the officers was able to provide any evidence on the subject, Crane J was left to speculate as to what happened. He found that it was not credible that the Venison team had failed to raise the Hawk issue at the three conferences with Counsel that took place after the receipt of the intercept material simply because it 'slipped everyone's mind'. He also found it extremely unlikely that the issues had not been discussed with senior officers in Policy in the same way as had been the case in Operation Entrée and, further, that the (incomplete) evidence trail indicated that Policy had, at the very least, been

failures at a time when disclosure was at the top of everybody's minds.

This case highlights the perennial concern that HMCE was institutionally averse to disclosure. A criticism regularly leveled at HMCE – both in criminal and civil cases – was its culture of seeking to get a result, whatever the cost and whatever the means used. Full disclosure is a cornerstone in any legal system and must always be respected. It is of course very disappointing that a trial of alleged fraudsters has collapsed – but Crane J had no choice but to order a stay when it became clear that officers had gone to the lengths of lying to try to ensure that they would 'get their man'. It is hoped that lessons will be learned from this case and that RCPO will ensure that the new merged body, HM Revenue & Customs, will adopt a more accountable approach. Whether the merger will cleanse the service of the culture of 'excessive secrecy' (even to the extent of keeping its own Counsel in the dark) in relation to customs matters remains to be seen.