Past, present and future tension. Does section 6 of the Fraud Act 2006 apply to pre-existing fraud?

R v Smith **[2020] EWCA Crim 38, Court of Appeal**

Key words: Fraud; possession of an article for use in fraud

Andrew Smith (S) operated a gardening business, All Seasons Tree & Garden Landscapes. He conducted some work for a customer, Sydney McFarlane (M). The work did not go as planned and M contacted trading standards. In due course S was charged with fraud, contrary to s 1 of the Fraud Act 2006 (the 2006 Act) and with having 'in his possession… any article for use in the course of or in connection with any fraud', contrary to s 6 of the 2006 Act. On the latter charge, the Crown alleged that S had subsequently created a false cancellation notice, purportedly signed by M, in order to try to conceal the earlier fraud.

S appeared before HHJ Cooper and a jury at Cambridge Crown Court in June 2019. HHJ Cooper directed the jury that s 6 applied in such circumstances. S was convicted and appealed.

Held, dismissing the appeal, that the words 'in connection with' in s 6 of the 2006 Act were 'broad' with 'no technical or restricted meaning'. Rather, they were 'ordinary words of the English language'. Moreover, they 'must add something to what precedes them – 'in the course of' – otherwise they would be otiose' (at [30]). Section 6 therefore covered an article which was to be used 'in connection with' a pre-existing fraud (at [31]). According to Singh LJ, giving the unanimous judgment of the Court, 'it could well be said, applying the statutory language to the facts of the case, that the offence under section 6(1) has been committed because the article is intended to be used in connection with the fraud' (at [31]).

Commentary

In July 2002, the Law Commission published its proposals on reform of this area of law (Report on Fraud (Law Com No 276)). However, the Report did not include any discussion of, let alone proposals for, the creation of an offence dealing with possession of articles for use in, or in connection with, fraud. In May 2004, the Labour government published its own consultation paper, 'Fraud Law Reform: Consultation on Proposals for Legislation'. Unlike the 2002 Report, this paper did invite discussion around a proposed offence of 'possessing equipment to commit fraud'. In November 2004, the government published the responses it had received ('Fraud Law Reform: Government Response to Consultations'). On the mooted possession offence, the government noted that:

The proposal for this new offence was welcomed by almost everybody. It represents an addition to the Law Commission proposals, and replaces the 'going equipped to commit a cheat' offence in

section 25 of the Theft Act 1968… We believe that the prosecution should have to prove a general intention that the article be used by the possessor (or someone else) for a fraudulent purpose, though they should not have to prove intended use in a particular fraud. The case law on section 25 establishes that the offence requires an intention that the article be used for some future fraud, although the intention may be general rather than specific and the intended use may be by someone else. We intend to use similar wording in order to attract that case law' (at [46], emphasis added).

In due course, when the Fraud Bill was introduced into the House of Lords in May 2005, the wording of clause 6 (now section 6 of the 2006 Act) was modelled on s 25 of the Theft Act 1968 (the 1968 Act). As originally enacted, s 25 provided that it was an offence for the accused to have with him 'any article for use in the course of or in connection with any burglary, theft or cheat'. Section 25 of the 1968 Act was amended by the 2006 Act to remove the words 'or cheat' but otherwise remains in force as originally enacted. There is not now, and nor has there ever been, any reference in s 25 of the 1968 Act to 'future' burglaries or thefts (or cheats). As the government claimed in November 2004, the limited application of s 6 to future frauds is a product of case law on s 25 of the 1968 Act. The government's explanatory notes to s 6 of the 2006 Act reiterate this point; they state that the 'intention is to attract the case law on section 25'.

For present purposes, the most important case on s 25 is R v Ellames [1974] 1 WLR 1391. Charles Ellames, a docker, was charged with going equipped to steal. The articles (including a sawn-off shotgun, a pair of goggles, a brown wig, two masks, two 'Jif' plastic lemons containing ammonia solution, two other shotguns, some cartridges and a pair of white gloves) were found in a bag behind a shed in West India Dock, east London. The Crown case was that the articles had all been used in an armed robbery of a company in the Isle of Dogs, that the robbers had driven to the Dock where Charles worked and had given him the bag to dispose of, which he did. At trial, Charles admitted having temporary possession of the bag. He was charged with and convicted of the offence under s 25. Charles appealed, arguing that s 25 only created an offence 'where a person had articles for future use in any future burglary, theft or cheat'. The Court of Appeal agreed and quashed his conviction. Giving the unanimous judgment of the court, Browne J said that:

In our view, to establish an offence under s 25 the prosecution must prove that the defendant was in possession of the article, and intended the article to be used in the course of or in connection with some future burglary, theft or cheat (at p 1398; emphasis added).

Hence, given the government's stipulated intention when introducing what is now the s 6 offence (in 2004) to 'attract' s 25 case law, the precedent in Ellames presented the Court of Appeal in the present case with a potential difficulty.

Another, rather more pressing, difficulty for the court in the present case was presented by R v Sakalauskas [2013] EWCA Crim 2278, [2014] 1 WLR 1204, a case on s 6 of the 2006 Act. Gytis Sakalauskas had opened two bank accounts using false identity documents, in July 2011 and January 2012, respectively. He then used the debit cards and overdraft facilities to fraudulently obtain

£1,471 of petrol from different petrol stations. When arrested in October 2012, he had a 25-litre petrol can in the boot of his car. He was charged with two counts of fraud contrary to s 2 of the 2006 Act (relating to the opening of the bank accounts) and one count of possession of an article for use in fraud contrary to s 6 (relating to the petrol can). He was convicted on all counts but appealed his conviction under s 6, submitting that the jury should have been directed that he could only be convicted if sure that he intended to use the petrol can for the purposes of fraud in the future. The Court of Appeal quashed his conviction of the s 6 offence. Giving the unanimous judgment of the court, Mitting J said:

The observations of the court in Ellames in relation to section 25 apply with equal force to an offence charged under section 6... The intention of Parliament as in the case of section 25 was to prevent the possession of articles that were intended for use then or in the future, not those which had been used in the past (at [7], emphasis added).

However, the court in the present case was able to distinguish both Ellames and Sakalauskas. Singh LJ said that:

There is nothing in those authorities which holds that the relevant fraud cannot be one which has already been committed in the past. What they do decide is that the defendant must intend to use the article either then or in the future in connection with fraud. As those authorities make clear, it will not suffice that it is an article which has been used in the past in connection with fraud (at [29], emphasis added).

The Court was able to justify this stance by pointing out that the words ‘in connection with’ in s 6 were ‘ordinary’, English words with ‘no technical or restricted meaning’ and moreover that they had to ‘add something to what precedes them – 'in the course of' – otherwise they would be otiose’ (at [30]). The court derived support from the 15th edition of Smith, Hogan and Ormerod’s Criminal Law (2018, OUP) in which the present authors contend that:

The items which might be used 'in connection with' [fraudulent] activities are endless. It is not necessarily a defence that D did not intend to use the article while in the physical commission of the contemplated crime. If, for example, he intended to use it only in the course of covering his tracks after the commission of the offence, this would be enough, being use 'in connection with' the offence’ (at p.974; emphasis added).

It is difficult to argue with any of this. The court in the present case is right to hold that anyone found in possession of an article with intent to use it (either now or in the future) in order to cover up and/or avoid liability for a past fraud is guilty under s 6.