

Extradition and Bounced Security Cheques: The Defence of 'Dual Criminality' in Practice

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INTRODUCTION: Al Tamimi & Company has published articles separately about extradition and bounced cheques.

In the first, the blend of legal and political considerations that are involved in extradition were highlighted, the procedure for extradition was explained and the available defences, one of which is 'dual criminality', were set out. In the second article², the author explored the increasing problem of dishonoured cheques in the UAE, the difference in approach taken by the criminal and civil courts and the establishment of the Judicial Committee for Bounced Cheques by Decree No.56 of 2009. In recognising the commercial nature of some transactions and the practice, among some property developers, of presenting a cheque for payment to which they are not (or not yet) entitled, that article urges the criminal courts to investigate the circumstances and merits behind a criminal complaint that a cheque was issued in bad faith, with the option of referring the case to the civil court where it can be dealt with if no bad faith is established. Finally, it considers the situation where a borrower of a bank loan defaults on the repayment schedule with the result that the security cheque is presented by the bank in order to prosecute the borrower.

COMBINING THE TOPICS IN AN EXAMPLE – AMANDA JANE ALLEN

This article examines the recent decision by the High Court of England & Wales in the case of *The Government of the United Arab Emirates v Amanda Jane Allen* [2012] EWHC 1712 (Admin)³. This case is an example of the meeting of the two subjects of extradition and dishonoured 'loan security cheques'.

In May 2008, Amanda Allen took a loan of AED 2,380,000 from Abu Dhabi Commercial Bank to purchase a property, the total cost of which was AED 2,800,000. The loan was repayable over 20 years by monthly instalments through a credit card account with the bank. As security, she provided the bank with an undated cheque for AED 2,337,500. In late 2009, she defaulted on the loan. The bank called in the loan, entered 30 December 2009 on the cheque and presented it for payment, but there was insufficient credit to meet the cheque. Ms Allen then made a payment of AED 800,000, which left an unpaid balance of approximately AED 1,500,000, and returned to the UK.

Ms Allen was prosecuted in absentia at the Abu Dhabi Court of issuing an uncovered cheque contrary to Article 401(1) of the Federal Penal Code. She was sentenced to three years' imprisonment.

On 22 March 2011, the UK received a request for Ms Allen's extradition. She was arrested and brought before Westminster Magistrates' Court where, on 2 December 2011, the District Judge found in her favour and ordered her discharge. The UAE appealed to the High Court against the District Judge's decision. The appeal was heard on 14 June 2012 and judgment was handed down on 22 June. The High Court dismissed the UAE's appeal⁴.

What follows is a summary of the relevant law, an examination of the reasons for the findings of the UK courts and concluding remarks about why this request for extradition was never likely to succeed.

THE LAW AND ISSUES

There are two legal instruments relevant to the extradition part of this case: The bilateral Extradition Treaty of 2006⁵ between the UAE and the UK and the UK's Extradition Act 2003⁶.

The 2006 Treaty was announced in the UAE by Federal Decree No (38) of 2007. It came into force in both countries on 2 April 2008. The UAE is designated a Category 2 territory under the UK's Extradition Act 2003. Therefore, the provisions in the 2006 Treaty, as to requirements for extradition requests and available defences, mirror those contained in Part 2 of the 2003 Act.

The sections of the 2003 Act relevant to Ms Allen's case are sections 78, 138 and 86:

- Section 78 requires the Court to ensure that the extradition request documentation is in order, satisfy itself as to the person's identity and establish whether the offence specified in the extradition request is an 'extradition offence'. This last concept is known as the requirement for 'dual criminality'.
- Section 138 sets out the conditions to be satisfied in determining whether the offence for which a person has been convicted and sentenced in a category 2 territory is an 'extradition offence', which includes a requirement that the conduct would constitute an offence in the United Kingdom punishable with imprisonment for a term of 12 months or greater and a sentence of imprisonment for a term of 4 months or a greater has been imposed in the category 2 territory.
- Section 86 requires the Court to decide whether there is, on the papers in the extradition request, sufficient evidence to make a case requiring an answer by the person whose extradition is sought, if the proceedings were a summary trial (a prima facie case).

As noted above, the Extradition Act requires 'dual criminality'. Article 401(1) of the Federal Penal Code (Law No.3 of 1987 as amended) states:

A punishment of confinement shall be inflicted on any person who, in bad faith draws a check without an existing or drawable provision, or who, after issuing the check, withdraws all or part of the fund so that the balance becomes insufficient to settle the amount of the check, who orders the drawee not to pay check, or deliberately makes or signs the cheque in such a manner as to prevent it from being paid.

Section 2 of the Fraud Act 2006⁷ states:

- (1) A person is in breach of this section if he—
 - (a) dishonestly makes a false representation, and
 - (b) intends, by making the representation—
 - (i) to make a gain for himself or another, or
 - (ii) to cause loss to another or to expose another to a risk of loss.
- (2) A representation is false if—
 - (a) it is untrue or misleading, and
 - (b) the person making it knows that it is, or might be, untrue or misleading.
- (3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of—
 - (a) the person making the representation, or
 - (b) any other person.
- (4) A representation may be express or implied.

Although the letter of the law in the UAE requires bad faith for the offence to be established, in practice, a finding that the opponent issued the cheque and that the cheque was dishonoured will

usually result in confinement. The UK does not punish the mere non-payment of a cheque by criminal means. In the absence of dishonest intent, the matter of unpaid cheques is one for the civil courts. The UAE's case in the extradition proceedings needed to overcome this issue, which would be realised as a dual criminality defence. It therefore argued implied misrepresentation: that Ms Allen was guilty of an offence under section 2 of the Fraud Act 2006 (Fraud by false representation) on the date entered on the cheque by the bank (30 December 2009) on two propositions:

1. There was an implied representation by her at the time she provided the cheque in 2008, that it would in the ordinary course be met whenever it was presented for payment.
2. This representation became false (bad faith was established) when her account was depleted so as to render the balance insufficient to meet the cheque on presentation.

It is important to note that it was not the UAE's case that the representation was false at the time of the loan (that could not have been sustained on the facts), but that it became false at the time there was insufficient credit to meet it.

The High Court identified the critical issue as: what, if any, representations were to be implied from the giving of the cheque in the commercial context in which it was given?

As to the UAE's first proposition, Toulson LJ pointed to a number of what he called 'striking features' of this case that distinguished it from a situation where a cheque is presented in a deception by a person who knows, when he hands over the cheque, that there are, will or might be insufficient funds to meet it:

- The amount of the cheque was practically equal to the amount of the loan, but was not the intended method of repayment. Rather, the cheque was to provide a form of security upon a certain contingency, such as default, which might occur at any time within the 20-year period of the loan. Any banker would know there are a number of reasons why a borrower might default in that time, other than a deliberate intention to do so, and takes them into account when deciding the terms on which it will lend, including the rate of interest.
- The purpose of the loan was to buy a property. No banker could have supposed Ms Allen to be suggesting that she could keep the amount of the loan in her bank account. If that was her position, it is unlikely she would have needed the loan. The bank knew her financial circumstances and there was no evidence that she did not make full and frank disclosure of her financial circumstances.
- The bank would have known that the value of the security (the cheque) would depend on Ms Allen's circumstances at such time as default might occur, which might arise for any number of reasons. No reasonable banker could have inferred that she was making a representation that her current financial circumstances were such that the cheque would be met if presented at any time during the period of the loan. The Court commented that it would make no sense if she were to be taken by the bank as saying that in an event resulting in default, her circumstances at the time of the loan were nevertheless such that the cheque would be met, despite the fact that she could not now meet the repayments.

In answer to the first proposition, therefore, the Court held there was no implied representation by Ms Allen that the cheque would in the ordinary course be met whenever it was presented for payment.

As to the second proposition, the High Court dismissed the arguments advanced on behalf of the UAE, for the following reasons:

- A representation is limited to statements about past or present intent and cannot be made as to a future state of mind. Any such statement will not fall within the legal classification of a representation. Therefore, any breach of such statement will not be a false representation.

- There was no requirement for Ms Allen to keep the bank updated about her financial situation and there was no basis for inferring a continuing implied representation (by her silence) that she was still in a position to meet the cheque (which would have become a misrepresentation at the time she had insufficient credit to meet it).
- The cheque provided the bank with a cause of action, with the reinforcement of criminal sanctions under UAE law. It was not (contrary to the submission made by counsel for the UAE) rendered commercially worthless if it did not operate as providing such a continuing representation.

In relation to the requirement under s.86 for a prima facie case to be established in the extradition request, although it was not necessary to decide the point given the above findings as to the issue of representation, the High Court found that no evidence was provided to show, either directly or by inference, that Ms Allen had acted with any dishonesty. As dishonesty is a required element of s.2 Fraud Act, a prima facie case would not have been established.

CHANCES OF SUCCESS

Although the High Court correctly identified that the scope of representations is in law limited to statements as to the past or present (including the person's state of mind) and that there was no basis for an implied continuing representation by Ms Allen, this request for extradition was doomed to failure for the lack of dishonesty too.

The purpose of extradition is to allow participating states to investigate, put on trial and sentence individuals who commit serious criminal acts and then flee the jurisdiction. It is not intended to assist in the enforcement of commercial agreements. It should come as no surprise, therefore, that in the absence of any evidence that Ms Allen acted dishonestly when taking out the loan (or at any stage), there was no offence under the Fraud Act and thus no basis for her extradition.

CONCLUDING COMMENTS

In an article with what could be considered as an inflammatory headline, the High Court has been reported⁸ as saying that "Jail for bounced cheques makes no sense". This is inaccurate. What the Court said "makes no sense" is for an inference to be drawn that a borrower would make a representation, at the time a loan is taken, that a security cheque would be met in the ordinary course of events if presented at any time during the 20-year period of a loan, when the ordinary course of human events may well include illness, accident or unemployment so as to render him unable to meet the monthly instalments. This was in the context of the Court explaining that a bank will know that the value of a security cheque will depend on the financial circumstances of the borrower at the time the security is needed. Of course, this will invariably be at a time when, for whatever reason, the borrower has little or no money.

The issue of whether the UAE should invoke the criminal law for people who later become unable, rather than unwilling, to honour a cheque written in good faith is not a subject upon which the High Court commented in this case. It merely confirmed that, in these circumstances, there is no representation that the cheque will always be met and so, in the event that it is dishonoured, there is no basis for a criminal charge in the UK. The reality of the situation is that the arguments advanced on behalf of the UAE were inherently unsupported by UK legal theory or precedent precisely because the remedy for Ms Allen's actions would, in the UK, lie in civil action rather than criminal proceedings.

If, as was urged in Hassan Arab's article referred to above, the Abu Dhabi Criminal Court had investigated the circumstances of this case, it may have found that Ms Allen did not act in bad faith, but that her circumstances had changed such that she was no longer able to repay the loan. Lenders in the UAE are of course entitled to file criminal complaints against their defaulting customers, but this article would also urge the Criminal Courts to take into account (i) that default may result from a change in circumstances rather than bad faith; (ii) that lenders will know that an

average borrower cannot realistically be certifying that they will always have sufficient funds to repay the full debt by way of the security cheque; and (iii) that, in the absence of bad faith, the repayment of the loan is likely to be the preferred outcome for all parties.

Given that lenders must always have known that an average borrower is unable to repay the loan at any time and given the known difference in approach to dishonoured cheques between various jurisdictions, it seems highly unlikely that this judgment of the High Court will have any direct effect on current lending practices in the UAE. Having said that, the business of lending is of course a risk-based activity that may look to preferring secured loans over personal cheques, and to requiring substantial deposits from borrowers to mitigate any future loss.

In any event, in terms of enforcement, progress might conceivably be made by focussing on civil recovery rather than criminal punishment. If a lender's desire is to recoup the money owed to it, the best chance of achieving that aim is to obtain a money judgment against the debtor for the amount actually due, with an easily-enforceable right (granted by a loan agreement secured against the property and/or by a power of attorney given by the borrower) to sell the debtor's identified assets. In addition to recognising the situation for the commercial transaction that it is, this approach would also acknowledge the futility, however incentivising it may be, of confining to prison a person who could more usefully be finding ways to repay his debt.

Footnote:

1. 'Extradition Requests and Available Defences' by Ibtissem Lassoued & Mahmoud Mostafa, Al Tamimi Law Update (January/February 2012)
2. 'Dishonoured Cheques in the UAE – a Criminal Law perspective' by Hassan Arab, Al Tamimi Law Update (June 2012)
3. <http://www.bailii.org/ew/cases/EWHC/Admin/2012/1712.html>
4. There was a further right of appeal (not taken in this case) to the Supreme Court, to be sought within 14 days of the discharge, but this needs permission of the High Court (or the Supreme Court) which permission must not be given unless the High Court has certified a point of law of general public importance and it is a point that the Court considers ought to be heard by the Supreme Court: s.32 Extradition Act 2003.
5. <http://www.official-documents.gov.uk/document/cm73/7382/7382.pdf>
6. <http://www.legislation.gov.uk/ukpga/2003/41/contents>
7. <http://www.legislation.gov.uk/ukpga/2006/35/contents>
8. Shane McGinley, Arabian Business, 24 July 2012 "Jail for bounced cheques "makes no sense" – UK judge".