

## **Fraud under the Furlough Scheme**

### **The Key Questions and Answers for those Investigated under the Scheme**

#### **Introduction**

The Government has extended its Covid-19 loan schemes from November 2020 until at least the end of January 2021. Since the schemes opened in May 2020, more than £60 billion has been lent by banks to about 1.4 million companies. The majority of this lending has been through the bounce back loan scheme (BBLs) which allows businesses to apply for up to £50,000 in state-guaranteed loans.

In a letter published by the British Business Bank on 5 November 2020 to the House of Commons' public accounts committee (PAC), the chief executive Catherine Lewis La Torre said that 26,933 loans had been rejected by banks as fraudulent since the BBLs launch in May 2020. Based on bank data, the British Business Bank calculated the fraudulent loans would have been worth £1.1 billion had they not been stopped. This startling figure indicates how aggressively the scheme has been targeted by individuals seeking to make fraudulent claims.

In May 2020 Yasin Patel and Amy Hazlewood assessed some of the key statutory and common law provisions pertaining to [Fraud under the Furlough Scheme](#). This article written by the same authors answers the 10 most commonly asked questions posed by clients and personnel concerned with the scheme. The piece delves deeper into the procedural and practical implications behind the statutes by evaluating some of the fundamental questions clients have asked.

#### **1. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate or business fraud?**

The Serious Fraud Office (SFO), Her Majesty's Revenue and Customs (HMRC) and the police are the main agencies that investigate, prosecute and enforce actions in terms

of corporate and business fraud. All have wide ranging powers in their remit. Complex or serious fraud tend to fall under the domain of the SFO. Fraud cases that do not fall into the SFO's remit are instead investigated by the police and then prosecuted by the Crown Prosecution Service (CPS). Tax fraud is investigated by HMRC and they have the powers to prosecute and enforce in these matters.

## **2. Who Can Prosecute me for Fraud?**

The SFO have the power to prosecute cases, as well as investigate. Cases that are investigated by HMRC and the police are prosecuted by the CPS.

The Financial Conduct Authority (FCA) also has criminal prosecution powers in relation to offences involving the financial markets, such as market manipulation and insider dealing. However, they can prosecute other offences due to the plethora of potential offending within the various financial markets such as shares, stock exchange trading, Forex, acquisitions etc.

## **3. Who Can Interview Me?**

The SFO, police and other investigatory bodies can interview suspects under caution. Police powers are governed by the Police and Criminal Evidence Act 1984 (PACE) and include powers of arrest, detention, search and seizure, and surveillance.

A suspect has all of the protections available under PACE as per any normal suspect interview by an investigating body including the rights to a legal advisor, the interview being recorded, the right to remain silent and many more.

## **4. What do I have to Disclose?**

The right to silence is inherit in any interview done under caution and it is one that applies regardless of which of the agencies is conducting the interview. However,

different agencies have different powers. The SFO has additional powers to compel the provision of documents or information. They are gifted the specific powers to do this under section 2 of the Criminal Justice Act 1987. The powers under this section are incredibly broad. They can require a person under investigation, by way of written notice, to produce specified documents which appear to relate to any matter relevant to the investigation. Upon producing such documents, copies or extracts can be taken from them and the person producing the documents may be required to provide an explanation of them. Note the fact that they “may” be required to provide one as opposed to “have” to give one.

Any statement made in relation to documents disclosed under section 2 of the Criminal Justice Act 1987 can only be used if evidence relating to the statement is adduced, or a question relating to it is asked in proceedings arising out of the prosecution. It may also be used as evidence against the person if they are being prosecuted for,

- i) making a statement which the accused knows to be false or misleading, or
- ii) recklessly makes a statement which is false or misleading.

If the suspect cannot produce the documents, they can be required to state to the best of their knowledge where the documents are. If the suspect fails to comply with an obligation to produce the document(s), serving a written notice is not practicable, or the service of such a notice may prejudice the investigation, a warrant may be issued. The warrant authorises a constable to enter and search the premises specified in the warrant. It also permits a constable to take possession of any document(s) necessary for preserving them and preventing interference with them. One can imagine that if a business has several premises, warrants may be issued in relation to all of them.

An important exception to the rules is that a person is not required to disclose any information or produce any document that he/she would be entitled to refuse to disclose or produce on the grounds of legal professional privilege.

Failing to comply to comply with the section 2 disclosure without a reasonable excuse can lead to a conviction, and up to six month's imprisonment, or fine. It is also an offence carrying up to 7 year's imprisonment for anyone who falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of documents which he knows or suspects are or would be relevant to such an investigation.

The equivalent powers for the CPS are found in Section 62 of the Serious Organised Crime and Police Act 2005 (SOCPA).

## **5. Can I be Arrested?**

The police, the National Crime Agency (NCA) and HMRC have the powers of arrest contained in PACE section 24. The SFO do not have the powers of arrest. Arrests on behalf of the SFO are carried out by the police.

The suspect must be released where there is insufficient evidence to charge but the detention of a suspect can no longer be justified. If a suspect is released on bail, the bail period is limited to 28 days, or three months in an SFO case. The initial period can be extended to up to six months in certain cases. Conditions typically imposed include residence at a particular address and a requirement that the defendant surrender their passport. Applications to remove or vary bail conditions can be made to the Magistrates' Court. It may not come as a surprise but many of the conditions of arrest and release are no different to those currently in existence and used for financial and white collar offences.

## **6. Who decides whether to Charge me?**

The prosecuting authority will make the decision on whether to charge. This will be the CPS for simple matters, or the SFO for serious or complex fraud. Both authorities have to apply the "Full Code Test" which sets out 2 stages:

- 1) Evidential stage. Prosecutors must first ask themselves whether there is sufficient evidence to provide a realistic prospect of conviction.
- 2) Public interest stage. Only where there is sufficient evidence to justify a prosecution, must prosecutors then consider whether a prosecution is required in the public interest.

Having applied the Full Code Test, the prosecuting authority may decide to take no further action or they may decide to charge the accused.

## **7. What is a Deferred Prosecution Agreement?**

Deferred Prosecution Agreements (DPAs) were introduced on 24 February 2014, under the provisions of Schedule 17 of the Crime and Courts Act 2013. They have been available to the CPS and SFO since February 2014.

A DPA only applies to organisations for fraud, bribery and other business crimes. They cannot be applied to individuals. Under a DPA, an agreement is reached between the organisation and the prosecuting authority and is supervised by a judge.

Under a DPA, the organisation agrees to terms and conditions that could for example include, paying compensation or a financial penalty, and cooperating with the future prosecutions of individuals. Proceedings are automatically suspended if the DPA is entered into by both parties, and is approved by a judge. If the organisation is found not to have honoured the conditions, the prosecution may resume.

## **8. Can I Obtain Immunity from Prosecution?**

Prosecutors have a discretion to offer conditional immunity notices to individuals who agree to assist in the prosecution of others Under sections 71 and 72 of the SOCPA.

If an individual is given an immunity notice, no proceedings for the described offence within the notice may be brought against them, except in circumstances specified in the notice. An immunity notice ceases to have effect in relation to the person to whom it is given if the person fails to comply with any conditions specified in the notice.

#### **9. Can I Secure an Undertaking as to the Use of Evidence?**

Prosecutors have the discretion to offer a person by way of written notice, an undertaking that information of any description will not be used against the person in any proceedings to which the notice applies. The notice can apply to both criminal and Proceeds of Crime Act proceedings.

Such a situation is likely to arise if representations are made by the suspect's legal team, a deal is agreed by the suspect and the prosecution or (in the rare cases) the prosecutor decides of their own accord.

#### **10. Can I Receive a Reduction in Sentence?**

A defendant who pleads guilty to an offence may benefit from a reduction in sentence under section 73 of SOCPA if they have reached a written agreement with the prosecutor to assist or offer to assist in relation to the offence or any other offence. In determining what sentence to pass on the defendant the court may take into account the extent and nature of the assistance given or offered however, sentencing remains at the discretion of the court.

The discount for early guilty pleas applies as per other criminal offences along with the mitigating and aggravating features for sentencing purposes. The Sentencing Guidelines Council's guidelines on Fraud would be the starting point in relation to offending within this area as well as sentencing authorities

## **Conclusion**

Fraud cases are often complex, with high stakes for reputations and finances of individuals and companies. If you are seeking further legal advice in connection to fraud or associated charges contact Yasin Patel ([y.patel@churchcourtchambers.co.uk](mailto:y.patel@churchcourtchambers.co.uk)) and/or Amy Hazlewood ([a.hazlewood@churchcourtchambers.co.uk](mailto:a.hazlewood@churchcourtchambers.co.uk)).