SLAUGHTER AND MAY/

GLOBAL INVESTIGATIONS BULLETIN

July 2024

Court of Appeal Rules on Money Laundering Risks in Supply Chains
Recent News
Horizon Scanning

COURT OF APPEAL RULES ON MONEY LAUNDERING RISKS IN SUPPLY CHAINS //

The Court of Appeal in *R (World Uyghur Congress) v NCA* has found that the NCA's decision not to open a money laundering investigation into the trade of cotton in the UK from the Xinjiang Uyghur Autonomous Region of China (XUAR), was unlawful.

Importantly, the judgment disagreed with a widely held interpretation of the money laundering offences in the Proceeds of Crime Act 2002 (POCA). If the Court of Appeal's interpretation is correct, it means that trading in goods that are known or suspected to have been produced with forced labour, or any other criminality, (and products containing those goods) can be a money laundering criminal offence, even if fair value has been paid.

Background

The World Uyghur Congress (WUC) is an NGO that aims to promote the interests of the Uyghurs, an ethnically and culturally Turkic people living in the XUAR. The WUC provided evidence to the UK National Crime Agency (NCA), to demonstrate the widespread use of forced labour in the cotton industry in the XUAR, and the trade in this cotton in the UK. The WUC alleged that such cotton was 'criminal property' under POCA and sought to persuade the NCA to investigate businesses who were trading the cotton in the UK for potential money laundering offences.

Money laundering offences in POCA

There are three principal sections in POCA that contain the money laundering offences. These are:

- Section 329 - which makes it an offence to acquire, use or possess criminal property.
- Section 328 - makes it an offence to facilitate the acquisition, retention, use or control of criminal property by or on behalf of another person.

- Section 327 – makes it an offence to deal with criminal property in various ways, including concealing it, disguising it, converting it, transferring it, or removing it from the UK.

In order to be liable under any of these sections, a person must know or suspect that the property is a benefit of someone's crime (ie. that it is "criminal property"). The apposite offence in the context of a supply chain case is section 329. This section contains an exception whereby if 'adequate consideration' (ie. market value) is paid for the criminal property, then there is no offence. There is no similar exception in sections 327 or 328.

The NCA's decision

The NCA decided not to open an investigation stating that:

- It was not required to investigate unless a *specific* shipment of cotton had been identified as the proceeds of crime; and
- Once someone in the supply chain had paid 'adequate consideration' for the product, the product could no longer be criminal property. Given the likelihood that, at some point in the supply chain for the XUAR cotton, adequate consideration would have been paid, the chances of there being any money laundering offence was low.

The WUC launched a judicial review of the NCA's decision.

During the Court of Appeal process, the NCA accepted that it *can* commence an investigation into the proceeds of crime before specific criminal property (or recoverable property) is identified.

The Court of Appeal's decision

The Court of Appeal found that the NCA had misdirected itself in law when deciding not to investigate. Critically, the Court of Appeal found that the adequate consideration exception operates only in relation to the acquiring, using, or possessing of criminal property (under s.329), and that it does not operate to 'cleanse' the property of its criminal character. Therefore:

- the payment of adequate consideration by one party somewhere in a supply chain does not 'break the chain'; and

- a purchaser of criminal property for adequate consideration can still commit a different money laundering offence (under section 327) if they deal in that property, for example by using it to manufacture another product, and/or selling it to someone else.

The NCA must now re-consider its decision. However, the judgment does not compel the NCA to open an investigation. It is possible that the NCA will again refuse to investigate, but for other legitimate reasons (from a public law point of view). As such, this may be a hollow victory for the WUC.

Implications for companies and international supply chains

As a consequence of this decision, any business (or person) that becomes suspicious that the property they are acquiring or have acquired is tainted by criminality, even where they have paid market value for that property, now faces greater risk of committing an offence under POCA in any onward dealing with the property (eg. selling, transferring, or moving it). This is because it cannot rely on the adequate considerate exemption to cover these steps. Businesses will need to consider how to protect themselves when doing anything with such property, for example, seeking a Defence Against Money Laundering (DAML) from the NCA.

It remains to be seen whether the judgment will lead to an increase in money laundering investigations, but there is no doubt that it has significant implications for business in terms of how they manage the risk of human rights abuses, environmental crimes and other criminality in their international supply chains.

Businesses should reflect on the processes that they have in place to monitor their supply chains for wrongdoing and what steps are taken if concerns about wrongdoing in their supply chains comes to light.

For more detail on this case and its implications for businesses, see our client briefing Money Laundering: Now a Never-Ending Chain?

RECENT NEWS //

SFO Round-Up: Permission sought from Attorney General to charge individuals in Glencore case; Greenergy trader cleared of fraud and money laundering at trial; Cash seized from official linked to Nigerian bribery

The SFO has sought permission from the Attorney General to bring corruption charges against individuals in the long-running Glencore investigation. An answer is expected from the Attorney General's Office by the end of July. The prosecutor originally had a court-imposed deadline of April 2023 to decide whether to bring cases against individuals connected to the Glencore investigation. However, the deadline was extended to July 2024. Glencore Energy UK Ltd pleaded guilty to seven counts of bribery in 2022 following an SFO investigation and was required to pay over £280m.

On 28th June, a former trader at Greenergy, Gianni Rivera, was cleared of fraud and money laundering charges by jurors at Southwark Crown Court. Rivera had been accused by the SFO of one count of money laundering and one count of fraud by abuse of position. The prosecutor alleged that Rivera had received improper payments from a Dutch company, BDK, owned by Cees Bunschoten, a friend of Rivera's. The SFO said Rivera was secretly being paid by BDK while trading in sustainability and non-sustainability fuel contracts worth hundreds of millions of Euros. Bunschoten was convicted in the Netherlands in 2019 on fraud and money-laundering charges.

The SFO has confiscated £36,000 from the bank account of Emmanuel Okoyomon, a former director at a Nigerian state banknote printing company, as part of a proceeds of crime case against him. The court heard that Okoyomon was paid bribes by Peter Chapman, a former sales director at an Australian technology company (Securency), to win business contracts

worth around EUR 30m. Chapman was jailed for 2 ½ years in 2016 for bribery offences, following an SFO-led prosecution.

Boeing agrees plea deal triggered by US DPA breach

Boeing has agreed a plea deal, trigged by violations of its existing DPA with the US Department of Justice (DOJ). Boeing entered into a DPA with the DOJ in 2021 relating to the fatal crash of two Boeing 737 MAX aircraft – caused by faulty flight technology which was concealed from the regulators. The DOJ said that Boeing had violated its obligations under the 2021 DPA by "failing to design, implement and enforce a compliance and ethics program to prevent and detect violations of US fraud laws." As part of the recent plea deal, which still requires judicial approval, Boeing has been fined US$244m, and must invest over US$450m over the next three years towards compliance and safety initiatives. The fine will be added to the US$244m already paid by the company when it entered into the DPA in 2021.

Mike Lynch cleared of US criminal charges

Mike Lynch has been cleared of 15 fraud and conspiracy charges in the US, relating to the 2011 sale of his tech company (Autonomy) to Hewlett-Packard (HP) for US$11bn. Lynch had faced up to 20 years in prison in the US over allegations that he had misled HP as to the financial health of Autonomy. Lynch fought to avoid facing trial in the US, but he was extradited from the UK in May 2023. Attention will now likely turn to the second leg of the UK civil case against Lynch. The UK High Court delivered a 'liability judgment' in May 2022, finding that HP had "*substantially succeeded*" in its civil claims. The 'compensation judgment' is now expected later this year.

FCA / PRA Round-Up: Citi fined £61m for trading systems and controls failures; HSBC fined over treatment of customers in financial difficulty; FCA charges 'finfluencers' for unauthorised promotions on social media; Individuals banned over mistreatment of pension funds

The PRA and FCA have published Final Notices in respect of separate investigations run in parallel into Citigroup Global Markets Limited, fining it close to £33.9m and £27.8m respectively for failures in its trading systems and controls. This is the biggest FCA fine of the year so far. The firm agreed to resolve the matter and qualified for a 30% discount under the PRA and FCA's executive settlement procedures.

The FCA has published a Final Notice addressed to HSBC UK Bank plc, HSBC Bank plc and Marks and Spencer Financial Services plc (together HSBC), fining it close to £6.3m for failures in its treatment of customers who were in arrears or experiencing financial difficulty. The FCA found that HSBC failed to properly consider customers' circumstances when they had missed payments and to always conduct the right affordability assessments when entering arrangements to reduce or clear customers' arrears. The failings breached Principles 3 and 6 of the FCA's Principles for Business. HSBC agreed to resolve the matter and qualified for 30% discount. HSBC also made redress payments totalling £185m.

The FCA has brought charges against nine individuals in relation to an unauthorised foreign exchange trading scheme promoted on social media. One individual has been charged with one count of breaching the general prohibition under s.19 of FSMA for operating an

unauthorised investment scheme and one count of unauthorised communications of financial promotions under s.21. The eight other individuals each face one count of issuing unauthorised communications of financial promotions. In March 2024, the FCA published guidance on financial promotions on social media to clarify its expectations for when firms and influencers use social media to communicate financial promotions, and to address emerging consumer harm seen as arising from use of social media.

The FCA has issued Final Notices and Decision Notices, fining and banning three individuals who were involved in running SVS Securities Plc, a discretionary fund manager. SVS managed investments held on behalf of its customers. Under FCA rules, the firm was required to act in the best interests of its customers and not let conflicts of interests interfere with its obligations to them. The FCA found that the former CEO, recklessly caused SVS to use a complex business model intended to maximise the flow of customer funds into high-risk illiquid bonds. The model created systematic conflicts of interest and inappropriately prioritised income to SVS over the best interests of customers. The FCA has found that the three individuals acted recklessly in deciding to mark-down customers' valuations when they disinvested from fixed income assets. Two of the individuals have referred their Decision Notices to the Upper Tribunal.

Court of Appeal adopts broad interpretation of sanctions legislation

In June, the Court of Appeal delivered its judgment in *Celestial Aviation Services v UniCredit Bank.* The decision is significant as it denotes a slight reversal of the recent trend in the UK and Europe of successful challenges to Russian sanctions. The dispute arose out of UniCredit's refusal to pay under letters of credit issued as part of leasing arrangements with Russian airlines. UniCredit argued, amongst other things, that payment was prohibited by UK sanctions. The Court of Appeal overturned the first instance decision and found that UK sanctions did apply on the facts, and UniCredit was therefore entitled to suspend payment. The Court adopted a broad interpretation of the sanctions legislation and emphasised the importance of the licencing regime to mitigate any unintended consequences of sanctions.

ICO: No Enforcement Action against Snap; Joint Statement from the ICO and the Office of the Privacy Commissioner of Canada

In June, the ICO announced that it would not take enforcement action against Snap for its ChatGPT powered 'MyAI' chat-bot – despite its Preliminary Enforcement Notice of October 2023, which suggested it may do so to prevent Snap processing personal data in connection with MyAI. The ICO has now published its decision explaining why it chose not to bring such enforcement action. The decision is helpful reading for any organisation looking to implement genAI or undertaking any other high-risk processing. For more on the ICO's decision see our article on The Lens.

The ICO and the Office of the Privacy Commissioner of Canada (OPC) have published a joint statement announcing their offices will collaborate to investigate the 23andMe data breach that occurred in October 2023. The statement sets out that whilst this collaboration will leverage the combined resources and expertise of both offices, each regulator will investigate compliance with the law that it oversees.

Horizon Scanning

What can we expect from the new Labour government in terms of the financial crime and anti-corruption agenda?

- Labour has promised in its manifesto to introduce a "new expanded fraud strategy" focusing on online, public sector and serious fraud. The new government says it intends to work with technology companies to protect their platforms from criminal exploitation. Labour's plans also include creating a 'COVID Corruption Commissioner' who will bring enforcement agencies together to coordinate on recovering public funds lost to pandemic-related fraud.

- David Lammy, the Shadow Foreign Secretary (as he was then), made a speech in May 2024, confirming Labour's plans to introduce a reward scheme for whistleblowers who identify sanctions breaches. The director of the SFO has also championed similar proposals.

- In a policy paper published just before the election, Labour suggested expanding deferred prosecution agreements (DPAs) to individuals, not just corporates – but only for tax evasion offences.

- Labour has also historically proposed reviewing the funding model for the SFO and considered whether the agency should keep a portion of the revenue it generates from financial settlements such as DPAs.

What we have yet to hear is the detail on what these policies would entail, if and when they might be implemented, and how budgets would be increased to the deliver them.