Dear All,

Welcome to the YFLA Spring 2022 Newsletter.

Details of our upcoming events can be found on our website (**www.yfla.com**) and on our LinkedIn group (search for "**Young Fraud Lawyers Association**").

Social Update

It was great to see so many of you at both the postposed Winter Social and social breakfast that took place last month. I think you will agree that both were really well organised and great fun. Next up on the social calendar is the Summer Social which will take place in July. We have big plans for this one so keep an eye out for more details to follow soon.

Upcoming Educational – 'Demystifying Crypto: What it means for your practice... '

On 16 June we will be joined by a stellar panel of practitioners as we talk cryptocurrencies, virtual assets, NFTs and more including what it all means for you and your clients including the ways in which the Courts, Regulators and Investigators are seeking to catch up with these increasingly important technological advances. Our panel, chaired by David Savage of Stewarts, will comprise:

- Racheal Muldoon (36 Commercial)
- Anna Holmes (Kingsley Napley)
- Rob Moore (Mitmark)

If you are interested in attending this event - which will take place at the offices of Kingsley Napley LLP, 20 Bonhill St, London EC2A 4DN and will start at 6.30pm – please register your attendance by emailing educational@yfla.com

Publicity Secretary's Note

I am delighted to again have the opportunity to present six engaging contributions covering criminal, civil and practical developments in the fraud practice area and drawing from the YFLA's solicitor and barrister membership.

- **Omar Khan & Flora Stafford** have produced a thought-provoking and topical article on what the UK might do with confiscated Russian assets and illicit financial flows.

- **Ashley Fairbrother** provides an excellent case summary of *Macmillan Cancer Support v Toogood [2022] EWCA Crim 633* in which the Court of Appeal clarify *Momodou* and explain the consequences of not having a fully pleaded defence statement.

- **Jamie Holmes** takes us through a recent decision of the Cayman Islands' Court of Appeal ("CICA") and the proper approach to freezing assets offshore, which is sure to be of great interest to our members who work in multiple jurisdictions.

- **Anthony James** has produced a useful guide on the collateral use of documents disclosed in civil proceedings in criminal proceedings, a topic which will no doubt benefit all of our members.

- **Ellen Sanchenko** takes a timely look at how HMRC is tackling fraud in business rescue schemes.

- **Sofia Berggren & Rebecca Belgrave** have produced an interesting and informative article on the ever hot topic of Asset Recovery Tools in the Crypto Era: Freezing Assets Held in Private Wallets.

I continue to be deeply impressed by the depth and breadth of expertise of the YFLA's membership as illustrated by these articles, and hope that all members will consider volunteering articles for future newsletters.

I encourage you now to find a spot in the sunshine with a cold beverage and tuck in to this excellent edition.

With many thanks to our contributors.

Katie Allard, Publicity Secretary

What will the UK do with Confiscated Russian Assets and Illicit Financial Flows?

The Russian invasion of Ukraine on 24 February 2022 quickly led to the imposition of unprecedented sanctions on Russian entities and individuals, resulting in the freezing and/or seizure of assets worth hundreds of millions of pounds. States are now addressing what do with those assets: (i) can they be permanently confiscated from their owners, and (ii) to where should the proceeds of any confiscation be directed.

Where seized assets represent the misappropriation of public funds from the Russian state, under international law they would normally be repatriated for the benefit of the people of the nation from where they were stolen. However, the President of Ukraine has repeated calls for Russian assets to "be found, seized or frozen, and allocated to a special fund to compensate all the victims of the war"1, a view echoed by politicians in the UK and the US.

[1] https://www.ft.com/content/f625893a-4377-44f1-b100-47ee07b794ef

In addressing whether assets can be permanently confiscated and directed as President Zelensky suggests, it is worth briefly recapping: UK legislation under which corrupt assets may be identified and confiscated; the international legal framework for repatriation; and how well the UK has fared at confiscation and repatriation, before turning to the seized Russian assets.

UK Anti-Corruption Legislation

The Proceeds of Crime Act 2002 ("POCA") is the UK's principal asset recovery legislation. Confiscation orders can be made after a conviction in the domestic courts and civil forfeiture orders may be pursued by prosecutors even where there is no conviction. Unexplained wealth orders ("UWO/s") target, among others, politically exposed people outside of the EU and their associates, who have assets in the UK which on paper they seem unable to afford. UWOs require the respondent to demonstrate the source of their wealth, failing which the respondent's assets may be confiscated. UWOs also do not require a criminal conviction.

The recent Economic Crime (Transparency and Enforcement) Act 2022 (the "Economic Crime Act") seeks to strengthen the UWOs regime by: allowing law enforcement agencies ("LEAs") to pursue properties held under opaque ownership structures; giving LEAs longer to investigate assets frozen under related interim or account freezing orders; and limiting the costs exposure of LEAs where a UWO is successfully contested by its target. Anti-corruption author and journalist Oliver Bullough has highlighted that, despite the Economic Crime Act, the NCA and SFO remain "disastrously underfunded" and "lack the people, resources or political cover to go after financial criminals"[2]. Despite the new measures limiting the costs that respondents to UWOs can claim back following an unsuccessful filing, there has been no indication of new resources being provided for funding investigations.

The Economic Crime Act also provides increased transparency over property ownership by extending the UK's beneficial ownership register to require overseas entities purchasing UK property to declare who their ultimate beneficial owners are, with retrospective application to property purchased in the last 20 years.

Through POCA, UWOs and recent legislation, the UK has demonstrated political will to identify and confiscate corrupt assets, albeit these measures largely stalled after the 2016 Brexit referendum, until the war in Ukraine provided the current Government with impetus to focus on this area.

[2] https://www.theguardian.com/commentisfree/2022/mar/09/oligarch-economic-crime-bill-law-uk

The International Legal Framework

The UN Convention against Corruption ("UNCAC") is the principal legally-binding instrument on the repatriation of confiscated property, enshrining the return of stolen assets to their countries of origin as a "fundamental principle"3. Repatriation is not obligatory unless three conditions are met: (i) the courts of the country of origin must have made a final order confiscating the assets, (ii) which is recognised by the courts of the confiscating country, and (iii) the assets must derive from embezzled public funds or the country of origin must have established its ownership of the assets or the confiscating country recognises damage suffered by the country of origin as a basis for returning the assets.

In reality, successful repatriation of assets has tended to be based in longer terms commitments between individual states and/or case-by-case agreements; that is to say, the UNCAC provides a framework, but states still have much to do to reach the point where assets are transferred back to their countries of origin.

UK Record on Repatriation

There is no UK domestic legislation which specifically provides for the repatriation of assets to their countries of origin. This can be contrasted with Switzerland, which enacted the Foreign Illicit Assets Act in 2016 to formalise a framework for the freezing, confiscation and restitution of assets, building on the leadership it has demonstrated in this area for several decades.

It is perhaps the lack of specific legislation in the UK that has resulted in a piecemeal repatriation of assets, including: £4.4 million that was returned to Chad for investment in humanitarian aid projects; £4.2 million repatriated to Nigeria for infrastructure and building projects, following the signing of a 2016 memorandum of understanding by which the UK agreed to repatriate confiscated criminal assets identified as belonging to Nigeria; the first publicised UWO case against Zamira Hajiyeva, which could see millions of pounds of assets returned to the Azerbaijani government should the High Court find in the NCA's favour; and the recent arrangement to repay a longstanding £400 million debt to Iran, "ring-fenced" for humanitarian aid purposes in accordance with both international sanctions regimes and UK anti-money laundering laws.

Confiscating Russian Corrupt Assets

Commenting on the possibility of property owned by sanctioned Russian individuals in the UK being confiscated and the proceeds donated to Ukraine, Deputy Prime Minister Dominic Raab said "If we've got the evidence and the legal basis, then we'll do it". This

[3] https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf

neatly illustrates that key questions remain unresolved – what would the evidential and legal bases be for (i) permanently confiscating corrupt assets, and (ii) transferring the proceeds to Ukraine?

With respect to confiscation, UWOs could play a role, although the High Court would need to be satisfied that (i) the respondent is a politically exposed person or that there are reasonable grounds for suspecting they or a person connected with them are or have been involved with serious criminality whether in the UK or abroad, and (ii) they did not have sufficient "lawfully obtained income" to purchase the property subject to the UWO application. Against sanctioned Russians, this would potentially present a high hurdle given that many amassed the root of their wealth from state privatisations several decades ago and subsequently reinvested those proceeds into legitimate business. This is one demonstration of the gulf between seizing and confiscating the assets of sanctioned individuals.

Civil forfeiture powers also introduced by the Criminal Finances Act 2017 could be used to confiscate money held in bank accounts and certain other property such as art and cryptocurrency, that represents the proceeds of unlawful conduct or is intended for use in such conduct. As with UWOs, these forfeiture orders can be obtained absent any criminal conviction however the issue present here would be establishing that the property whose forfeiture is sought is "recoverable" i.e. the proceeds of unlawful conduct. This is not to say the hurdles of UWOs and civil forfeiture orders are insurmountable but, in respect of some individuals at least, LEAs would need to forensically cover a lot of ground and at some expense to convert seizure into permanent forfeiture and confiscation. The Government would need to grasp the nettle and ensure LEAs are adequately resourced to carry out this work.

The Government has indicated that it may introduce powers to "swiftly acquire specific land and property owned by a sanctioned person, without the need to pay them compensation"4, in a second Economic Crime Bill in the 2022-23 parliamentary session. A paper from the University of Oxford discusses the challenges the Government might face in ensuring that any such measures would comply with its obligations under Article 1 Protocol 1, Article 6, and Article 8 of the European Convention of Human Rights5. Article 1 Protocol 1 protects the right to property, including the right not to be deprived of one's possessions: any interference must be provided for by law and be justified as a proportionate means of pursuing a legitimate aim in the public interest. The paper suggests three legitimate aims which could be invoked when deciding whether expropriating property is within the public interest: that confiscating assets

[4] https://www.ft.com/content/71a856af-061b-49cc-8c30-7819d2296f96
[5] https://www.law.ox.ac.uk/research-and-subject-groups/property-law/blog/2022/03/enacting-echr-compliant-measures-confiscate

could exert pressure on oligarchs to persuade Putin to cease waging war; confiscation could be used as a mechanism for redistribution in favour of Ukrainian individuals affected by the Russian acts of aggression; and confiscation is justified by the importance of upholding the international rule-based order and deterring other states from following Putin's example. The paper also points to the possibility of oligarchs invoking their Article 8 rights (protecting individuals' rights to respect for their private and family life, including their home) when resisting confiscation of their residential properties. In short, this route, should it be pursued, would present its own challenges.

Repatriation to Russia vs Transfer to Ukraine

The UNCAC represents the overarching international consensus that corruptly acquired assets and illicit financial flows should be repatriated for the benefit of the people of the nations from which they were misappropriated. This was reaffirmed at the Global Forum on Asset Recovery ("GFAR") in 2017, at which Ukraine was one of four focus countries for the recovery of its stolen assets6. In this sense, confiscated corrupt Russian assets are no different than other corrupt assets stolen around the world which trace their origins to misappropriated public funds.

However, the UNCAC framework is only of partial assistance in the case of repatriating Russian corrupt assets, as it cannot be expected that any Russian court will be making a final order for the confiscation of corruptly obtained assets under the current regime, a precondition for obligatory restitution under the UNCAC (albeit one that can be waived by the confiscating state). This links to a broader issue facing any country which confiscates corruptly obtained assets: how can they be repatriated for the benefit of the people of the country harmed by the underlying corrupt conduct without being "re-corrupted" by being channelled back into corrupt circles or other illicit activity. The UK's arrangement to repay £400 million to Iran discussed above demonstrates that money can be returned even where there are serious concerns over a regime and how it will use those funds, where appropriate assurances are given and monitoring is permitted, although it remains to be seen whether those arrangements will succeed in practice. With respect to Russia, it is difficult to see any repatriation terms being agreed as things stand, not least while it maintains its war in Ukraine, and given that Putin's government is said to be complicit in much of the corruption alleged to have taken in place in Russia in the last two decades.

Although the focus of the UNCAC and the GFAR principles are undoubtedly on repatriation to countries of origin, certain UNCAC provisions may provide a basis for transferring the proceeds of confiscated assets to Ukraine, were such basis to be required. Article 57(2) UNCAC, "Return and disposal of assets", envisages confiscating

[6] https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf

states "taking into account the rights of bona fide third parties", when dealing with the return of confiscating assets. Article 57(3)(c) refers to "compensating the victims of the crime". Neither "bona fide third parties" nor "victims" are defined, and while "victims" here may be taken to mean victims of the crime by which the confiscated assets were misappropriated, it may equally be argued that the Ukrainian people, as victims of unlawful Russian aggression, have status as victims with rights to compensation under the UNCAC. Alternatively, their entitlement to the proceeds of confiscated assets may derive from being "bona fide third parties".

The UK Government will obviously need to give careful consideration to where it ultimately places the proceeds of any assets it manages to successfully confiscate. This could involve the proceeds being ring-fenced in the Consolidated Fund or paid into a specially established forfeiture fund, along similar lines to the Unites States' Department of Justice Assets Forfeiture Fund, with a view to paying some of the funds to Ukrainians victims and/or third parties, or to specific projects for the Russian people and/or any specifically identified Russian victims, when the conditions in Russia allow for this to be done. In this respect, the UK will have regard to the GFAR principles regarding the management, transfer and ultimate use of confiscated property.

What path will the UK follow?

The seizure of vast amounts of Russian-linked assets around the world by the UK, the US, the EU and Canada, among others, is unprecedented, as are the globally co-ordinated sanctions that have formed the basis of those seizures. Whether the assets will ultimately be confiscated is as much a political question as it is legal. European Council President Charles Michel acknowledges that reaching the same consensus across the EU to permanently confiscate Russian assets as there was to seize them in the first place will be very difficult and take a long time, if it is possible at all7. And while Mr Raab spoke of evidential and legal bases for turning seizures into realisable proceeds to benefit the Ukrainian people, he did not address whether the political will exists to fund LEAs to build persuasive cases for the confiscation of Russian corrupt assets and illicit financial flows. Legislatively at least, the UK can look to other common law jurisdictions: Canada has already announced measures to allow for the forfeiture of assets it has seized and redistribution to Ukraine8, and the Biden Administration has made proposals for "Establishing a Streamlined Administrative Authority to Seize and Forfeit Oligarch Assets" and "Enabling the Transfer of the Proceeds of Forfeited Kleptocrat Property to

[7] https://www.politico.eu/article/michel-confiscate-sanctioned-assets-russia-oligarchs/
[8] https://www.jdsupra.com/legalnews/canada-introduces-amendments-to-seize-9034061/

Ukraine"9. Should these measures pass through their respective legislatures, they may yet provide a template, if not a blueprint, for the UK to follow.

Flora Stafford and Omar Khan
Addleshaw Goddard

Macmillan Cancer Support v Toogood [2022] EWCA Crim 633
The Court of Appeal clarify *Momodou* and explain the consequences of not having a fully pleaded defence statement

The Court of Appeal [Lord Burnett CJ, Mr. Justice Sweeney and Mr. Justice Cotter] last week handed down its ruling in *Macmillan Cancer Support v Toogood* [2022] EWCA Crim 633 in which Macmillan, the well-known charity and private prosecutor, successfully responded to an appeal against conviction. The convictions were of a pub manager for fraud and theft of monies belonging to Macmillan; the pub manager retained monies that were raised in connection with a 'Go Sober' charity event by regular customers and was deliberately misleading customers to donate money to Macmillan in order to keep the money for herself.

Following a 6-day trial, the defendant was convicted and sentenced to imprisonment of 18 months and 4 months, both suspended for 18 months, an unpaid work order for 100 hours and ordered to repay the stolen charitable donations back to Macmillan by way of compensation.

The Grounds

The Appellant appealed on three grounds:

> Ground 1: The summing up was prejudicial to the defence;
> Ground 2: The judge should have excluded the late evidence called by the Prosecution; and
> Ground 3: The prosecution (wrongly) showed a part of the Appellant's Defence Statement to key prosecution witnesses.

The Court rejected all three of the Appellant's grounds of appeal in a judgment handed down by the Lord Chief Justice on 11 May 2022.

Ground 1 – the Trial Judge's summing up.

The Appellant's Defence Statement alleged that her ex-partner, Mr Fisher, was trusted with banking the charitable donations and that he therefore stole the money. Mr Fisher flatly denied in a witness statement and oral evidence being given the money to pay in.

[9] https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable/

During the trial, a second strand defence emerged during cross-examination of the prosecutor's investigator, namely that Mr Fisher may have paid it in and had either forgotten he had done so or was deliberately concealing that he had done so. When summing up the case, the judge observed:

"You might think, it's a matter for you entirely, that she can't really have it both ways. Either [Mr Fisher] stole it or it's sitting in a bank account somewhere and it's never gone missing at all. So, as I say, keep your eye on the ball."

The law on judicial comment as a ground of appeal was considered in the Privy Council judgment of *Byfield Mears v The Queen* [1993] 1 W.L.R. 818 at page 822, in which their Lordships cited with approval the test set down by Lloyd L.J. in *Reg v.Gilbey* (unreported), 26 January 1990: *'…that the judge's comments went beyond the proper bounds of judicial comment and made it very difficult, if not practically impossible, for the jury to do other than that which he was plainly suggesting*.' The summing up must be so unbalanced or unfair as to call into question the safety of the conviction.

In the instant case, the Court stated that put simply, the central issue for the jury was whether the appellant gave the money to Mr Fisher or not. That was the ball which the judge reminded the jury to keep its eye upon and no more than a means of reminding them "*to focus on the real issues*." Given Mr Fisher's evidence rejecting he had ever received the money, the court found that there was no substance in this ground.

Ground 2 – the importance of a fully pleaded Defence

The Appellant's second ground asserted that prosecution evidence, obtained, served and given during the trial as rebuttal, ought to have been excluded. The Court of Appeal upheld the trial judge's ruling to admit the evidence as the issues to which the evidence was rebuttal ought to have been flagged in the defence statement, and they were not.

The Court of Appeal took the opportunity to remind practitioners of the content which must be included in a defence statement, as set out in section 6A of the Criminal Procedure and Investigation Act 1996 and supplemented by The Attorney General's Guideline on Disclosure [2020].

The Court found it striking that the defence statement did not take issue with the prosecution case that Macmillan had not receive the charitable donations; the defence statement should have made it clear if that was the case: *R v. Rochford* [2011] 1 Cr. App. R. 11. The court found that the reality is that the defence statement focused on what was always the main issue: did the appellant give the money to Mr Fisher to pay into the bank?

The essential reason why the trial judge concluded that the prosecution should be able to investigate the new defence strand was that it had not been flagged in the defence

statement and it was thus reasonable to enable further inquiries to be made overnight. For the same reason it was proper to admit the evidence; the Court of Appeal agreed.

Ground 3 - *Momodou* clarified

The Appellant's third ground asserted that the Prosecutor's investigators had (wrongly) shared her defence statement in meetings with key prosecution witnesses, allowing them to tailor their evidence and warning them of potential cross-examination points.

In the well-known case of *R v. Momodou and another* [2005] 2 All ER 571, it was agreed that there had been inappropriate witness coaching with Judge LJ [at 61] stating:

"… This is the logical consequence of the well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness: see [authorities cited]. The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations … An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved."

The Appellant's case here was different – it was not that prosecution witnesses colluded, but that the witnesses were informed by the investigators of the nature of the defence case so that they could make further statements. The meeting notes indicated that the witnesses had not been given the defence statement but, instead, a 'short unobjectionable summary of the defence'. The Court found there was "*nothing improper in that*". The investigators had merely complied with their duty to make reasonable lines of enquiry and "*There is no question of an abuse of process; nor was a direction needed, of a sort that was necessary in the Momodou.*"

This case serves as a reminder that (i) the Defence have duties to serve a fully pleaded case, (ii) the Prosecutor is entitled to summarise that defence to witnesses in order to take further statements and (iii) should the Defence seek to raise new matters during the trial process, the Prosecution will not be stopped from calling new late evidence to rebut that position.

John Ojakovoh, counsel was instructed at trial and in the appeal by Edmonds Marshall McMahon in this private prosecution for Macmillan Cancer Support.

Ashley Fairbrother
Edmonds Marshall McMahon

Freezing assets offshore - and the proper approach on appeal

On 30 December 2021, the Cayman Islands' Court of Appeal ("CICA") handed down its (as yet unreported) judgment in *Raiffeisen International Bank AG* ["RBI"] *v. Scully Royalty*

Limited ["SRL"] *& Ors.*, upholding two €153m worldwide freezing orders ("WFO") that had (respectively) been continued and granted by Parker J on 1 May 2020. The decision made new law as to the test to rely on fresh evidence on an appeal, provided guidance as to the circumstances in which it would be appropriate to grant an 'uncapped' WFO, and involved an early (*obiter*) application of the *obiter* of the majority of the Privy Council in *Broad Idea v. Convoy* [2021] UKPC 24. The judgment also includes a helpful summary of the core requirements to obtain a WFO (the 'good arguable case' and 'real risk of dissipation' tests) and the proper approach to each on appeal. The latter is of particular significance as an appeal is as of right upon any WFO in Cayman.[10]

In outline, RBI alleges that SRL and others, including other entities within a 'newco' group of companies of which SRL is the parent, committed a fraud on RBI in the process of asset stripping an 'oldco' group of companies, RBI holding a number of guarantees against the parent of the oldco group. RBI's two causes of action are in the tort of unlawful means conspiracy and under the Cayman Islands' *Fraudulent Dispositions Act (1996 Revision)* ("*FDA*"). SRL and the other appellant were both Cayman entities at the time that the proceedings were served and neither challenged jurisdiction. The (all ultimately unsuccessful) jurisdiction challenges of a number of the other defendants have been the subject of several other judgments, including a separate appeal to the CICA (see the unreported judgment of 13 March 2022). An anti-suit injunction was also obtained against SRL (see the unreported judgment of 28 October 2020). The underlying claim upon the guarantees is the subject of a separate arbitration.

The sole reasoned judgment of the CICA was given by Birt JA, with whom Morrison and Moses JJA agreed at paragraphs 213-4. The 80-page judgment can be found in full here. The three most notable findings are as follows:

The CICA tightened the approach for fresh evidence on appeal. The CICA overturned its previous decision in *Columbraria v. Beteta* [2000] CILR Note 2 as to the approach where a party seeks to rely on fresh evidence in an appeal of an interlocutory matter (such as a WFO). The "*comparatively relaxed approach*" provided for in *Columbraria* where the appeal concerned an interlocutory matter was held "*no longer appropriate*" following "*considerable changes in the way in which parties are expected to conduct litigation*" in the 20 years since. That included in particular the introduction of the overriding objective into the Grand Court Rules. Going forwards, the principles set out in *Ladd v. Marshall* [1954] 1 W.L.R. 1489 at 1491, whilst not a jurisdictional gateway, should be considered by the CICA when any such application is made in an appeal following trial or of an interlocutory matter. This is considered across paragraphs 27 to 45 and see esp. paragraphs 32 to 42.

The CICA gave guidance as to when it would be appropriate to include no maximum sum (or 'cap') within a WFO. Parker J held below that the circumstances of the case were sufficiently exceptional, by analogy to the decision of the English Court of Appeal in

[10] *The Court of Appeal Act (2011 Revision), Section 6.(f).(ii).*

London & Quadrant v. Prestige [2013] EWCA Civ 130, to justify a departure from the usual practice that a WFO should be capped (see the unreported judgment of 7 July 2020, esp. at paragraphs 183-7). The CICA accepted that an uncapped order could be justified on "*rare occasions*" where there were "*exceptional reasons*" but ultimately overturned the Judge and imposed a €153m cap. In so deciding the CICA distinguished *London & Quadrant* on the basis that the findings in that case were following trial and the terms of the particular order were narrower and less intrusive than those in this matter (which, nonetheless, were not standard form WFOs, and were limited to certain specified property): see paragraphs 185 to 196. In setting the cap at €153m, the CICA accepted that RBI had established at least a good arguable case that its claim under the *FDA* was not limited to the sums owed to it, but to those owed to all creditors: see paragraphs 197 to 212, esp. 199 to 204.

The CICA clarified the cause of action' requirement for a WFO. As Ground 6 of the appeal, the CICA considered whether it could be said that RBI had a cause of action against the appellants in circumstances in which both of RBI's pleaded causes of action turned on a matter that was the subject of a foreign arbitration (the underlying claim on the guarantees). The CICA determined the point primarily from first principles, holding this did not affect that RBI had causes of action against both appellants under the *FDA* and in conspiracy; RBI having established a good arguable case on the guarantees (paragraphs 167-181). The point also involved an early (*obiter*) application of the *obiter* of the majority of the Privy Council in *Broad Idea v. Convoy*; handed down shortly after the oral hearing in this appeal. The CICA held (*obiter*) that had it felt unable to distinguish the authority on which the appellants had relied on this point, it would have followed this *obiter* in *Broad Idea* to the effect that those authorities (namely *Steamship Mutual v. Thakur* [1986] 2 Lloyd's Rep 439 and *The Veracruz 1* [1992] 1 Lloyd's Rep 353) should no longer be followed on this point (paragraphs 182-184).

Jamie Holmes
Wilberforce Chambers

The collateral use of documents disclosed in civil proceedings in criminal proceedings

This article seeks to outline the relevant rules and case law that practitioners should be aware of when seeking to make use of documents disclosed in civil cases in subsequent or concurrent criminal proceedings.

Civil Procedure Rule (CPR) r31.22 outlines the general rule for collateral use and the limited exceptions:

> ***31.22 Subsequent use of disclosed documents and completed Electronic Documents Questionnaires***
> *(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –*
>
> > *(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;*

(b) the court gives permission; or
(c) the party who disclosed the document and the person to whom the document belongs agree.

Similar provision is made for witness statements in CPR r32.12:

r32.12 Use of witness statements for other purposes
(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.
(2) Paragraph (1) does not apply if and to the extent that–
(a) the witness gives consent in writing to some other use of it;
(b) the court gives permission for some other use; or
(c) the witness statement has been put in evidence at a hearing held in public.
(3) This rule applies to affidavits in the same way as it applies to witness statements.

Document used at a public hearing or by agreement

Where the document is read to or by the court, it is worth noting that the exception extends to documents read by a judge out of court but to which reference is made to in the judgment (*SmithKline Beecham Biologicals SA v Connaught Laboratories Inc* [1999] 4 All ER 498).

As regards witness statements, the evidence contained therein can be used once that evidence is given in court. It may not be used if that evidence is not called or if the matter settles before trial. Likewise, where the party who disclosed the document and the person to whom the document belongs agree to its collateral use, matters are self-explanatory.

In circumstances where the proposed use is the investigation, instigation or advancement of criminal proceedings – often against the party who disclosed the document – that agreement is often not forthcoming, and it will be necessary for the party who wishes to make collateral use of the documents to apply to the court for permission.

The Court gives permission

The test from the authorities is clear: the court will only grant permission where the party seeking permission 'demonstrates cogent and persuasive reasons' for permitting collateral use *and* that permission will not occasion injustice to the person giving discovery (*Crest Homes Plc v Marks* [1987] 1 AC 829 at 859G per Lord Oliver). This has been held to apply to r31.22 by Jackson LJ in *Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 at [66].

The High Court in *ACL Netherlands BV v Lynch* [2019] EWHC 249 (Ch) held that a more restrictive test is to be adopted for the collateral use of documents prior to trial where 'it will usually be difficult, if not impossible, to obtain permission for collateral use (especially in the case of witness statements) except where the Court is persuaded of

some public interest in favour of, or even apparently mandating, such use which is stronger than the public interest and policy underlying the restrictions that the rules reflect' (at [33] per Hildyard J).

What is required is a balancing of public policy interests with cogent and persuasive reasons for permitting collateral use. One such public policy interest is the investigation and/or prosecution of serious fraud or criminal offences (*ACL Netherlands* at [34]).

The Court of Appeal in *Marlwood Commercial Inc v Kozeny* [2004] EWCA Civ 798 is emphatic in its view that the investigation and prosecution of criminal offences does take precedence over the concern of the courts to control collateral use of disclosed documents (at [52]). In that case, Azerbaijani nationals were sued by US nationals in the English courts, where they were compelled to give disclosure. US prosecuting authorities obtained the co-operation of the SFO in issuing notices under section 2 Criminal Justice Act 1987 on the solicitors of both parties.

The test was somewhat refined in *Gilani v Saddiq* [2018] EWHC 3084 (Ch), where HHJ Cooke added that part of the balancing exercise requires the courts to take into account that 'the prosecutor has the duty to lay before the criminal court all the evidence relevant to the offences charged, and would be hindered in doing so if evidence that would otherwise be relevant has to be withheld because this court refused permission' (at [23]).

The risk of injustice to parties is also a decisive factor when applying the test as exemplified in *PJSC National Bank Trusts v Mints* [2020] EWHC 3253 (Comm) where the claimant Russian banks were granted permission to disclose documents to Russian investigators pursuant to a Russian court order. The Court held that it 'would give leave for the information to be disclosed to foreign authorities because it would be a grave injustice for a person who has been granted relief to redress the wrong done to him to find himself compelled to choose between breaking an undertaking or breaking the law where he resides or carries on business and suffering a penalty abroad because of this' (at [151] per Bryan J).

However, this can be contrasted with *ACL Netherlands* which prima facie appears to be a similar case. In this case, the claimants were issued with a subpoena from a US district court to provide documents and witness statements. The Court held that the claimants had failed to demonstrate cogent and persuasive reasons to depart from the general rule. There was insufficient evidence that the subpoena actually compelled the claimants to provide the relevant documentation. Nonetheless, the mere fact of compulsion does not of itself establish a cogent and persuasive reason for giving permission, the test is whether the use for which permission is sought justifies an exception to the general rule on the grounds of the public interest.

This is in line with the court's tendency to be wary of applications which are not properly substantiated. Other examples include *Sita UK Group Holdings Limited and*

another v Andre Paul Serruys and others [2009] EWHC 869 (QB), where the claimant sought leave for the release of documents disclosed by the defendant, intending to provide the information about possible tax frauds to HMRC. The High Court held that the application was premature and it was for HMRC to request the documents.

Further, in *Barry v Butler* [2015] EWHC 447 (QB), mere assertions in a skeleton argument that the CPS were interested in certain witness statements was a 'frail and insubstantial basis on which to seek an order for the disclosure to third parties of witness statements' (at [59] per Warby J).

Conclusion

The general rule is clear: the starting point is that documents cannot be used collaterally, a rule intended to respect the public interest in protecting a litigant's right to privacy and confidentiality and to encourage compliance with the disclosure regime in the civil courts. That public interest can of course be outweighed by the interest in facilitating the investigation and prosecution of criminal offences. Applications must be properly substantiated and the burden on the applicant is a high one. Mere compulsion on the applicant to provide documents to a third party is not a trump card, what the courts are concerned with is the balancing of the public interests at play.

Anthony James
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Covid-19 – how HMRC is tackling fraud in business rescue schemes

Last year, the UK Chancellor Rishi Sunak announced the introduction of the Taxpayer Protection Taskforce to tackle fraudulent activity connected with the use of the government's business support schemes during the pandemic.

Subsidised by £100 million of government money, the Taskforce has already commenced over 13,000 investigation claims, including possible fraud as well as other breaches of rules.

These investigations by the HMRC relate to the use of the government's programmes, such as the self-employment support scheme (SEISS), the job retention scheme (CJRS) and the Eat Out to Help Out (EOTHO) scheme.

However, not all of these claims are expected to turn into criminal investigations. Furthermore, the authorities have already stated that, in many cases, it may be difficult to differentiate criminal activity from an honest mistake.

The government support is expected to reach more than £150 billion in various funding schemes, according to the May 2021 National Audit Office Covid-19 tracker. As such, it is crucial for the businesses and the employers to be aware of the existing requirements in connection to the above governmental grants.

It normally takes up to two years for the government to put systems in place, from the date a claim is received until the day the grant is released.

During the extraordinary Covid-19 lockdown times, such grants were normally approved and released in a matter of days. It is, therefore, not very surprising that there was room for mistakes by the applicants, whether innocent or deliberate.

HMRC made it clear that businesses will be punished if they fail to come forward after having identified an overclaim or an otherwise incorrect claim. A 'deliberate and concealed' mistake can lead to a penalty amounting to 100% of the claim. In the worst-case scenario, there is a risk of criminal prosecution for those who committed fraud or breached the rules.

Common instances of such breaches include claiming furlough while continuing to work. In fact, many enquiries have been raised by people who were made to work when they shouldn't have been, which led to a high number of such HMRC claims.

HMRC previously stated that it expected to recover approximately £1 billion of fraudulently or mistakenly claimed furlough money over the two years. As of September 2021, businesses have already returned £1.3 billion in furlough cash since July 2020.

There is a 90-day grace period to notify the authority of an overclaim or any other error made during the application process to obtain CJRS or SEISS. If such a notification is made, it will help to avoid a penalty. However, there is a scope to bring down the penalty if steps to rectify a genuine error were made, even if those steps were taken outside of the 90-day window.

HMRC also opened hundreds of inquiries into business claims under the EOTHO scheme. In order to be able to rebut any inquiry made by the authority, businesses must have good records of cash sales as well as business accounts. Again, the principle of 'deliberate and concealed' is intact.

Deliberate errors may lead to a 100% penalty, which, as mentioned above, could potentially be reduced to half if reasonable steps to rectify any issues were taken as soon as those issues were identified by the business.

In summary, HMRC encourages self-review, cooperation, voluntary disclosure and, in general, establishing good working relationships with those under investigation. To assist the grant applicants, HMRC published guidance on how to repay overclaimed CJRS and SEISS grants.

It is clear that it is up to the taxpayer to notify the authority if they have overclaimed and, therefore, it is important for businesses to have relevant mechanisms in place.

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Asset Recovery Tools in the Crypto Era: Freezing Assets Held in Private Wallets

With the rise in popularity and value of cryptocurrency, there has been an increasing number of cryptocurrency-related fraud cases. The English court has repeatedly demonstrated its willingness to apply traditional asset recovery tools in order to assist victims of cryptocurrency fraud, as first seen in the landmark decisions of *Ion Science Ltd v Persons Unknown* (unreported) and *AA v Persons Unknown* [2019] EWHC 3556.

In many instances, the key to unlocking crypto fraud is obtaining disclosure from third party cryptocurrency exchanges that have received the stolen funds. In this regard, crypto exchanges have been seen to play a similar role to banks in traditional fraud cases, where the first step will often be seeking disclosure from a recipient bank pursuant to the *Norwich Pharmacal* and/or *Bankers Trust* jurisdictions. However, the decision of *Lubin Betancourt Reyes and Ors v Persons Unknown and Ors* [2021] EWHC 1938 (Comm) demonstrates that due to the nature of cryptocurrency, the relief that may be available to the victims of crypto fraud has the potential to go further than in a traditional fiat currency fraud case.

Facts of *Lubin Betancourt Reyes*

The claim arose from a relatively straightforward phishing scam. Mr Reyes, the first claimant, attempted to make a payment of circa 100,000 USD₮ (Tether tokens, which are pegged to the value of the US dollar 1:1) to a counterparty in the Philippines using the cryptocurrency exchange Binance. Mr Reyes alleges that while he was in the process of sending the Tether tokens to the counterparty's legitimate wallet address, a malware programme on his computer caused that address to be substituted for the fraudster's wallet address ("wallet 1").

Mr Reyes was able to trace his Tether tokens through wallet 1, where they were split and transferred to "wallet 2" and "wallet 3" respectively. Tether Holdings, the minter of Tether, took temporary action to freeze the Tether tokens held in wallet 2 and wallet 3 on a voluntary basis, but made it clear that the funds would be released unless an order was obtained from the court. This alone highlights the unusual nature of some cryptocurrencies, namely that the issuer may retain the right to freeze coins in the hands of third parties in some cases.

Mr Reyes issued proceedings in England, seeking relief including but not limited to:

1. a worldwide freezing order against the persons unknown operating wallet 1 (the first defendant);
2. a proprietary injunction against the persons unknown operating wallet 2 and 3 (the second and third defendants); and
3. a disclosure order against Tether Holdings (the fourth defendant) and Binance Holdings (the fifth defendant).

Judgment in *Lubin Betancourt Reyes*

The Judge granted the freezing order against the first unknown defendant, notwithstanding the relatively low value of the freezing order sought (circa $100,000), and granted the proprietary injunction against the second and third unknown defendants.

The Judge also granted disclosure orders against Tether Holdings and Binance Holdings under the *Bankers Trust* and *Norwich Pharmacal* jurisdictions. The Judge held that those entities must have information about the unknown defendants, including their identity and whereabouts, finding it difficult to see how those entities could operate without having information about the wallet holders to hand.

Asset recovery after *Lubin Betancourt Reyes*

One of the central features of cryptocurrency is the ability to transact anonymously. It is therefore not a coincidence that the decisions of *Ion Science Ltd*, *AA* and *Lubin Betancourt Reyes* were claims against, *inter alia*, persons unknown. However, the distinguishing feature of *Lubin Betancourt Reyes* is that the claimant in that case made an application for a freezing order and a proprietary injunction in relation to cryptocurrency held in a private wallet rather than cryptocurrency which had been traced into an exchange.

One might expect that freezing cryptocurrency held in the private wallet of an unknown defendant before that defendant has been identified and served is impossible. The usual course is to wait until funds have been deposited into an exchange and then serve the exchange with a disclosure order seeking confirmation as to the identity of the defendant together with a freezing order, as was the case in *Ion Science Ltd* and *AA*. That way the exchange can freeze the relevant accounts even before it has handed over details of the defendant's identity, which helps to ensure proper enforcement of the freezing order. In this way, the role of cryptocurrency exchanges in these types of cases can be compared to that of a bank in a traditional fraud case.

In contrast, in *Lubin Betancourt Reyes*, the Court granted proprietary and freezing orders in circumstances where the relevant Tether tokens had been traced into the private wallets of persons unknown rather than a cryptocurrency exchange. Notably,

effectiveness of the order was ensured by the fact that Tether Holdings, the minter of the Tether tokens, was able to implement the freeze due to the centralised nature of Tether tokens. There is no direct equivalent in fiat currency cases – it would be like freezing banknotes held in the purse of an unknown individual and asking the Bank of England to enforce it.

The Judge was also able to conclude that Tether Holdings and Binance Holdings were likely to have information relevant to the identity and whereabouts of the first to third defendants. Without knowing the evidence before the Judge, it is difficult to see how Binance Holdings would have this information on the basis that wallets 1-3 were private addresses not held on the Binance platform. In relation to Tether, it is again likely to be as a result of the centralised nature of Tether tokens that Tether Holdings would have relevant information.

While this decision was made *ex parte* and is in many respects peculiar to the distinctive nature of Tether tokens, it does demonstrate that in some cases the English Court has additional tools at its disposal to assist the victims of crypto fraud, which would not be available in a fiat currency fraud cases.

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We would like to extend our heartfelt appreciation to all our contributing authors.