

# THE YFLA NEWSLETTER



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## Contributors in this issue

- David Rundle, Old Bailey Chambers
- Shula de Jersey, Russell Jones & Walker
- Jemma Hamlin, Corker Binning
- Rachel Heading, Corker Binning

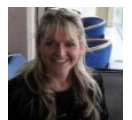
## WELCOME FROM YOUR PUBLICITY OFFICERS

Welcome to the first edition of the YFLA's newsletter!!!



*Jemma Hamlin is a Solicitor at Corker Binning.*

Our aim is to send out a quarterly newsletter, which we hope you find informative and interesting. Our goal is to provide details of future events, report on previous events and encourage you to share legal knowledge and awareness with other YFLA members. We hope that you enjoy the read, if you have any comments or suggestions, any feedback on events attended, items of interest etc, please get in touch!



*Diane Calnan is a Solicitor at BCL Burton Copeland.*

*Jemma Hamlin and Diane Calnan are Joint Publicity Officers of the YFLA Committee for 2011 to 2012.*

## DEFERRED PROSECUTION AGREEMENTS

The approach taken by the United States has frequently informed the UK's development in tackling corporate crime. Deferred Prosecution Agreements (DPAs) - a US-styled tool which diverts state action away from prosecution towards a regulatory outcome - are currently the subject of a consultation initiated by the Office of the Attorney-General. Like with plea negotiations, DPAs have been praised for offering a practical solution to the problems typically associated with the prosecution of complex fraud and bribery. They have also been recognised as a potential source of abuse. A focal issue for the consultation will be the judicial involvement in sanctioning and supervising DPAs and their compatibility within our legal system.

Typically in the US DPAs are entered into after charges are brought. A prosecution will not be pursued if the company abides by the agreement. The terms of a DPA typically demand: the implementation of structural reforms to address the offending behaviour; the payment of restitution; and a commitment to assist with on-going investigations. They therefore achieve a regulatory outcome under the threat of criminal proceedings. The scheme has been widely adopted in the US and earlier this year the Security and Exchange Commis-

sion for the first time entered into a DPA in relation to an overseas bribery case.

In offering a mechanism to avoid prosecution, through engagement with the authorities, DPAs are thought to encourage self-reporting, cooperation and greater transparency. In so doing they can also potentially address a concern typically expressed by corporate clients (like all clients), namely the lack of certainty and clarity in the result of any action. At the same time they present an opportunity for the authorities to achieve a positive prospective outcome without suffering the risks of protracted and expensive litigation. Whilst the obvious criticism of DPAs, like with plea negotiations, is the emphasis on pragmatism at the expense of an appropriate sanction, there are also substantive concerns.

A source of significant, and perhaps inevitable, tension is the level of cooperation in on-going investigations one would expect from companies. Under a DPA the defendant company may be obliged to investigate individual employees suspected to be criminally liable. Two issues have arisen in the US. Firstly, whether companies can

*“DPAs are thought to encourage self-reporting, cooperation and greater transparency”*



fund an employee's legal representation and secondly, whether they can waive privilege, for instance in relation to internal investigations and employee interviews. These matters underline the need for clear guidance, as well as early judicial involvement. Not only will the Judiciary monitor and supervise the conduct of the parties during the DPA, but they should also be tasked with ensuring their suitability before they are entered in to. The public might rightfully be sceptical of an agreement between the State and a company seeking to avoid criminal sanctions, especially when pragmatism and scant resources may appear to have been its broker. Therefore if DPAs are to have any legitimacy their use should be circumscribed and rigorously scrutinised.

*David Rundle is a Barrister at Old Bailey Chambers.*



## MONEY LAUNDERING UPDATE

The three principal money laundering offences under the Proceeds of Crime Act 2002 (“POCA”) focus on dealings with criminal property which is defined in Section 340 POCA as property that constitutes a person’s benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly) and the alleged offender knows or suspects that it constitutes or represents such a benefit.



The meaning of criminal property has been the subject of a number of Court of Appeal decisions, most recently R -v- Amir and Akhtar 2011 EWCA Crim 146. The interpretation of the meaning of criminal property by the Court of Appeal is clear: it has the same meaning in respect of all three principal money laundering offences as set out in Section 340: *“It does not embrace property which the accused intends to acquire by criminal conduct.... Property is not criminal property because the wrongdoer intends that it should be”* [Lord Justice Elias in Amir and Akhtar].

The property must be criminal property at the time of the of-

***“Money laundering offences can be attractive to prosecutors”***

fence: *“the natural and ordinary meaning of Section 328(1) is that the arrangement to which it refers must be one which relates to property which is criminal property at the time when the arrangement begins to operate on it. To say that it extends to property which was originally legitimate but became criminal only as a result of carrying out the arrangements is to stretch the language of the Section beyond its property limits”* [R-v-Geary 2010 EWCA Crim 1925].

Money laundering offences can be attractive to prosecutors: often it is relatively easy to prove the elements of the offence particularly as there is no requirement to prove that the property in question is the benefit of a particular or specific act of criminal conduct. Furthermore frequently the money laundering offence carries a higher maximum sentence than the underlying allegation of fraud. However, as the recent decisions demonstrate, the law is clear as to the definition of criminal property namely that it must be criminal property *at the time* of the act.

*(A longer version of this article was first published in the Money Laundering Bulletin September 2011)*

***Shula de Jersey is a Solicitor at Russell Jones & Walker***



## ‘FIGHTING FRAUD TOGETHER’ - NEW ANTI-FRAUD STRATEGY RELEASED

On 12 October, the Home Office presented a new “cross-sector strategy” and “activity programme” entitled “Fighting Fraud Together—The strategic plan to reduce fraud”. The report, signed by 38 organisations including MPs, charity and commercial organisations, amongst others, sets out what it calls a new plan to re-energise the fight against fraud.

The report starts with a collective statement of intent signed by a representative of each organisation to give “fresh impetus” to fighting criminals “who attack us”. The figures are startling— the 2011 National Fraud Authority Annual Fraud Indicator estimates a loss of £38.4bn, of which £12.2bn is lost from the public sector (thereby impacting on already constrained budgets), £12bn is lost by the private sector, £1.3bn is lost by charitable organisations and £4bn is lost by individuals amongst others.

So what does this report suggest to do about this startling loss to the UK, which must surely be impacting on our ever dwindling economy? The report sets out

an ideal process of information sharing between organisations, including the collation of a compendium of information showing what individual organisations are doing to fight fraud. Most concerning to any clients who we may represent is the continued push in respect of the desire to “detect, disrupt and punish fraudsters” noting that “For some it is the loss of assets gained through their crimes that they fear most”.

***“The figures are startling— the 2011 National Fraud Authority Annual Fraud Indicator estimates a loss of £38.4bn”***

The terms of the increased drive to disrupt “fraudsters” is largely undefined in the report. In section 2 of the paper, the “Strategic Direction” is set out. Again there is emphasis on sharing information but the main steer seems to be towards increasing the disruption and punishment of fraudsters, including increasing the use of civil litigation to “deny access to their criminal assets” stating that they will make other sectors aware of the options available to it in the civil courts to increase their use. This raises questions as to what Parliament’s intention was when they introduced civil recovery as an asset management tool. There has already

been much controversy raised over shopping centres using civil recovery threats to make shoplifters pay and although this extension is still within the remits of fraud, any extension in civil recovery, where guilt only is needed to be proved to the civil standard—should be monitored closely. The report also states that there should be a “zero-tolerance” in respect of public sector fraud, suggesting that we may see more prosecutions of this ilk in the future. There are policy issues with taking such a stance where clearly the public interest test as to whether to prosecute should apply.



In its summary, the report sets out clearly its intention, “This will include more effective civil and criminal processes, as well as greater early restraint of criminal assets”. Clients should be warned that whilst the draconian process of asset restraint and recovery has perhaps felt unreasonable and restrictive to date - things may get much worse.



***Jemma Hamlin is a Solicitor at Corker Binning***

**ARTICLES WELCOME!** Want to write an article for the next edition of the newsletter??? All members of the YFLA are welcome to submit any proposed articles to Jemma Hamlin or Diane Calnan. Please contact them for details.

## CASE UPDATE

- **Raj Rajaratnam:** founder of the Galleon hedge fund, on 13 October, received the highest ever sentence for insider dealing. Despite US prosecutors seeking a sentence of 25 years, Rajaratnam received a record-breaking 11 years in prison. He will also pay fines of \$10m and restitution of \$50m. US sentencing guidelines are based on the amount of gain made by the defendant; the prosecution contended that Rajaratnam gained between \$50m to \$70m and this was largely accepted by the court. It is thought that had Rajaratnam been convicted in the UK his sentence could have been as reduced as 7 years.
- **R v Munir Patel:** Patel pleaded guilty on 14 October at Southwark Crown Court to bribery and misconduct in public office, becoming the first person to be convicted under the Bribery Act 2011. Patel, who worked as a court administrative officer at Redbridge Magistrates' Court in East London, admitted soliciting and receiving a £500 bribe to get rid of a speeding charge for a member of the public. He also pleaded guilty to misconduct in public office for other similar offences. On 18 November he received a six year sentence.
- **R v Cranswick:** An ex-policeman has received a ten year sentence after HMRC successfully brought its 'largest VAT fraud case'. Nigel Cranswick, 47, was charged with conspiracy to cheat the public revenue after setting up a fake technology firm in a bid to claim back VAT. Around £330m in fraudulent VAT repayments were generated using the details of hijacked or fictitious companies to produce billions of pounds in fabricated turnover. Cranswick was described as the ringleader, who went from 'rags to riches' within weeks.
- **Rameshkumar Goenka:** A record \$9.6 million fine has been imposed on a Dubai-based private investor by the FSA - twice the size of the previous record penalty received by an individual. The penalty consisted of \$6.4 million fine plus a restitution of \$3.1 million to be passed on to the bank involved. Goenka artificially inflated closing prices to manipulate the securities of Indian refining giant Reliance Industries on the London Stock Exchange. Goenka also planned a similar scam in April 2010, however no trading took place due to events beyond his control. The tough stance of the FSA has been taken in the wake of the financial crisis, and the increased fine was calculated under the FSA's new penalty regime.



*Rachel Heading is a Legal Executive*



## RECENT PAST EVENTS

**The YFLA AGM at Paternoster Square (23 September 2011)**

*A drinks reception followed by a 3-course meal and the return of the fabulous 10-piece jazz/funk band, Good Vibes Collective*

A fabulous evening was had by all : One of our members said "Fantastic evening guys and well done to Diane and her team once again". We hope you all enjoyed yourselves and look forward to seeing you at our future events.

**YFLA Educational Seminar (28 September 2011) " General Principles of Professional Regulation"**

*This talk provided an overview of professional discipline law, and a guide to the issues which may arise in regulatory proceedings that can be avoided by careful management at the earliest stages of any investigation.*

## UPCOMING EVENTS

### **EDUCATIONAL SEMINAR— Wednesday 14 December**

**2011 7 Bedford Row, London WC1R 4BS**

**Sue Patten (Head of the Crown Prosecution Service, Central Fraud Group)** discussing current issues for fraud prosecutions.

Lecture starts at 6 pm, followed by a drinks reception with nibbles!

This event is open to all members and is free of charge. CPD will be applicable.



*For enquires in respect of the seminar please contact Hamish Common, our Educational Secretary*

### **WINTER SOCIAL— Thursday 1 December 2011 (6.30 until 10 pm)**

**The Artisan, 52 St John's Square, London, EC1M 4NL** (please note that following a refurbishment the venue name has now changed from that previously advertised)



Note the venue is licensed until 1.00am for those in party mode! Please note that this is a ticketed event and, therefore, early booking is recommended.

**Ticket price is £15 for members**, which includes a selection of canapés and drinks.

*Tickets for those already signed up to follow at the beginning of the week commencing 28 November*

*For enquires in respect of the Winter Social, please contact Rachel Cook or Emmeline Coerkamp who are our joint Social Secretary*



The YFLA brings together young fraud lawyers in private practice as well as public prosecutors. Whatever your interest in fraud law - be it civil, regulatory or criminal the YFLA aims to give you a forum in which to learn and an opportunity to meet like minded

members. The key aims of the YFLA are the combination of education, training and social interaction. The YFLA hosts four educational events a year as well as four social events. The YFLA membership year runs from 1st October to the 30th September the following year.

## YOUR YFLA COMMITTEE 2011/2012

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Please see our website [www.yfla.com](http://www.yfla.com) for more details about the YFLA

