THE YFLA WINTER NEWSLETTER 2017

Young Fraud Lawyers Association

Dear members, welcome to the YFLA Winter newsletter. The Winter is a busy time for the YFLA and we would like to extend our gratitude to all those who attended our Winter Social and the Educational: Civil Asset Recovery, Proceeds of Crime and Brexit by Andrew Bodnar.

We will shortly announce the dates of our next events and we look forward to seeing you there.

In this issue:

Never-ending Confiscation: Practical Consequences of Increased Investigatory Powers for those Engaged in Revisit Investigations

With the nights now firmly drawn in, one is reminded of the damascene conversion of Ebenezer Scrooge in Charles Dickens' a Christmas Carol. There are many lessons to be learnt from the tale of the miser bent only on securing his own lot. Dickens was a friend of the law. He spent time as a legal clerk (which inspired the superbly realised case of Jarndyce v Jarndyce in the Court of Chancery in the novel Bleak House). Those trapped in seemingly never-ending confiscation proceedings will be able to relate to both the tale of Scrooge and the debilitating mundanity suffered by all involved in the case of Jarndyce. There is little more satisfying than the conclusion to lengthy and litigious confiscation proceedings.

"A revisit investigation after the conclusion of proceedings is currently the exception rather than the rule. That now seems likely to change".

However, the reader will appreciate that for those who work in defence, unless a defendant's available amount is higher than the benefit figure, it is never appropriate

to advise a defendant that the confiscation proceedings truly are over. There remains the spectre of the power under section 22 of the Proceeds of Crime Act 2002 ("POCA"): the ability to revisit the available amount after the confiscation order has been finalised. When giving practical advice, particularly where smaller sums of monies are involved, it is often appropriate to point out that Financial Investigation Units ("FIUs") are less likely to begin an investigation into a person's finances with a view to inviting the court to exercise its power under section 22 ("revisit investigation") due to a lack of resources and/or a lack of investigative power. A revisit investigation after the conclusion of proceedings is currently the exception rather than the rule. That now seems likely to change.

It now seems probable that FIUs will be given more power to use in revisit investigations. Within the Criminal Finance Bill, currently proposed clause 29 (following amendment of the bill at the Public Bill Committee stage) amends section 341 of POCA so that it would read as follows (with the part in square brackets reflecting the proposed amendment):

(1) For the purposes of this Part a confiscation investigation is an investigation into—

(c) [the available amount in respect of the person or] the extent or whereabouts of realisable property available for satisfying a confiscation order made in respect of him.

The purpose of the amendment is to clarify the powers available to a financial investigator in the course of a revisit investigation. The Minister for Security, Ben Wallace, upon introducing the bill at the Public Committee at its fourth sitting (at which stage the relevant clause was clause 27) said that "currently it is open to question whether an investigator's ability to identify money made by the defendant using the investigatory powers in POCA—for example, by monitoring bank accounts, searching property or requiring the production of evidence —is available for investigations linked to revisits. Clause 27 strengthens investigative powers, making confiscation revisits more effective and helping to make best use of the resources being put into revisiting confiscation orders."

It is clear that the clause strengthens investigative powers by putting a revisit investigation onto the same statutory footing as a standard confiscation investigation with all of the powers that kind of investigation entails. It seems obvious that with financial officers assured of their ability to use significant powers in revisit investigations one can expect more frequent revisiting of old orders. This should have a concomitant effect on the nature of advice given to a defendant about the likelihood of their particular order being revisited. It is possible that defendants who are aware of the strong possibility of a robust revisit investigation may decide to be more open and honest about their finances at the earliest stage.

Joshua Normanton
5 Paper Buildings

Anti-Corruption Agency à la Française

On 8 November 2016, France saw the adoption of new anti-corruption legislation, named Sapin II.

Sapin II is thought to be a 'game-changer' in French corruption enforcement, seeking to raise France to the best international standards in the global fight against corruption.

The key measures of Sapin II are as follows:

1. The creation of an anti-corruption agency to help prevent and detect acts of corruption, influence peddling, extortion, misappropriation of public funds, and other related misconduct.

In 2017, the new Agency will replace the current central service for the prevention of corruption, and will have a much wider mandate.

2. The protection of whistle-blowers through the imposition of financial penalties on those who retaliate against whistle-blowers, the provision of financial assistance and indemnities to whistle-blowers and the non-disclosure of their identities.

3. The introduction of an obligation for companies to prevent corruption applying to companies with at least 500 employees (or to groups of at least 500 employees whose parent entity is headquartered in France) and with consolidated revenues in excess of EUR 100 million.

Senior management is required to now take appropriate measures to prevent and detect acts of corruption both in France and abroad through the implementation of:

(i) an ethics code,

(ii) an internal whistle-blowing procedure,

(iii) risk mapping,

(iv) assessment procedures for customers, major suppliers and intermediaries

(v) accounting checks

(vi) employee training

(vii) disciplinary sanctions, and

(viii) an internal check and assessment system regarding the implemented measures.

The Agency is charged with overseeing compliance. It can issue warnings and injunctions and refer conducts to the Sanctions Commission, which is empowered to impose fines of up to EUR 200,000 for individuals and EUR 1 million for companies.

The obligation to implement these measures will enter into force on 1 June 2017.

4. The possibility for companies to negotiate financial settlements with judges:

A new form of French deferred prosecution agreement ("DPA") has been introduced to allow companies to avoid prosecution and criminal sanctions if they agree to either:

- pay a public fine (limited to 30% of the average annual revenue of the company among other factors); or

- implement an internal compliance program overseen by the Agency for 3 years.

Any such fine and/or compliance program must be approved by a judge in a public hearing. The settlement order, the agreement and the fine amount must be published on the Agency's website. In exchange, charges will be dropped and the company will not be required to make any admission of liability.

5. The creation of the French legal equivalent of U.S. monitorships. Sapin II creates a penalty of "mandatory compliance" for companies convicted of acts of corruption to ensure that they implement effective compliance programs at their own expense, under the supervision of the Agency, within a court-defined time limit not to exceed 5 years.

Prior to Sapin II, relevant French law only applied extra-territorially, to individuals or companies incorporated in France, if the acts were punishable under local law. Sapin II now allows for the prosecution of foreign companies which conduct the whole or part of their businesses in France.

Sapin II appears to be a good illustration of the scrutiny countries are facing internationally to take action against corruption and it seems to be a step towards an alignment with the US and England's approach to corruption.

Emma-Jane Price
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The Globalisation of Anti-bribery Enforcement Continues

Recent fines in the high-profile investigation of Embraer S.A., the Brazilian aerospace conglomerate, highlight the continued focus of US authorities on cooperation between US regulators and prosecutors and their counterparts in other countries.

International companies cannot fail to be aware that the US and the UK have extra-territorial legislation of which they can potentially fall foul anywhere in the world. Trading shares in the US, issuing American Depository Receipts and routing emails or payments through a US server or bank renders companies subject to US laws. Likewise, "doing business" in the UK is enough to fall within the jurisdiction in relation to bribery activities anywhere in the world.

Embraer

Latin America has been, and unfortunately, remains, fertile ground for prosecutions under the US Foreign Corrupt Practices Act ("FCPA"), and is now a focus for multijurisdictional enforcement cooperation. We have seen this with Petrobras and now Embraer. In October 2016, Embraer agreed to pay US$205m in fines to the Department of Justice ("DOJ") and the Securities and Exchange Commission ("SEC") after a bribery investigation was carried out by the US authorities under the FCPA involving aircraft sales to Saudi Arabia, Mozambique, India and the Dominican Republic. Embraer was also fined US$20m by the Brazilian regulator. In an interesting indication of the level of cooperation between the US and Brazilian authorities, the Brazilian fine will be offset against its SEC payment.

"this prosecutorial trend of offsetting the fine will lead to better co-operation"

Whilst the US does not recognise international double jeopardy, this prosecutorial trend of offsetting the fine will lead to better co-operation and information sharing between other countries and the US. Globally, off-setting fines in this manner is increasingly common in cross-border anti-corruption cases in order to adhere to international double jeopardy rules and to avoid parallel and/or successive criminal enforcement actions in multiple jurisdictions.

DePuy

An example of cross-jurisdictional prosecution is the 2011 case of DePuy International Limited, the medical and dental instruments and supplies manufacturer. In this instance, when DePuy self-reported to the DOJ and SEC bribery by DePuy officials, as well as other offences not involving DePuy, the UK's Serious Fraud Office ("SFO") found that the international double jeopardy rule prevented further criminal sanction in the UK. Instead, the SFO obtained a Civil Recovery Order requiring DePuy to pay £4.829m. DePuy also paid US$21.4m to the DOJ, US$24.26m plus interest of US$6.26m to the SEC and €5m to Greek authorities.

Conclusion

As the anti-corruption drive escalates, international cooperation will continue to grow in a bid to share responsibility and harmonise approaches in regulatory regimes. In this terrain, organisations must not only understand the trends that are driving enforcement activity locally, but also globally, and develop strategies to address these challenges.

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Unexplained Wealth Orders

The Criminal Finances Bill 2016-17 introduces a number of measures to combat perceived failures in anti-money laundering and confiscation measures in the UK. Right at the top of the Bill are amendments to the Proceeds of Crime Act 2002 introducing Unexplained Wealth Orders 'UWOs'. These will enable a number of enforcement authorities to apply to the High Court for an order requiring an individual to provide information about their ownership of assets and how they were obtained.

The High Court will grant a UWO where satisfied that the respondent holds property worth over £100,000, there are reasonable grounds to suspect that the respondent's lawfully obtained income would have been insufficient to obtain the property, and either the respondent is a politically exposed person, or family member or close associate thereof, or there are reasonable grounds to suspect that the respondent or a person connected with the respondent (as defined by section 1122 of the Corporation Tax Act 2010) has been involved in serious crime (as defined by Part 1 of the Serious Crime Act). The application for a UWO can be made without notice, and can be accompanied by an application for an interim freezing order.

If a UWO is granted then the respondent must, within a specified time period, provide a statement setting out the nature and extent of his interest in the property, and explaining how he obtained it. Failure to respond will result in a presumption that the property is recoverable in civil recovery proceedings under Part 5 of POCA, and knowingly or recklessly making a false or misleading statement in response to a UWO will be a criminal offence punishable by up to 2 years' imprisonment.

Statements made in response to a UWO will not normally be admissible in criminal proceedings but exceptions do apply. They will be admissible in POCA proceedings, and where the respondent himself introduces evidence that is inconsistent with the statement in any criminal proceedings. They will also, unsurprisingly, be admissible in a criminal prosecution for the aforementioned offence of making a false or misleading statement.

"respondents to UWOs will need to be carefully advised on a range of civil and criminal consequences"

Practitioners in this area will quickly be able to identify that in its current form the Bill presents the possibility of a large volume of intrusive orders being granted in a myriad of different situations. However, given that the problem with confiscation and enforcement has often been identified as a lack of resources on the part of enforcement authorities, rather than a lack of powers, to what extend UWO's will be regularly used remains unclear. The Home Affairs Select Committee earlier this year estimated that only around 15,000 of the 380,000+ annual suspicious activity reports were considered in any detail by the NCA. If that figure is accurate, the introduction of UWOs is unlikely to prove a magic bullet. What does need to be considered however, is that respondents to UWOs will need to be carefully advised on a range of civil and criminal consequences, so practitioners will need to ensure their knowledge in this area extends sufficiently.

Lewis MacDonald
2 Hare Court

SARs, seizures and the Met's solution

Money laundering is a big problem. It destabilises financial markets, facilitates organised crime and funds terrorism. The best available estimate of the amount of money laundered worldwide is equivalent to some 2.7% of global GDP.

The POCA money laundering provisions require banks and other persons operating in a regulated sector which know of or suspect money laundering, or which have reasonable grounds to know or suspect, to make a disclosure to the National Crime Agency (NCA). This low bar of suspicion, coupled with an increasingly risk-averse banking culture, results in many thousands of Suspicious Activity Reports (SARs) being submitted every year.

The disclosure regime enables suspicious banks to ask the NCA to consent to monies being sent back to the customer. The NCA can give consent within 7 days, or refuse it, allowing for a moratorium period of 31 calendar days. Law enforcement can then apply for a restraint order, if appropriate. The bar for obtaining a restraint order is high and must be considered by a judge.

It seems however that law enforcement has hit upon a quick fix alternative. Their solution is this.

1. Bank submits SAR
2. Police suggest POCA cash seizure
3. Bank converts the suspect assets into a good old fashioned cheque, which (incidentally) falls under POCA's definition of "cash"
4. The bank's Reporting Officer can opt for a "cash" seizure and arrange for a police officer to attend to "seize" the cheque, which can ultimately be forfeited

The advantages of the manoeuvre are clear: the bank can dump the suspect assets, and they won't just go back to the (possible) crim. The bank has no tipping off worries; it can tell its customer that the police have seized the funds and it's up to them to persuade a court that the money is kosher.

"arguably this mechanism is used to deliberately circumvent judicial intervention"

There is a catch: arguably this mechanism is used to deliberately circumvent judicial intervention. It's an abuse of process. Law enforcement should do just that – enforce the law, not make it. Legislators did not intend banks to churn out cheques to enable an easy seizure: this ignores the criteria which must be satisfied to obtain a freezing or restraint order and completely bypasses the court's process.

It can only be a matter of time until a claim is brought and this practice is exposed. Until then, we have our hopes pinned on the Criminal Finances Bill, currently making its way through Parliament.

Hannah Hooper
Howard Kennedy

Thank you to all those who contributed to the newsletter