THE YFLA SUMMER NEWSLETTER 2018

Young Fraud Lawyers Association

Dear members,

Welcome to the 2018 YFLA Summer newsletter. Details of our upcoming events can be found on our new and improved website www.yfla.com. We hope you enjoy the Newsletter.

In this issue:

The Curious Case of Kevin Brewer

The ease with which criminals can set up shell companies to launder their ill-gotten gains has been well known for some time. But that the first successful prosecution for filing false information on the company register was brought against a man who was apparently trying to highlight exactly that problem has left many feeling troubled.

Kevin Brewer is the owner of a business consultancy who felt so strongly about the regulatory lacuna that is the company register – a problem that he had written to Companies House and government ministers about for years – that he took it upon himself to take drastic action. Mr Brewer set up two shell companies. One purported to be owned by Sir Vince Cable, and the other by former Parliamentary under Secretary of State for Business with responsibility for Companies House – Baroness Neville-Rolfe, James Cleverly MP, and an entirely fictitious Israeli man. Shortly after registering the details of John Vincent Cable Services Limited, Mr Brewer wrote to Sir Vince, expressing his consternation at the Citizens' Incorporation Service – a system which, lacking in safeguards as it is, *"has created a massive opportunity for fraud and deception with no way of knowing who is behind any wrongdoing*". He also explained that he had set up this company in Sir Vince's name to "*illustrate the point*". Neither company ever traded.

Despite the obviously questionable public interest in prosecuting such an unusual case, prosecuted it was, and Mr Brewer pleaded guilty at Redditch Magistrates' Court to knowingly or recklessly making a statement to the Registrar that was misleading, false or deceptive in a material particular contrary to section 1112(1) of the Companies Act 2006. For his troubles he was fined £1,602, and ordered to pay prosecution costs of £10,462.50 and a victim surcharge of £160.

Perhaps more surprising even than the prosecution of Mr Brewer in these circumstances is the fact that

this is the first successful prosecution of its kind. In its report published in November 2017 – Hiding in Plain Sight – Transparency International indicated that up to £80billion had been funnelled through UK registered shell companies. It was also highlighted that in the previous year, 40 per cent of new incorporations were done through the Citizens' Incorporation Service, which does not undertake background checks on its users. As the UK makes the move into full autonomy when it comes to developing anti-money-laundering regulation, it may be that the government needs to rethink both the processes of incorporation and the resources it invests in ensuring these processes are not abused with impunity. Otherwise, the response of Business Minister, Andrew Griffiths MP, to Mr Brewer's conviction – that Companies House works hard and closely with law enforcement agencies to "*bring those perpetrators to justice*" risks inviting ridicule.

Paul Renteurs
2 Hare Court

Service by Data Room – thinking outside of the (in)box

CMOC v Persons Unknown [2017] EWHC 3599 (Comm): The challenges of multi-party, multi-jurisdiction service, and whether these can be solved by obtaining an order for service by data room.

The challenge

In October 2017, CYK were instructed to obtain a freezing injunction in respect of the cyber theft of its client's money, and seek to recover those funds. This entailed obtaining a number of ancillary disclosure orders against banks. It quickly became clear that, although the identity of the defendants was quite literally, unknown, and hence the usual challenges and difficulties one might face from an active Defendant(s) were not present, there was another, very real opponent that CYK had to battle with on a weekly basis: worldwide service.

The service regime

Because of the layering process implemented by the fraudsters to disperse the stolen funds, within a matter of weeks, the case had grown to 30 parties (including 21 banks) in 10 jurisdictions, and the hearing bundles consisted of seven lever arch files.

Although CYK had obtained the Court's permission to serve by email, the hours (and costs) needed to complete service were still high. It was then that CYK considered seeking the Court's permission to serve via a data room: an obvious way to share large volumes of information with multiple people, and a system already used in abundance for commercial transactions. Would it work for commercial litigation?

Application to serve by Data Room

Below is summary of the key points that may assist to persuade the Court to make such an order:

1. Costs. Being able to show the Court how much you will save on service. CYK compiled a record of the administrative, photocopying and courier costs to date, and estimated that one service round alone absorbed 138 worker hours.

2. Security. The Court will want to know the data-room provider is secure and reliable. Such as a company that provides an end-to-end encrypted online cloud storage service.

3. Confidentiality. If you have any confidentiality rings in operation, or just material that some parties cannot see, you will have to show how you intend to protect confidentiality. CYK had over 20 password-protected sub-folders in place.

4. Accessibility. The Court will have to be convinced that using a data room does not create an unfair barrier to accessing documents. The more sophisticated your opponent, the easier this should be (however, you may need to accommodate institutions with certain IT restrictions). The Court may also be interested in whether (as the data

room host) you can see who has accessed it/who has read what. CYK made a point of explaining that it could not see this information.

5. Overriding objective. It is worth noting how such an application can be in accordance with the OO and objectives of the Commercial Court to remove as much paper as possible from commercial litigation.

In a case that now has 78 parties in 21 jurisdictions, permission to serve by data room has already saved a large amount of time and costs. There have been issues along the way, for example, certain banks not being able to access, and others refusing to use, the data room. CYK is also aware that there may be future obstacles arising from service by this method. However, it does provide a secure, flexible and efficient method of document distribution and CYK hope that other practitioners may consider this option in cases going forward.

(Article correct as at 3 May 2018)

Rosie Wild & Thomas Burton Wills, Cooke, Young & Keidan

The FCA's ban over Paul Flowers: Too little, too late?

On 1 March 2018, the Financial Conduct Authority ("FCA") published its final notice in respect of Paul John Flowers, former Chair of the Co-op Bank ("the Bank"). The FCA made an order prohibiting Mr Flowers, a former reverend who acquired the press moniker "Crystal Methodist" following his criminal conviction on drugs charges in 2014, from performing any function in relation to any regulated activity.

The FCA had granted Mr Flowers Approved Person status in May 2009, in relation to his non-executive director (CF2) function at the Bank, a subsidiary of the Co-op Group ("the Group"), one of the UK's largest mutual businesses. Subsequently, in April 2010, Mr Flowers was appointed Chair of the Bank and Deputy Chair of the Group; he retained both positions until his resignation on 5 June 2013, in the immediate aftermath of the Bank's near-collapse following its failed bid to acquire parts of Lloyds Banking Group. Mr Flower's resignation also resulted in his Approved Person status being terminated.

The FCA found that both during his time as Chair of the Bank and afterwards, Mr Flowers demonstrated that he lacked the fitness and propriety to work in the financial services industry. Mr Flowers was found to have neither the integrity nor the reputation required to do so, having failed to comply with the requirements and standards expected of him. These requirements included key benchmarks of corporate governance guidance applicable at the time, including the Financial Reporting Council's UK Corporate Governance Code, as well as a variety of internal Co-op Bank policies that were publicly confirmed through its Board-approved financial statements.

Not only did Mr Flowers, as Chair of a financial institution, hold a special position of trust and influence with an impact on the public confidence in the wider financial industry; he also specifically agreed to uphold the high ethical standards of conduct consistent with the values of the Bank which was, at the relevant time, ultimately owned by millions of UK consumers. The FCA found that Mr Flowers failed to act with the integrity and probity expected of him. Specifically, Mr Flowers was found to have used his work mobile phone on several occasions in 2011 to call a premium rate chat line, for "personal use". Following the receipt of a warning about his phone use from the Bank, Mr Flowers proceeded to use his work email address over

periods of time in 2012 and in 2013 to send and receive sexually explicit messages and to discuss illegal drug use.

The FCA also made a finding to the effect that Mr Flowers demonstrated his lack of readiness and willingness to comply with the high standards to which he was subject, including not only those of the regulatory system but also as a Methodist Minister. These high standards continued to apply following Mr Flowers ceasing to be an Approved Person, and included his 2014 conviction at Leeds Crown Court for the possession of cocaine, methamphetamine and ketamine. Mr Flowers' actions thus resulted in him not having the requisite reputation to carry out functions in the financial services industry.

Interestingly, the FCA stopped short of making any findings in relation to Mr Flowers' competence and capability (the other part of the FCA's Fit and Proper Test for Approved Persons). This is particularly noteworthy in circumstances where Mr Flowers' resignation from the Bank followed the discovery of a £1.5bn capital shortfall in the Bank's books, and the Bank's abortive attempt to purchase 631 branches from Lloyds, resulting in the Group losing its majority ownership thereof. Whilst prior to his nomination as Chair Mr Flowers had served in roles on the Boards of various charitable, co-operative and religious organisations, it was noted at the time that he lacked any financial qualifications and direct relevant expertise.

Therefore, the FCA has faced public criticism for not scrutinising – or even halting – Mr Flowers' appointment. The final notice contains the FCA's restrained response: (i) the Board's decision to appoint Mr Flowers had been unanimous; (ii) there had been no process in place at the time for the FCA to formally approve the appointment of Chairs; and (iii) following his appointment, the FCA wrote to Mr Flowers stating "that it would be beneficial for him as Chair to increase areas of his technical banking knowledge."

The last point to note is that the FCA has drawn wide-spread criticism for taking almost five years from the date of Mr Flowers' resignation to publish its prohibition order, and for not going far enough in examining Mr Flowers' role in the Bank's near collapse. However, the FCA had to first wait for the criminal proceedings against Mr Flowers and for the Prudential Regulatory Authority's ("PRA") own investigation into the Bank to conclude, and for the Treasury Select Committee to publish their report into the Bank's crisis. Furthermore, immediately after the final notice was published, the Treasury announced that it had instructed the PRA to launch a new independent review into the supervision of the Bank (including the role of the Financial Services Authority and the Bank's auditor, KPMG) between 2008 and 2013.

Diana Czugler
Peters and Peters

A Cautionary Tale on the Bribery Act for Small Businesses

In a landmark case, a small British interior design company has been convicted of the corporate offence of failing to prevent bribery.

Skansen Interiors Limited was an office interiors contractor with just thirty employees working in a single open-plan office. Following a change in the company's leadership, its new Chief Executive uncovered improper

payments of £10,000 made by one of its former directors to a prospective client during the tendering process for a £6million contract.

The incident was self-reported to the National Crime Agency and Skansen co-operated fully with the investigation that followed. However, the corporate was charged and prosecuted for an offence of failing to prevent bribery under section 7 of the Bribery Act 2010.

This decision was met with surprise amongst legal practitioners, concerned that it may send the wrong message and discourage SMEs from self-reporting such issues. Notably, a number of larger corporates, such as Tesco and Rolls-Royce, have benefitted from Deferred Prosecution Agreements (DPA) in recent years, after self-reporting far more substantial incidents of bribery. This option was not available to Skansen because it did not have assets to pay the fines that accompany a DPA and had been dormant since April 2014. It is remarkable that the CPS considered the public interest test had been met in those circumstances.

The contested prosecution of Skansen considered for the first time the parameters of the "adequate procedures" defence. The corporate sought to rely on the fact that it was a small, localised business and therefore did not require sophisticated anti-bribery procedures.

Furthermore, Skansen had an honest and ethical culture with policies supporting this and a number of financial controls relating to the payment of invoices. However, the company did not have a compliance officer or a dedicated anti-bribery policy and there was no evidence that its staff had been actively trained on the internal policies that did exist. The jury determined that Skansen did not have adequate procedures in place and the company was duly convicted of the criminal offence of failing to prevent bribery.

In view of the apparently aggressive approach adopted by the CPS in this case, it is more important than ever for corporates to maintain rigorous measures guarding against bribery and corruption, including risk-based anti-bribery policies that are up to date and address the key areas of exposure for the business; a compliance officer that employees can escalate concerns to; and regular training on anti-bribery and corruption issues that are relevant to the business and its employees.

Julianna Tolan
Fox Williams LLP

Internal Investigations – The Proffer Minefield:

On 19th April 2018 the High Court gave judgement in the case of **The Queen (on the application of AL) v SFO v XYZ Ltd, ABC LLP, MS, DJ [2018] EWHC 856 (Admin)**. Whilst the underlying claim for judicial review ultimately failed, the case brings home once again the limits of privilege in internal investigations and the dangers of the oral proffer to regulators.

In 2012 XYZ Ltd became concerned that it may have become involved, through its agents, in the offer and or payment of bribes to secure contracts in foreign jurisdictions. The company engaged ABC LLP to undertake an internal investigation.

ABC LLP's investigations included extensive interviewing of four employees, including the claimant AL, said to be involved with or have knowledge of the alleged activity. Verbatim transcripts of the interviews were not produced, but the lawyers conducting them took detailed notes. Significantly, the purpose of the interviews was to enable the company to decide whether or not to self-report.

The company self-reported and during the subsequent investigation the SFO sought disclosure of the interview notes. ABC LLP declined to provide the notes claiming legal advice and litigation privilege. Notwithstanding, a partner from ABC LLP agreed to a proffer session in which he gave an oral summary of the interviews. The partner prefaced each summary with, "The provision of these facts is not to be taken as a waiver by [XYZ Ltd] of its lawyer/client privilege either (a) specifically with regard to the matters being investigated by the SFO or (b) generally regarding any other proceedings arising from these matters". The proffer session was recorded and transcribed by the SFO.

Ultimately the company was made the subject of a DPA and the SFO brought prosecutions against several employees, including the claimant AL. Unsatisfied with disclosure of the interview summaries contained within the oral proffer, AL requested disclosure of the full interview notes taken by ABC LLP. ABC LLP maintained their position that the notes were privileged and the SFO declined to pursue the issue further. AL sought to judicially review the SFO's refusal to pursue disclosure of the interview notes.

A Harder Line

Whilst the High Court refused to exercise its jurisdiction in this case, finding that the appropriate forum for the resolution of such disclosure disputes is the Crown Court, they were highly critical of the stance taken by the SFO. In the Court's view there is a clear duty on the SFO to be persistent and to deploy procedural force where necessary. In the instant case by applying for a witness summons compelling ABC LLP to produce the interview notes to the Crown Court. Whilst *obiter*, the comments are likely to lead to the SFO taking a more sceptical view of privilege claims in the future. It may well be that they place more weight on waiver in their assessment of co-operation going forward.

Waiver Through Oral Proffer

The Court observed that the inclusion of the oral summaries in the proffer session *prima facie* opened the door to the disclosure of the underlying interview notes. Oral proffer sessions have become a popular way of sharing information with a regulator whilst seeking to maintain privilege; particularly in cases engaging multiple jurisdictions where the same proffer may be made to different regulators. The efficacy of this approach is now clearly in doubt. The timing and content of any such proffer will require renewed scrutiny.

Robert Shaw
25 Bedford Row

Elena Elia, talks to Si En Tan, former prosecutor at the Attorney General's Chambers ("AGC") in Singapore on the introduction of DPAs in Singapore

1. Tell us a little bit about your experience as a prosecutor at the AGC in Singapore?

I was part of the Criminal Justice Division of the AGC. We prosecuted all kinds of cases – from simple mentions for 'cheating' offences to full-blown High Court murder trials. My caseload included working as part of a team of prosecutors on High Court matters, including the most serious, capital cases, as well as criminal appeals. In addition, I prosecuted a number of trials on my own from the get-go in our State Courts.

2. What was your most interesting case?

I worked on a case where a woman had been charged with the murder of her toddler. She had been rescued from the sea just off Singapore's coast, and the body of her toddler, who had drowned, was found three hours later. She was later found to be suffering from a psychiatric condition at the time. She eventually recovered fully from it, and was granted a discharge not amounting to an acquittal on a culpable homicide charge. As part of the discharge, she had to comply with conditions such as undergoing regular psychiatric assessments for a period of three years.

3. I understand that Singapore has recently introduced a framework for DPAs. Could you explain how DPAs will work in Singapore?

The amendments introducing DPAs into Singapore law were passed in Parliament in March 2018 but have not yet come into effect. When they do, the DPA regime will be largely similar to the UK scheme, and available only for corporates. The defendant, who must be represented by an advocate and solicitor, must admit to the charge and statement of facts presented. The prosecutor can impose terms that can include a financial penalty, disgorgement, monitorship and other measures for a limited period of time, after which no prosecution will be carried out in respect of that offence.

A declaration from the High Court that the DPA is in the interests of justice and the terms of the DPA are fair, reasonable and proportionate is required before the DPA can take effect.

4. What are the main differences with DPAs as we now know them in the UK?

One key difference that may on the face of it have some impact on corporate decision-making is that the internal code of practice for use of DPAs will not be published. However, this is consistent with the approach in Singapore that guidelines for prosecutors are kept confidential and not in the public domain.

Secondly, the High Court in Singapore will also not be required to give written grounds for its declaration on whether the DPA is in the interests of justice, and whether the terms are fair, reasonable and proportionate. Again this follows general court practice on the giving of reasons. It does not restrict the court on providing written grounds should it wish to do so.

5. What advice then would you give to corporates or legal advisers considering whether to cooperate or self-report in return for a DPA?

At this stage, there is little visibility on the factors the prosecution will consider before offering a corporate the opportunity to enter into a DPA. We can however

take some guidance from the factors that the prosecution and the courts consider in the exercise of their general prosecutorial and sentencing discretions respectively. As in the UK, factors such as voluntary remediation and cooperation with the authorities are likely to be looked upon favourably. We expect there to be more guidance from the prosecution and from the courts, once the laws come into effect.

6. What criminal offences qualify for DPAs in Singapore?

It's quite a wide variety – money laundering offences, bribery offences, market rigging, insider trading, falsification of accounts, dishonest receipt of stolen property, and failing to comply with due diligence measures for prevention of money laundering and terrorist financing, and operating without a capital markets service license, failing to report suspicious property, and broadcasting the information relating to the informant in AML reporting.

A key difference to the UK is that certain fraud and theft related offences are not within the qualifying list of offences in Singapore. But a wide range of regulatory and market offences are included.

7. What do you think is the main hurdle for prosecutors wanting to use the new DPA regime?

The general trend in Singapore has been to prosecute individuals, even high-ranking senior executives, rather than corporates for misbehaviour such as bribery in the course of business. The identification principle in Singapore law (similar to the position in UK law) is likely to present some problems for prosecutors when considering DPAs for corporates, where it may be difficult otherwise to prove corporate criminal liability in contested proceedings. There is also currently no equivalent of the s 7 of the UK Bribery Act.

8. What further developments do you expect to see as a result of this?

A 'failure to prevent' offence has been expressly suggested in Parliament. Singapore has been reviewing its anti-corruption legislation, as well as its Penal Code, and we may see changes in the law relating to corporate criminal liability in the near future.

Elena Elia and Si En Tan
Pinsent Masons

YFLA Spring Educational: "McMafia As A Teaching Tool"

Our three speakers provided a thoroughly informative and at times entertaining summary of recent developments in (for those who haven't seen the BBC drama) approaches by law enforcement and litigators to transnational economic fraud & money laundering.

HHJ Michael Hopmeier took us through recent developments in confiscation. Inter alia, he enlightened the audience by describing the sheer scale of fraud-related money laundering in the UK, why this jurisdiction might be attractive to overseas would-be money launderers, and describing cooperation between other countries.

We then heard from Keith Oliver, Head of International Litigation at Peters & Peters, on recent developments in civil remedies. This was a whistle-stop tour through recent developments in the area, during which he described a high-speed car chase of a defendant in a civil claim, the various approaches to litigation that parties might employ, and the increasingly fraught relationship between Britain and its former overseas territories.

Leon Kazakos of 2 Hare Court then concluded the evening with a discussion of Unexplained Wealth Orders, focusing on some

of the practical issues practitioners might encounter. This took in (inter alia) the differing approaches to UWOs by various bodies of UK law enforcement, how UWOs differ from similar remedies under POCA 2002, and possible Human Rights challenges to UWOs.

Sam Roake
Charter Chambers

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