Young
Fraud
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Association

Dear all,
Welcome to the YFLA Winter newsletter 2018. Details of our upcoming events can be found on our new and improved website (www.yfla.com) and on our LinkedIn group (search for "Young Fraud Lawyers Association"). We hope you enjoy the Newsletter.

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A Changing Landscape in Search and Seizure

In June 2018 the Law Commission published its Consultation Paper on Search Warrants. The proposals recommend root and branch change to the existing legal landscape. The consultation period has now closed. This article examines the most important proposals.

There has been a significant increase in challenges to search warrants in the last 10 or so years as those affected by them become more aware of their ability to do so. At present a challenge to the lawfulness of a search warrant may only be brought in the High Court by way of judicial review, though there is a more limited ability to regulate the way a seizing authority may retain or examine seized material through s. 59 of the Criminal Justice and Police Act 2001 by making an application under that section in the Crown Court. Often, if a judicial review is successful, a second round of litigation under s. 59 ensues as the errant seizing authority seeks to regularise its otherwise unlawful possession of the material.

A challenge to a search warrant, particularly if a claimant obtains interim injunctive relief, necessarily interferes with the course of a criminal investigation. This may well be to the advantage of the suspect and to the detriment of the investigating authority. The Commission identified a number of problems with the current law which in no small part has led to mistakes being made by applicant investigators, and Courts issuing warrants, which make search warrants, and the seizures made under them, susceptible to challenge.

The Commission managed to identify 176 different provisions which enable a Court to issue a search warrant. Many of these, though still used, such as those under the Theft Act 1968 permitting a search for stolen goods, or under the Misuse of Drugs Act 1971 for drugs and documents, are subsumed within the most usually used provision of s. 8 of PACE. In turn, there are warrants that permit entry only, such as under the Consumer Rights Act 2015, so that statutory powers to seize certain items may be exercised. A concomitant problem is that across these provisions, the threshold for issuing a warrant is not uniform. So, a warrant obtained under the Misuse of Drugs Act 1971 to search for heroin requires only reasonable grounds to suspect the criteria are satisfied whereas if the warrant was sought under PACE the Court would need to be satisfied to the higher standard of belief. This makes little sense given, as said, the broader power in PACE subsumes the 1971 Act power.

Most, if not all, of the powers have been unable to keep pace with the fact that relevant evidence will now most often be held electronically, on computers and smart phones. This has been a febrile area of litigation in which the power to seize an item such as a computer has become blurred with the desire to obtain only a small category of documents contained upon it, and the confusion as to whether a warrant can or should authorise such a seizure,

rather than resorting to the additional powers of seizure under the Criminal Justice and Police Act 2001 which entail a statutory sifting procedure not present in PACE.

The proposals made are pragmatic and sensible. The Commission identifies four main areas of reform:

- simplify the law and procedure governing search warrants by rendering it more rational and accessible at all stages of the search warrant process;
- make the law fairer by extending protections, improving judicial scrutiny and making the law more transparent;
- modernise the law to ensure that it reflects the changing nature of investigations and is equipped to deal with current technology; and
- make the law more cost-effective by introducing a streamlined way to obtain a search warrant and a new procedure to challenge and correct procedural deficiencies.

In particular the Commission proposes that search warrant legislation be rationalised with the repeal of unnecessary and otiose provisions in tandem with standardising the access criteria. This will make it far less likely that applicants will address the wrong threshold test, or fail to address some criteria at all.

In terms of any challenge, the Commission recommends that the jurisdiction of the High Court be limited by introducing a broader alternative remedy by amending s. 59 of the 2001 Act. This new power would enable the Crown Court to set aside a warrant, resulting in the return of the material to its owner, or an order for the return of material without setting the warrant aside. In addition, the Commission proposes that an *inter partes* costs jurisdiction be introduced, currently something sorely missing from the s. 59 regime.

The proposed grounds for having a warrant set aside in the Crown Court are those most often advanced in judicial review proceedings, namely that that the applicant failed to provide sufficient information to the Court issuing the warrant so that it cannot have been satisfied of the statutory criteria, or the provisions of s. 15 of PACE (the statutory safeguards applicable to all warrants) were not satisfied. If this new jurisdiction is created in the Crown Court, it will no longer exist upon judicial review given there is an alternative procedure for challenge.

However, judicial review will still exist for a challenge to the statutory criteria being found to be met and there is an obvious and significant overlap between this ground of challenge, and a failure on the part of the applicant to provide sufficient information at first instance. This aspect may require further scrutiny.

Broadly, the proposals should be welcomed. It is unlikely that litigation in this area will decrease, indeed with the new procedure in the Crown Court and the existence of a costs jurisdiction it may even increase, but it will certainly shift away from the High Court into the Crown Court. How the Crown Court will cope with this further burden in terms of listing will be another matter.

Rupert Bowers QC
Doughty Street Chambers

Brexit and the Extradition Backstop

This year has seen a number of remarkable rulings in the extradition of alleged white collar crime offenders: Monaco refused to extradite Unaoil's chief executive to the United Kingdom (UK), Frankfurt prosecutors declined to extradite the Euribor traders and the High Court of England and Wales would not extradite a HSBC trader to the United States.

However, with the Brexit Withdrawal Agreement (the "**Withdrawal Agreement**") currently being debated in Parliament, our attention should turn to the Irish extradition case of Mr Thomas Joseph O'Connor ("**Mr O'Connor**"), and what the Brexit 'deal' really means for the European Arrest Warrant ("**EAW**") and the policing of white collar crime.

The case of Thomas Joseph O'Connor

Back in February, Ireland's Supreme Court declined to extradite Mr O'Connor to the UK, where he had been convicted of fraud, because by the time he would have finished his prison sentence the UK would have left the EU.

Mr O'Connor, a construction company director, had been convicted in his absence of tax fraud back in 2007. At the time, Mr O'Connor had absconded on bail and fled to Ireland.

In 2009 he was arrested on an EAW and, in 2014, Ireland's High Court ordered his extradition to the UK. Following a succession of challenges, the Irish Supreme Court declined in February to extradite Mr O'Connor to the UK. Instead it ruled that his case should be referred to the European Court of Justice (ECJ) in Luxembourg for resolution.

The ECJ has since said in an explanatory note to the test case, identified only as "*RO*": "*Mere notification by a member state of its intention to withdraw from the European Union is not an 'exceptional' circumstance capable of justifying a refusal to execute an EAW issued by that member state*."

EAW after Brexit

So what is the impact of Brexit for extradition requests from EU Member States? Unhelpfully, the Withdrawal Agreement puts this question along with the Irish border into the 'to do' list and allows the status quo to continue, more or less.

Article 62 (c) of the Withdrawal Agreement envisages that the EAW scheme will continue to apply during the transition period. This implies no change to existing arrangements as of March next year, but that is not quite the full picture. Turning through to Article 185 of the Withdrawal Agreement, this contains a significant provision, which allows, even in the transition period, for EU states to refuse to extradite their own nationals to the UK.

On this view, the UK is not so much leaving the EU as the EU is withdrawing from the UK.

This could pose a real problem for the UK government's crime fighting hopes and, in particular, for the SFO; which wants to present itself at the forefront of policing white collar crime in Europe.

It is difficult to imagine that any replacement to the EAW regime in the UK will include as many advantages as the EAW does to law enforcement. And any replacement could signal an end to the free movement of suspects between the UK and the EU.

Josie Welland
Rahman Ravelli

A Q&A with *Matthew Wagstaff*, Joint Head of Bribery and Corruption at the SFO

For the benefit of our readers, please could you provide us with a brief overview of your career prior to joining the SFO?

I've been a government prosecutor for most of my career and a member of the Senior Civil Service since 2001. My early career was spent at HM Customs and Excise, where I was responsible for prosecuting and advising on a range of fiscal fraud cases. Thereafter, I joined the Revenue and Customs Prosecution Office in 2005; became a Deputy Head of Fraud in the CPS in 2010 and moved to the SFO in 2012.

What does your current role as Joint Head of Bribery and Corruption involve on a day-to-day basis?

I'm responsible for around two dozen cases and about 100 staff. On any given day, I'm likely to be involved in a variety of issues including giving advice and input into a range of complex legal or investigative issues; taking case related decisions; reviewing documentation such as search warrant applications or letters of request; supporting

and supervising my case controllers (senior members of SFO staff with a legal or investigative background who are responsible for the day to day running of our case teams); ensuring teams have the resources they need and briefing the Director on particularly high profile cases or cases where there are significant legal or operational risks. In addition, I'm a part of the SFO's Senior Management Team and so attend meetings of the Executive Group and other committees. I also spend a fair bit of time liaising with our key partners, both domestic and international, and representing the SFO at a range of external events.

And what do the more junior members of your team get involved with? For instance, what level of responsibility is expected of them and what would their case load look like?

We make use of the 'Roskill model'; meaning that our case teams consist of a mix of lawyers, investigators, case support staff and others. Within that, we rely on lawyers at all levels of experience and seniority; from the recently qualified through to highly experienced silks. At the more junior end, our lawyers can expect to get involved in every aspect of a case right from the outset. This will include determining potential offences and the evidence needed to pursue those offences; drafting case related documents; assisting in preparation for witness and suspect interviews (and sometimes getting involved in the interviews themselves); reviewing documentary evidence; advising on charges; overseeing disclosure; instructing counsel and corresponding with the court and defence. We deliberately refer to our lawyers as 'investigative lawyers' in order to emphasise that we want them to get stuck into *every* aspect of our cases and not necessarily limit themselves just to those tasks which may traditionally be seen as the lawyer's purview.

What do you enjoy most about working at the SFO?

I love the fact that I get to be involved in some of the most complex, high-profile and interesting cases within the criminal justice system and I love the fact that every day I am doing a job that really matters. Seeing case teams getting excited about their cases and supporting them in driving those cases forward is enormously rewarding.

The last few months have obviously been busy for the SFO, both as an organisation (i.e. Lisa Osofsky being appointed as the new director) and in terms of significant judgements (i.e. *ENRC v SFO* and *KBR Inc v SFO*). In light of those kinds of recent developments, what do you think will be the main priorities for the SFO over the next five years?

Broadly, our main priority will be the same as always: building strong cases that lead to the right outcomes, whether that be to bring an investigation to an end or to take it forward for plea or trial. As part of that, we will obviously want to navigate our way through some of the specific legal challenges we face, including those you highlighted around privilege and the extent of our s.2 powers. Doubtless there will be others along the way as well. Many of the suspects we investigate have enormous resources and will throw everything they can at us; our priority, however, remains not to be distracted by that but to keep a clear focus on progressing our investigations. More generally, the Director has indicated that she sees a number of areas as particular priorities; these include advancing our cases at pace; continuing to build and maintain really effective relationships with our key law enforcement partners, both here in the UK and overseas; and making the best use possible of the tools that have been entrusted to us, including, for example, s.7 of the Bribery Act, deferred prosecution agreements and unexplained wealth orders.

And what do you think will be the main challenges for the SFO over that same time period?

The challenges flow straight from the priorities. Our cases are complex; we often find ourselves investigating conduct that spans multiple jurisdictions and there is usually a vast amount of (increasingly digital) material to obtain and sift through. All of that brings enormous challenges in terms of evidence gathering, review and analysis. As noted, resource rich suspects will often seek to challenge us and it is clear that sometimes those challenges are intended to do no more than delay or frustrate our investigations. Against that backdrop, we need to ensure that we are progressing our cases and making decisions as speedily as we can; recognising, however, that some cases just take a really long time to investigate and that we will absolutely stay the distance where that is what is required. Modern technology presents both a challenge and an opportunity; obviously, there has been an exponential increase in the amount of potentially relevant material available to our investigations but the

innovative use of technology, such as the use of our AI robot, also has the potential to enable us to review much of that material more efficiently than previously. I'd also mention the ongoing debate around corporate criminal liability when thinking about specific challenges. Our outdated laws of corporate attribution, especially when compared to somewhere like the US, can make the successful investigation and prosecution of large corporates for non-bribery offences particularly difficult. This is an area where we would welcome reform.

Investigations such as that conducted into corruption at Rolls-Royce indicate that there is an increasing trend for enforcement authorities from different countries to coordinate their investigations (and settlements) when it comes to international crime. Please can you explain the extent to which the coordination between such enforcement authorities has changed since you joined the SFO?

I think that coordination between law enforcement authorities has always been a feature of these cases but there is no doubt that it has increased significantly over the last few years and will doubtless continue to do so in the future. As you say, the Rolls Royce DPA investigation was a great example of this in practice. We have always worked closely with, for example, the US Department of Justice and we are looking to strengthen that relationship even further over the coming months. One example of that is our bringing Peter Pope, a partner from Jenner & Block, into the SFO with a particular emphasis on building and consolidating our relationships with other jurisdictions, especially authorities in the US.

Finally, what advice would you give to young fraud lawyers looking to further their careers?

Don't be afraid to try different things and challenge yourself. Spending some time with an investigative or prosecutorial agency, whether on secondment or otherwise, can be a great way to broaden your skills and experience and expose yourself to a type of work that you might not otherwise get to be involved with. At the SFO, we offer young lawyers all kinds of opportunities to get stuck into our cases right from the outset of an investigation through to charges and beyond.

Michael Roach
Cahill Gordon & Reindel (UK) LLP

POCA and the Shift in Cannabis Laws – time for a rethink?[1]

In October, Canada legalised the recreational use of marijuana, following the passing of The Cannabis Act 2018 this summer. This reflects a global trend towards the deregulation of marijuana, the drivers of which are complex and varied, both economic and social. It also presents commercial opportunities: cannabis has become an attractive area for investment. In this context it is worth revisiting the scope and application of the UK's Proceeds of Crime Act ("**POCA**"), which defines the proceeds of crime by reference to whether the predicate activity ('criminal conduct') is lawful in the UK, not where it was committed. As such, revenue derived from a (legal) Canadian cannabis company constitutes the proceeds of crime. The growing deregulation and (global) commercialisation of cannabis exposes a policy paradox which warrants reform: secondary legislation could be introduced to extend the scope of the statutory defence and thereby alleviate the burden on the regulated sector.

The current legal framework

Until recently cannabis was listed on Schedule 1 of the Misuse of Drugs Regulations 2001, classified as having no therapeutic value and unable to be lawfully possessed or prescribed for medical use.[2] However, following a series of high-profile cases, the Home Secretary added cannabis-derived medicinal products onto Schedule 2, and since 1 November a number of those products can be legally prescribed.

The substantive offences of money laundering, as set out in Part 7 of POCA, specify a range of conduct (e.g. transference, conversion or possession) which, when performed in relation to 'criminal property', amount to a

[1] This piece is an abridged and edited version of an article that originally appeared in Money Laundering Bulletin.
[2] The only exception to this prohibition was Sativex, an oral spray which contains THC and was prescribed to patients suffering from multiple sclerosis.

criminal offence. Property is 'criminal property' where it represents or constitutes the benefit of conduct which would be unlawful were it committed in the UK.[3]

In 2005 a statutory defence to money laundering was introduced. Criminal liability under POCA was excluded from persons who knew or believed that the predicate 'criminal conduct' occurred in a country where it was lawful. However, the statute left it open to the Secretary of State (by way of statutory instrument) to prescribe certain predicate conduct where the defence would not apply. When the relevant Bill was discussed in Parliament the Government's representative stressed that, in prescribing any offence, the Secretary of State would seek to protect against serious crime, such as *"paedophilia, drug cultivation and the trafficking of people".*[4] She went on to clarify:

> "*The main purpose of [the statutory defence] is to filter out the need for the regulated sector to report activities such as, for example, the profit from bullfighting in Spain…or companies engaging in what is apparently lawful business abroad."*[5]

The following year the Government prescribed specific conduct, including any criminal offence which carries a maximum sentence exceeding 12 months' imprisonment.[6] Currently under UK law it is illegal to possess, cultivate and supply cannabis and all such offences carry a maximum sentence exceeding 12 months' imprisonment.[7] Accordingly, cannabis-related offences fall outside the scope of the statutory defence.

The resulting position and the call for reform

As it stands therefore, any person in the UK who receives a payment derived from the revenue of a legal foreign cannabis business commits a criminal offence, provided they know or suspect its origin. On one hand, and as a matter of policy, it makes sense to criminalise, and therefore stymie, the movement of money derived from activity considered unlawful in the UK, irrespective of its legality in the jurisdiction where conducted.

However, the implications of the law in the context of Canadian cannabis companies seem at odds with the policy underlying the statutory defence, especially given the UK Government now acknowledge the medicinal benefits of cannabis. This is particularly true for the regulated sector, which has an ongoing duty to monitor transactions and report suspected money laundering. Where a bank is deemed to know or suspect that funds originate from a Canadian cannabis company its obligation to submit a SAR would technically be triggered. This position makes little sense and calls for reform. Payments relating to a lawful market in Canada should - to quote the Government who introduced the statutory defence - be "*filtered out*" from the regulated sector's reporting obligations. One cannot imagine why the NCA would ever want to act upon or investigate a SAR based on lawful cannabis business in Canada. Consent for such transactions are inevitable and their reporting places an unnecessary burden on both the regulated sector and UK authorities.

Accordingly, the UK Government should consider how the provisions of the statutory defence could be extended to exclude lawful cannabis business - especially that relating exclusively to medicinal applications - from the scope of the regulated sector's reporting obligations. To do otherwise would be inconsistent with both the rationale of the statutory defence and the purpose of the reporting framework.

David Rundle
WilmerHale

Revised CPS Code draws attention to the importance of disclosure in charging decisions

On 24 October, the then Director of Public Prosecutions Alison Saunders unveiled the latest version of the CPS's Code for Crown Prosecutors (the "**Code**") in what was one of her last public acts at the helm of the agency. The

[3] S. 340(2) POCA
[4] *https://publications.parliament.uk/pa/cm200405/cmstand/d/st050113/pm/50113s09.htm*
[5] Caroline Flint, 13 January 2005, Standing Committee discussions for the Serious Organised Crime and Police Bill, available at https://publications.parliament.uk/pa/cm200405/cmstand/d/st050113/pm/50113s09.htm
[6] Proceeds of Crime Act 2002 (Money Laundering Exceptions to Overseas Conduct Defence) Order 2006 (SI 2006 No. 1070)),
[7] For example, possessing cannabis (s. 5(1) Misuse of Drug Act 1971) carries a maximum of 5 years.

publication of the revised Code – which replaces the previous version that had been in force since January 2013 – was directly preceded by a number of well-publicised disclosure failings by the police and the CPS which resulted in high-profile cases involving serious offences (notably, rape and grievous bodily harm) collapsing at the brink of trial.

The Code is at the core of every case the CPS deals with. By setting out the considerations that prosecutors must take into account when making charging decisions, the Code also inevitably touches upon the CPS's disclosure obligations, as set out in the Criminal Procedure and Investigations Act 1996 ("**CPIA**") and its Codes of Practice. Under CPIA, the Crown's statutory disclosure obligations start from the point of charge; subsequently, the duty to identify certain material not already disclosed to the defence is then triggered by receipt of the charged person's CPIA-compliant defence case statement. However, the sudden explosion of digital technology in recent years has highlighted the need for the CPS to pay close attention to digital evidence at the outset of each case, including before deciding whether to charge.

The recent swathe of collapsed prosecutions, together with a scathing report on the disclosure of evidence in criminal cases by the Commons Justice Select Committee,[8] has highlighted the need for the CPS to move with the times. Therefore, it is of little surprise that changes to the existing disclosure regime have been touted as being at the forefront of the new Code. In launching her revisions, Ms Saunders highlighted the need for prosecutors to rigorously examine "*any evidence that assists the defence*". This sentiment flows from the duties laid out in CPIA – i.e. to identify relevant prosecution material that will be, in turn, potentially disclosable to the defence – whilst also highlighting the need for disclosure to be considered at the point of charge, and not only subsequently when the statutory obligations under CPIA are triggered.

In line with this approach, the new Code contains a significant departure from the previous text, by explicitly requiring prosecutors to consider whether there is any material held by the police or material that may be available which could affect the decision to charge a suspect with any crime. This is the first time that as part of the evidential stage of the Full Code Test (which must be met before any charges can be brought), prosecutors explicitly must consider whether there is any material that may affect their assessment of the sufficiency of evidence, including examined and unexamined material in the possession of the police, and material that may be obtained through further reasonable lines of inquiry.

The revised Code highlights that prosecutors are under an ongoing duty to re-assess the sufficiency of evidence throughout the case (including during post-charge disclosure under CPIA). Moreover, the Code sets out that prosecutors must have regard to the impact of any failure by the investigators to pursue an advised reasonable line of inquiry or to comply with a request for information. Also, in appropriate cases, prosecutors may now invite the suspect to submit evidence or information to help inform the prosecutor's decision, either before or after charge.

Whilst arguably, many of the matters set out in the new Code should have already formed part of good prosecutorial practice, it is encouraging that the CPS officially now recognises the importance of disclosure to decisions whether or not to charge. However, as the Attorney General's recent review of the efficiency and effectiveness of criminal disclosure shows[9], there remains room for improvement.

Diana Czugler
Peters & Peters

Failure to prevent economic crime – an idea whose time has come?

Last month, in front of the ongoing House of Lords committee on the Bribery Act 2010, Sir Brian Leveson and Lisa Osofsky talked up the idea of a 'failure to prevent' offence covering the spectrum of economic crime. The interventions of the President of the Queen's Bench Division and the recently appointed director of the Serious Fraud Office have added to growing calls for expanded powers to tackle corporate criminality.

[8] https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/859/85902.htm
[9] https://www.gov.uk/government/publications/review-of-the-efficiency-and-effectiveness-of-disclosure-in-the-criminal-justice-system

Despite recent exceptions such as s. 7 of the Bribery Act and the 'failure to prevent tax evasion' offence contained in the Criminal Finances Act 2017, corporate liability for economic crime in this jurisdiction arises primarily from the identification principle. The principle has long been regarded by prosecutors as outdated and deeply flawed. According to critics it incentivises a company's board to distance itself from responsibility, discriminates against smaller companies for whom it is easier to identify levers of control and creates an inconsistent and uneven approach alongside the more recent strict liability offences. UK enforcement bodies glance enviously in the direction of their US counterparts, who, armed with the vicarious doctrine of *respondeat superior,* have long been able to hold corporates to account for the actions of *any* of their employees acting in the course of their employment – neither instructions to the contrary from senior employees nor a comprehensive compliance program can make a company impervious to prosecution. With a self-proclaimed "*avaricious*" ex-DOJ prosecutor now spearheading UK enforcement, it is unsurprising to hear the call from Cockspur Street renewed once again.

Last year's Call for Evidence by the Ministry of Justice interrogated different proposals for reforming corporate liability and included both the vicarious approach and an extension of failure to prevent. The findings remain as yet unannounced, but responses published online by the consultees show that significant scepticism still exists about the workability of such proposals. Whilst advocacy groups pushed for reform, industry bodies such as The Law Society expressed concern, noting that the Law Commission's 2010 consultation had concluded "*there is no pressing need for statutory reform or replacement of the identification doctrine*". A key reservation is the complexity involved – the MoJ's starting proposal for a failure to prevent model is that it applies to a short list of the most common serious economic crime offences, including conspiracy to defraud, s. 1 of the Fraud Act 2006, the false accounting offence in s. 17 of the Theft Act 1968 and the money laundering offences at ss. 327 to 333 of the Proceeds of Crime Act 2002. Encompassing multiple offences would create a vast array of compliance challenges for businesses – it is already felt there is a lack of clarity as to what is meant by "*adequate procedures*" for bribery. In the midst of the precariousness of Brexit, such a proposal would add more uncertainty and additional legal jeopardy for businesses. The iron fist of failure to prevent lies in its strict liability. By placing the burden of proof on the company, it sits uncomfortably alongside that golden thread of English criminal law – that it is the duty of the prosecution to prove the guilt of the accused.

Some respondees went further and questioned the "…*underlying policy question as to whether it is appropriate for a company to be criminally liable for the acts of others*…". This gets to the heart of the debate over corporate liability – rather than designing ways of attributing *mens rea* to corporate entities (and therefore punishing shareholders, employees and customers), should prosecutors not be focused on the individuals who commit the crimes in question? The use of s. 7 in recent DPAs, an ever growing feature of the landscape, will increase concerns that the expansion of corporate liability is about extracting large fines and grabbing headlines rather than punishment and deterrence.

Before parliament acts to further expand the tools at prosecutors' disposal, it may first need to decide what it wishes them to be used for.

Francis Bond
Macfarlanes LLP

Market Practice and Dishonesty

Cases involving allegations of 'civil fraud' or dishonesty necessarily involve an assessment of the conduct of the defendant. Where English law is concerned, in determining whether a person has been dishonest, the Court first determines the actual state of mind of the defendant: in essence, the Court asks whether the defendant held an honest belief as to the facts. Subsequently, the Court must consider whether, objectively, the ordinary decent person would consider the defendant's actions to have been honest or dishonest. If the defendant fails the objective dishonesty test, it simply does not matter that they believed that what they were doing was not dishonest because there is no independent requirement that the defendant must have appreciated that what he was doing was, by the standards of the ordinary decent person, dishonest (Ivey v Genting Casinos (UK) ltd [2018] AC 391).

The judgment of Morgan J in the case of Carr and others v Formation Group PLC and others [2018] EWHC 3116 (Ch) acts as a useful reminder of these general principles and, more specifically, of the fact that expert evidence as to market practice may go to establishing whether or not the defendant held an honest belief in the facts, but is irrelevant to the question of whether, objectively, those actions were dishonest.

In brief summary, the claim involved sixteen footballers and a Mr. Carr, a financial adviser, who had engaged the third defendant, Formation Asset Management Ltd ("**Formation AM**"), to provide financial advice following a recommendation from their agents. Formation AM duly provided financial advice as a result of which the claimants made a number of investments. As the claimants were aware, each party they invested in paid a commission to Formation AM.

The claimants were not aware, however, that Formation AM had agreed to share this commission with the claimants' agents. The claimants subsequently sued their agents and various other entities within the Formation group for various forms of dishonest conduct arising out of the payment of commissions, including deceit, unlawful means conspiracy and dishonest assistance.

One element of the defences filed by two of the agents was that there was a market practice of sharing commission. As a consequence of this, these defendants argued that expert evidence was required to prove the market practice in order to properly assess whether those defendants acted with any dishonest intent.

Morgan J held - consistent with authority - that evidence as to market practice was irrelevant to the issue of the objective test to be applied by the Court when assessing dishonesty: in the words of Morgan J, "*it is the court, rather than market practice, which sets the standard of honesty*" (paragraph 23).

This is a useful reminder of the limits of expert evidence in fraud/dishonesty cases governed by English law and a clear indication that the defence of 'everybody was doing it' simply does not work. If a practice is dishonest, the fact that it is carried on by a number of people within a particular industry does not make it any better. As the authorities have consistently held, nobody needs an expert to tell them that.

Simon Camilleri
Fried Frank Harris Shriver & Jacobson (London) LLP

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