Young
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Association

**Dear all,**

**Welcome to the YFLA Spring Newsletter 2019. 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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## Competing Extradition Requests and Julian Assange – A case of first in first out?

After a seven-year hiatus, the Assange extradition saga took a dramatic turn when the Wikileaks founder, transparency activist and enfant terrible of journalism, was dragged out of the Ecuadorian Embassy in London by British police after being arrested for failure to surrender to court. Assange was found guilty of this and is awaiting sentencing.

Assange has, since 2012, evaded the execution of a Swedish European Arrest Warrant ("**EAW**") issued in 2010 in respect of allegations of rape and sexual assault, which he denies. Assange challenged the extradition request on the grounds that the Swedish Prosecutor's Office was not a competent judicial authority, which was rejected by the UK Supreme Court. In 2017, the Swedish authorities closed their investigation because of the difficulty in arresting Assange while he remained in the embassy (the UK police could not enter the premises without Ecuador's consent). Ecuador's new President, whose patience wore thin following Assange's "*discourteous and aggressive*" behaviour and the violation of the terms of his asylum, withdrew Assange's protection. As at 25 April 2019, there are reports that Sweden is considering reopening the investigation and issuing a fresh EAW (the statute of limitation for investigating the alleged offences runs until mid-2020).

Assange also faces extradition to the US for conspiracy to commit a computer hacking offence, which is a federal offence carrying a maximum penalty of five years' imprisonment. The US DoJ alleges that Assange conspired with Chelsea Manning, a former US intelligence analyst, to try and crack a password that allowed Manning to gain unauthorised and anonymous access to highly sensitive US military computers. Assange, contrary to many fears, has not been charged with espionage or any other offence for publishing the classified material, a charge which would have implications for journalistic activities and freedom of the press – hacking cannot sensibly be considered standard journalistic behaviour. Additional charges would need to be subject to supplementary extradition requests and considered by the English courts prior to any extradition.

The question is what would happen to the US extradition request if Sweden reissues its EAW? Under s. 126 of the Extradition Act 2003, the Home Secretary can decide which request takes precedence, considering factors such as

seriousness of the offence, where the offence was committed, and, more pertinently, which request was made first. Matters are complicated, somewhat, by Britain's pending departure from the EU. The UK, as a continuing member of the EAW regime (for now), would be required to execute Sweden's EAW, and the UK Government has stated that any EAWs received prior to the withdrawal date would still apply provided the defendant has been arrested. Recent EU Commission guidance, however, suggests that in a no-deal scenario, the EU's framework on police and judicial cooperation, including EAWs, would cease to apply. It is unclear what would happen to pending EAWs in such a scenario (Sweden may have to reissue the request under the previous extradition convention). In any case, Sweden has until mid-2020 to serve an extradition request.

Assange may challenge his extradition either to the US or to Sweden (as he has done previously). Such challenges could take months or even years, particularly if Assange applies to the European Court of Human Rights arguing that the US extradition request violates his human rights. Whatever next steps Assange takes, he is likely to receive a custodial sentence first for failing to surrender to court (which carries a maximum 12 months jail term). And he may remain in a UK prison until all legal avenues have been exhausted, while Sweden and the US go tête-à-tête with their extradition requests, as he is unlikely to be given bail this time. Like Ecuador, the English courts' patience with him is becoming thread-bare.

**Eamon McCarthy-Keen**
**Peters & Peters**

## *Omers Administration Corporation and others v Tesco plc*[1] - Tesco to disclose evidence compelled by the SFO during the DPA investigation

In *Omers*, the Court laid out a framework for balancing competing duties of civil disclosure and confidentiality in the context of the new DPA landscape.

Background

In August 2014, Tesco plc issued a trading update stating that its expected profits for the previous six months had been overstated by an estimated £250m. Approximately £2 billion was wiped off the value of shares in Tesco plc and within two months the SFO had opened a criminal investigation. A potential action by shareholders against Tesco plc must have loomed large from an early stage both in the UK and the US, and is likely to have been seen by Tesco plc as posing a greater financial risk than the SFO.

In April 2017, Tesco plc's UK subsidiary, Tesco Stores Ltd ("**TSD**"), paid a fine of £129 million pursuant to the terms of a DPA with the SFO. On the basis of the same evidence, in October 2018 and January 2019, the three senior TSD executives identified in the Statement of Facts accompanying the DPA as being involved in the criminality were acquitted of Fraud by Abuse of Position and False Accounting (sir John Royce found there was no case to answer in respect of two of the men, and the SFO offered no evidence against the third).

Criticism followed from some quarters of Tesco's willingness to accept liability through the DPA. The reality is that its conduct made commercial sense. By cooperating fully with the SFO and entering into the DPA, Tesco prioritised certainty over a protracted criminal investigation. Moreover, the agreed Statement of Facts accompanying the DPA limited all allegations of criminal wrongdoing to the UK subsidiary and its employees, with no admission or suggestion of liability attaching to the parent company.

The judgment - *Omers Administration Corporation and others v Tesco plc*

At least two groups of shareholders have initiated proceedings under FSMA against Tesco plc. In *Omers*, two groups of shareholder claimants jointly applied to the High Court for disclosure of material in Tesco plc's possession, including interview transcripts and witness statements ("**the SFO material**").

[1] [2019] EWHC 109 (Ch)

The SFO material had been obtained from third parties in the course of the DPA investigation by the SFO, largely using its powers of compulsion under section 2 CJA. The SFO's DPA Code of Practice provides that a confidentiality undertaking must be obtained from the recipient. The SFO had provided the material to Tesco plc "*in confidence for the purpose only of providing legal advice in relation to the criminal investigation*", and had required Tesco plc to notify the SFO should it ever become aware that it may be compelled to disclose the material either by law or by a court order.

It fell to the Court to determine whether Tesco plc's duty of disclosure overrode the confidentiality undertakings it had provided to the SFO (in addition to dealing with third party objections from witnesses, who had provided the SFO material under compulsion).

The Court reiterated that the *prima facie* test in party-to-party civil disclosure is one of relevance. Where, however, competing duties of disclosure and confidentiality exist, relevance alone may not be a sufficient basis to override confidentiality, and a balancing exercise will be required.

The Court identified a series of relevant factors to be considered in balancing competing interests of confidentiality and disclosure, including:

(i) Whether disclosure would assist the applicant (and conversely, whether non-disclosure would disadvantage them);
(ii) The strong public interest in preserving the integrity of criminal investigations;
(iii) The timely cooperation with regulators and prosecutors that is likely to result from assurances of confidentiality;
(iv) The possibility that, absent assurances of confidentiality, a document would not exit or be in the possession of the party from whom disclosure is sought;
(v) Whether it is possible to obtain the same information from another source; and
(vi) Whether it would be sufficient to disclose the material in a restricted form.

The Court held that the key question is "*whether the overriding objective of dealing with the case justly and at proportionate cost can be secured without the production of the relevant documents*". It would be necessary to distinguish between public and private interest confidentiality, and particular weight should be given to claims of confidentiality over material obtained by compulsion.

The Court found that the SFO material was necessary for the fair disposal of the proceedings and that the claimants were likely to gain a litigious advantage from it, and ordered disclosure of the material.

It remains to be seen the extent to which any material thus disclosed will strengthen the claim of shareholders that liability attaches to the PLC itself as opposed to its UK subsidiary; and, if so, the extent to which that material is consistent with the terms of the DPA and its accompanying Statement of Facts.

However, one thing is clear: where material disclosed to corporates during DPA litigation is capable of having a significant bearing on civil proceedings, it will not be withheld from parties to that litigation solely on the basis that it was originally obtained under compulsion. This will add further complexity to the strategic decisions that must be made by companies facing the risk of parallel criminal and civil proceedings. It will also set a significant precedent in the context of both civil and criminal disclosure more generally.

**Victoria Gainza**
**23 Essex Street**

## Fraud v Finality - Big principles battle it out at the Supreme Court in *Takhar v Gracefield Developments Limited & Ors*[2]

Background

Lord Briggs called it "*a bare-knuckle fight between two important and long-established principles of public policy*". Lord Sumption, with customary sangfroid, declared "*the question before us [appears] more complicated than it really is*". But only you, learned reader, can properly assess the gravity of this Supreme Court judgment. The facts are these:

> In 2004, Mrs Takhar was in a spot of financial bother. Following a divorce, she had acquired a slew of knackered properties in Coventry. Mr & Mrs Krishan provided financial help to Mrs Takhar, and in November 2005 it was agreed that the title to the properties would be transferred to Gracefield Developments Ltd, of which Mrs Takhar and the Krishans were to be the shareholders and directors.
>
> When it all turned sour, Mrs Takhar issued proceedings in the High Court, claiming that the properties had been transferred to Gracefield as a result of undue influence. Mrs Takhar asserted that the actual agreement between her and the Krishans was that the properties would be renovated and then let. The rent would be used to defray the cost of the renovation, which would be met by the Krishans, but she would remain the beneficial owner of the properties. The Krishans countered that the properties were to be sold after they had been renovated. Mrs Takhar would receive a fixed amount from the proceeds of sale, and the Krishans would receive the rest.
>
> Mrs Takhar's claim was rejected. There was a profit share agreement in evidence which supported the Krishan's version of events. Mrs Takhar claimed to have had no recollection of signing the agreement, but did not allege forgery. She had sought permission to obtain evidence from a handwriting expert before trial but that application was refused because it was made too late in the proceedings. After the trial, Mrs Takhar obtained a report from a handwriting expert which concluded, strongly, that her signature on the profit share agreement was forged.

The Set Aside Proceedings: Fraud v Finality

Mrs Takhar issued proceedings to set aside the judgment, on the ground that it was obtained by fraud. The Krishans claimed that the proceedings were an abuse of process, because the documents on which the expert report was based had been available to her for approximately 12 months before trial. Thus, the principle "*fraud unravels all*" was pitched against the immutable concept of finality of justice.

At first instance, Newey J held that a party who seeks to set aside a judgment on the basis of fraud did not have to show that they could not have discovered the fraud by reasonable investigation before trial. The respondents successfully appealed, Patten LJ relying on, amongst other authorities, the House of Lords decision in *Owens Bank Ltd v Bracco*[3], in particular the dicta of Lord Bridge:

*"… the unsuccessful party who has been sued to judgment is not permitted to challenge that judgment on the ground that it was obtained by fraud unless he is able to prove that fraud by fresh evidence which was not available to him and could not have been discovered with reasonable diligence before the judgment was delivered."*

The Supreme Court Decision

All seven Supreme Court justices rejected the Court of Appeal's ruling, restoring the Order of Newey J, albeit Lord Kerr, Lord Sumption and Lord Briggs all came to the same conclusion by different routes, having grappled with a number of seemingly conflicting judgments from both the domestic courts and other common law jurisdictions.

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2 [2019] UKSC 13

3 [1992] 2 AC 443

Lord Kerr proposed a "*bright-line*" boundary test - where it can be shown that a judgment has been obtained by fraud, and no allegation of fraud had been raised at the trial, a requirement of reasonable diligence should not be imposed, subject to two qualifications: (a) where fraud has been raised at the original trial and new evidence of the fraud is relied upon to set aside the judgment, the court should have a discretion whether or not to hear the application; and (b) where a deliberate decision not to investigate the fraud at first instance was taken the court should have discretion whether to allow the application.

Lord Sumption disagreed with qualification (a) of Lord Kerr's "*bright-line*" test. In his view, proceedings to set aside a judgment would only be abusive where the point at issue and evidence in support of it could have been raised in the earlier proceedings and should have been. However, a reasonable person is entitled to assume honesty in those with whom he deals. Therefore, unless the claimant deliberately decides not to investigate a suspected fraud, it cannot be said that he *should* have raised the issue.

Lord Briggs, taking a more flexible approach than Lord Kerr or Sumption, concluded that the contest between the fraud and finality principles is inherent in all such applications to set aside judgments, and not only in Lord Kerr's two exceptions. He felt it would be wrong to say that most such applications are unaffected by questions about lack of reasonable diligence, as by their very nature they give rise to a risk of abuse because they undermine finality by their mere pursuit, regardless of outcome. Therefore, the court should have regard to the gravity of the fraud alleged when deciding whether or not to set-aside a judgment on that basis.

And How Does That Make You Feel?

The decision of the Supreme Court is eminently correct, although perhaps not as helpful to practitioners as it might have been, given the parting of ways between Lords Kerr, Sumption and Briggs.

It was important to their Lordships that the issue of the forgery had not been live in the original proceedings, and as such was not subject to any finding of fact. It was also important that Mrs Takhar had not made a conscious decision not to investigate the forgery. It was therefore entirely correct to set-aside the original judgment, given the risk that it not only crystallised a fraud against Mrs Takhar, but was a fraud against justice itself.

There are unlikely to be many situations in which a party deliberately decides not to investigate a fraud before trial. In reality, this is likely only to happen where a party lacks the financial resources to undertake such an investigation, and not where they decide to 'keep it in the back pocket' for another day. Such parties are deserving of the protection of the court's ability to set-aside a judgment obtained on the basis of fraud.

**Richard Clayman**
**Peters & Peters**

## The Case of *Jimenez*: Extraterritorial jurisdiction in a post-KBR world

The Divisional Court's landmark ruling in *R (KBR Inc) v Director of the SFO*[4] concerned a claim brought by US-based Kellogg Brown & Root Inc ("**KBR Inc**") for judicial review. The company took issue with the service of a section 2 notice on two of its senior officers while they were in London, which required KBR Inc to disclose documents relevant to an investigation into its UK subsidiary, KBR Ltd. Dismissing the claim, Gross LJ held that section 2(3) of the Criminal Justice Act 1987 could indeed apply extraterritorially provided the company had a "*sufficient connection*" with the UK.

The principles set out in *KBR* were recently and for the first time reaffirmed by the Court of Appeal in its important and potentially wide-reaching judgment in *R (on the application of Jimenez) v First-Tier Tribunal (Tax Chambers) and HMRC.*[5]

4 [2019] 2 WLR 267

5 [2019] EWCA Civ 51

The case of *Jimenez*

The case of *Jimenez* concerned the power of HMRC, under paragraph 1 of Schedule 36 to the Finance Act 2008, to issue a taxpayer notice. These notices require the provision of information or documents pursuant to an investigation into a person's tax position and carry a civil penalty for non-compliance. Having become the subject of a HMRC investigation, Mr Jimenez was issued with a taxpayer notice at his residence in Dubai. He challenged the notice and argued that paragraph 1 did not have extraterritorial effect.

Mr Jimenez's claim succeeded at first instance, but was overturned on appeal. The Court of Appeal adopted the "*sufficient connection*" test set out in *KBR* and found that, on the facts, there clearly was such a connection because taxpayer notices could only be issued in relation to persons who were, or may be, taxpayers. Having drawn attention to the absence of any express territorial limitation under Schedule 36, Patten LJ, who gave the leading judgment, reiterated the need to take a purposive approach. To that end, he identified two key factors supporting the contention that the provision was intended to have extraterritorial effect. Firstly, the subject-matter and purpose of the legislation concerned the prevention of tax evasion which – like the economic crime which formed the backdrop in KBR – often transcends national boundaries. Secondly, in the same connection, there were strong policy objectives involved in conferring effective investigatory powers on HMRC to carry out its statutory duties.

Comment

The following passage of Patten LJ's judgment illustrates the potentially wide ramification of the ruling:

> *[T]he more recent decision of the Supreme Court in Bilta and the Divisional Court in KBR confirm that the jurisdiction to serve a notice requiring the provision of information from a person resident abroad or even to impose liability on the recipient will not raise eyebrows where they serve to protect a sufficient national interest.*

*KBR* and *Jimenez* suggest that the various kindred provisions granting similar powers to other domestic authorities will be subject to the same considerations where their purpose is the protection of a key national interest. This, coupled with the adoption of the "*sufficient connection*" test, may result in other agencies deciding to test the limits of their own statutory powers. Lawyers operating at the confluence of criminal and regulatory law – for example, those advising in market abuse or cartel offence cases – will need to be especially wary of the potentially nascent extraterritoriality of the powers at the disposal of agencies such as the FCA and the CMA, both of which have the ability to require the production of documents pursuant to their investigations.

**Ryan Dowding**
**Three Raymond Buildings**

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