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Dear All,

Welcome to the YFLA July 2020 Newsletter. Details of our upcoming (virtual given ongoing circumstances) events can be found on our website (**www.yfla.com**) and on our LinkedIn group (search for "**Young Fraud Lawyers Association**"). We take this opportunity to wish all YFLA members well during the ongoing Covid-19 disruption.

Publicity Secretary's Note

This issue contains a number of excellent contributions covering both criminal and civil developments and drawing from the YFLA's solicitor and barrister membership.

- **Richard Clayman (Kingsley Napley LLP)** has produced a fascinating read in which he explores whether lockdown is causing more fraud and whether Lord Sumption's Covid-19 interventions match his so highly respected judgments. Members are invited to arrive at their own conclusions, but, as ever, Mr Clayman's intervention is clever, researched and witty.

- **Jessica Foley** and **Imtiyaz Chowdhury (both of CMS Cameron McKenna Nabarro Olswang LLP)** have written a detailed and engaging piece on Account Freezing Orders. Their article is an important read for those interested in this enforcement power, which is often overlooked in risk analyses.

- **Alice McDonald (Peters & Peters Solicitors LLP)** has contributed an excellent case study which explores human rights arguments in the context of procedural aspects to fraud litigation. Her thoughtful summary of a decision in the *RP Explorer* litigation currently before the Commercial Court will be helpful as well as hopeful reading to those instructed late and on behalf of recalcitrant defendants.

- Yasin Patel and Amy Hazlewood (both of Church Court Chambers) close off the newsletter where it started: fraud arising out of Covid-19. The article is a must-read for the YFLA's criminal membership who are anticipating which specific criminal offences are likely to arise in a Covid-19 era. The article is thoroughly researched and commends itself to a careful reading.

Many thanks are due to all of our excellent contributors. We hope you enjoy their fine work and encourage all members to volunteer articles for future newsletters.

We take this opportunity also to note to members a reason for real pride in the YFLA. Several recent high profile fraud cases (criminal and civil) have been even more notable for the presence of YFLA members in the legal teams. The YFLA is strengthened by the excellence represented within our membership and we wish all members continued success, good health and happiness in the months to come.

Philip Gardner, Publicity Secretary

Lockdown, Fraud and the Lord

There is an oft repeated mantra of uncertain truth which asserts that the Chinese characters meaning 'crisis' are the same as those meaning 'opportunity'. You may also have come across this outlook altering missive in a fortune cookie, as I did. In the lexicon of the fraudster, 'coronavirus' seems to bear that same dual meaning.

A September 2019 study conducted by FINRA Investor Education Foundation found that key risk factors for susceptibility to fraud are social isolation, active online engagement, and financial vulnerability.[1] Lockdown, enshrined in law and enforced by the state, has however been the near universal global response to halt the spread of Covid-19. Thus, life in lockdown has brought with it the ideal conditions for fraudulent activity, and in the prevailing climate of scientific dialectic and baffling but apparently acceptable excuses to go out for a drive, confusion and vulnerability reign.

Further, many aspects of life have been funneled online, from medical appointments to the pub quiz. It is perhaps unsurprising therefore that phishing scams and malware are busy doing the rounds. Tailor-made coronavirus scams have also cropped up, from fake lockdown fines to fake websites purporting to sell PPE. Within days of the UK entering lockdown, the City of London police reported a 400% increase in scams related to coronavirus. More recently, it has been reported that the Coronavirus Job Retention Scheme has been widely abused by unscrupulous employers claiming furlough subsidies while ordering their employees to continue working.

Many have questioned the wisdom of, and principles underpinning, lockdown - and not just sleep deprived tech-billionaires and conspiracy theorists. In May 2020, our own Lord Sumption penned a controversial article for the *Mail on Sunday* which strongly advocated for individual liberty over state intervention. In summary, Lord Sumption felt that lockdown is a tyrannical interference with life, and that we had too readily accepted totalitarianism on the joint premises of debated science, and the self-deceiving but rhetorically attractive cry: 'lives must be saved at all costs'. According to Lord Sumption, in wilfully abandoning the principles of our way of life, our liberty and our means of living (and still incurring a hefty cost measured in life – both literally and figuratively) we have made ourselves mere instruments of public policy, allowing basic freedoms to be conditional upon political decisions, responsibility for which has been abdicated to scientists and statisticians. His preferred response to the pandemic would have been to leave it to the individual to determine their actions, on the basis of informed choice. This would counterbalance loss of life against the preservation of economic, social and individual welfare as well as our fundamental values.

Like many, I disagree with his Lordship's take on the situation – While I may feel that having 'a' pint with a friend is worth the personal risk, the 8 key workers I stumble into on the way home may not. Public health is occasionally incompatible with personal

[1] https://www.finrafoundation.org/sites/finrafoundation/files/exposed-to-scams-what-separates-victims-from-non-victims_0_0.pdf.

liberty, and the inherent value of personal liberty decreases in proportion to the increased likelihood of those liberties causing the death of a third party. Thus, temporary lockdown is rational and proportionate – and democratic. Lord Sumption's libertarian aria is the lofty hymn of the strong, secure few; written for the choir, not the congregation.

What has this got to do with fraud? Lord Sumption unsurprisingly did not reference financial crime in his opinion piece, but given that lockdown has likely increased people's vulnerability to fraud, he might well have offered it up in support of his thesis. The question is would Lord Sumption's lockdown free world of individual responsibility be markedly more resilient against fraud? The FINRA study certainly suggests lockdown free nations may have fared better. However highly libertarian, low regulation societies are not known to be safe havens from financial crime. Moreover, Sweden, the country praised by Lord Sumption for resisting lockdown, did reportedly see an increase in "identity fraud and fraud through social manipulation" in comparison to the same period the year before in April,[2] while other forms of crime fell. Likewise, in February South Korea (which also did not enter formal lockdown) saw a dramatic rise in "smishing" (phishing via SMS) and blackmail calls, for example, it has been reported that one fraudster rang a restaurant claiming they had contracted coronavirus at the establishment, and demanded money or else they would inform the authorities.[3]

There is currently insufficient information from which to draw any clear comparisons or conclusions, however when the dust settles it will be interesting to see the extent to which a) the pandemic increased instances of fraud locally and globally; b) the extent to which formal lockdown measures directly increased people's susceptibility to fraud; and c) if there were any success stories in fending off fraud in lockdown, during this troubled year of Our Lord, 2020.

Richard Clayman
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Account Freezing Orders under the Criminal Finances Act 2017 – A freeze too far?

Introduction

On 31 January 2018, account freezing orders ("**AFOs**") became available to law enforcement authorities (following their introduction under the Criminal Finances Act 2017), as yet another power to recover unlawfully obtained assets and funds. AFOs have since been used hundreds of times to freeze and forfeit millions of pounds worth of suspected illicit funds held in bank and building society accounts. Despite the proliferation of use of this tool by multiple authorities, from the police to HMRC, AFOs have received little publicity, particularly compared with their "sister" measure – Unexplained Wealth Orders ("**UWOs**"). Yet AFOs are a controversial tool, largely

[2] https://www.thelocal.se/20200515/revealed-how-the-coronavirus-pandemic-is-affecting-crime-in-sweden.
[3] https://www.techspot.com/news/84043-text-scams-exploiting-coronavirus-fears-see-sharp-rise.html.

because of the low threshold test for them to be granted for anywhere up to two years, with very limited court oversight, no ongoing monitoring of the investigations by the authorities into whether the frozen funds are indeed illicit (compared with restraint orders), and their impact on account holders, whose funds may be seized and forfeited even if they are never convicted of (or even investigated for) a crime. We consider below the key features of AFOs, and the potential (limited) safeguards for those subject to them.

What are AFOs?

AFOs were introduced by section 16 of the Criminal Finances Act 2017 ("**CFA**"), which inserted additional provisions into Part 5 of the Proceeds of Crime Act 2002 ("**POCA**"), to facilitate civil recovery of property obtained through unlawful conduct or intended to be used in unlawful conduct. AFOs are one of a series of additional measures contained in the CFA aimed at tackling economic crime in the UK and the use of the UK as a seeming safe harbour for criminal property. An AFO prevents the withdrawal or payment from a bank or building society account by a person who operates that account (or on whose behalf the account is operated). A person "operates" the account if they are an account holder, signatory or identified beneficiary in relation to the account.

Who can obtain an AFO?

Only an enforcement officer may apply for an AFO, which includes officers of HMRC and the Serious Fraud Office ("**SFO**"), police constables and accredited financial investigators. Those officers must either be senior officers (i.e. of inspector or equivalent status) or authorised by a senior officer. This represents a significant expansion of those enforcement officers' former powers under POCA, whose seizure and forfeiture powers were previously limited to cash, rather than bank and building society accounts.

What is the process for obtaining an AFO?

Initially, an enforcement officer can apply to the Magistrates' Court (or to the Sheriff, in Scotland) if they have *reasonable grounds to suspect* that funds (of at least £1,000) held in an account were obtained through unlawful conduct ("recoverable property") or are intended to be used in unlawful conduct. In the Magistrates' Court, the application will usually be heard by a District Judge, but may be heard by a lay magistrate. Typically, this will follow receipt by the NCA's financial intelligence unit of a "suspicious activity report" (or SAR/ authorised disclosure) under section 330 POCA by the bank or building society that holds the account holder's credit balance, reporting knowledge or suspicions of money laundering. At the time of the making of the application, the authorities may have little more evidence than the SAR, together with any other intelligence they may have gathered from other sources.

If the Court is satisfied (on the balance of probabilities) that those grounds exist, it may grant an AFO, which can remain in force for up to two years. However, AFOs are typically requested and granted for less than two years initially – perhaps six months or

a year – with the enforcement officer able to go back and seek an extension if necessary up to the two-year limit.

The purpose of the AFO is to preserve the funds in the account while the authorities investigate further to establish whether they are in fact recoverable (i.e. unlawful). If, following that further investigation, the authorities are "satisfied" (on the balance of probabilities) that the property is recoverable, they may apply for forfeiture – i.e. permanent removal and addition to the Consolidated Fund (essentially the Government's bank account).

The enforcement officer can then send an account forfeiture notice ("**AFN**") to the account holder notifying them that forfeiture will occur unless objections are received in writing by the deadline in the AFN (not to be less than 30 days). If no objections are made, the funds will be forfeited. If objections are received, the officer can apply for a forfeiture order ("**FO**") to the Magistrates' Court (or the Sheriff), and the FO will be granted if the court is satisfied (on the balance of probabilities) that the funds were obtained through unlawful conduct or are intended to be used in unlawful conduct by any person. The FO may be appealed within thirty days by any person who is a party to the relevant proceedings and is aggrieved by either the making of, or decision not to make, the FO.

Case Examples

There was a relatively slow take up by enforcement agencies to make full use of their new power. Although some funds were frozen in 2018, from available public sources it appears that no FOs were made until early 2019. However, the enforcement agencies appear now to have found their feet with the tool. In July 2019, it was reported that AFOs had been used more than 650 times, and we anticipate that this figure is now significantly higher, once 2019/20 figures are taken into account. By way of example:

- In February 2019, the National Crime Agency ("**NCA**") obtained its first FO (following an AFO) in relation to approximately £500,000 held by a relative of a former foreign public official.

- In March 2019, the SFO obtained an FO in relation to around £1.5m held by an individual who had been investigated (but not charged) for their involvement in a fraudulent mortgage scheme.

- In December 2019, the NCA reached a £190m settlement (which included a property in the UK valued at £50m) with a property developer, which followed the NCA's use of AFOs to freeze funds amounting to £140m belonging to the same individual.

- In April 2020, the Metropolitan Police announced that an FO had been obtained in respect of EUR 1.9m of funds from 25 bank accounts, following a money laundering investigation, having frozen £58m of funds in 2019.

- HMRC have been particularly prolific in using these tools, reporting that they had obtained 60 AFOs in 2018/2019 and 166 in 2019/2020.

Comment

AFOs are a powerful tool to assist authorities in recovering and preventing the use of proceeds of crime. This tool should also deter individuals from seeking to disguise their illicit funds in the UK and, ideally, discourage the underlying unlawful conduct itself, on the basis the "ill-gotten gains" may never be realised.
However, they are very draconian powers, able to be obtained on the basis of very limited justification ("reasonable grounds to suspect"), which is a far cry from belief, let alone knowledge, yet also able to prevent a person accessing their own monies for up to two years, without being under suspicion of engaging in unlawful conduct themselves.

Given the lack of guidance as to what constitutes "reasonable grounds" to suspect the involvement of unlawful conduct, there is a risk that Magistrates will essentially be asked to "rubber stamp" orders that are purely speculative in nature, opening the door to lengthy prosecutorial fishing expeditions. This goes hand in hand with the concern that applications for AFOs may not be subject to the same scrutiny in a Magistrates' Court as they would be in a High Court (where an application for civil recovery would have to be made normally), or a Crown Court in the context of restraint orders made under POCA.

By contrast, when a freezing order is sought in civil proceedings (by way of the formerly named Mareva injunction) to prevent the respondent dealing with, or disposing of, their assets, the test applied is far more onerous. The court must be satisfied that: the applicant has a substantive cause of action, there is a good arguable case, there is a real risk of the assets being dissipated and it is just and convenient to grant such an order. The applicant must also provide the court with an undertaking in damages, to compensate the respondent if it is ultimately decided that the injunction should not have been granted.

These issues, together with the fact that funds can be forfeited without ever having to prove wrongdoing to a criminal standard, or achieving a criminal conviction, give rise to a concern that the subject of an AFO loses out on important safeguards built into the criminal justice system, whilst facing potentially very onerous restrictions on their property and other rights.

However, the individuals impacted by AFOs have perhaps not been left entirely out in the cold. It is open to the Magistrates' Court to attach exclusions to an AFO, e.g. allowing the operator of the account to meet reasonable living expenses or pay legal costs. The Court can also set aside or vary the AFO at any time upon an application by an

enforcement officer or by an individual affected by the AFO, to show that there are no reasonable grounds for suspecting the funds in relation to unlawful conduct. In addition, as AFOs only concern the funds themselves, they do not oblige account holders to assist the authorities with their investigation into the funds (albeit the account holder may be a suspect in a money laundering investigation and liable to interview under caution). Moreover, it is open to the account holder to seek compensation from the relevant enforcement agency if their funds are frozen but never ultimately forfeited, provided that the account holder suffered loss as a result of the AFO.

The simplicity with which the authorities can obtain an AFO illustrates the UK's lack of tolerance towards economic crime and its determination that the authorities should be well-equipped rapidly and effectively to detect and confiscate the proceeds of crime. Indeed, the power and appeal of AFOs is evidenced by the accelerating activity of the authorities in this area. However, the simultaneous potential erosion of individuals' rights through the backdoor of a civil order, for the purposes of a criminal investigation or prosecution, is undoubtedly a concern. It is therefore important that the use of this significant power is monitored and tested so as to provide essential ongoing scrutiny, whether that be through applications for variation / set-aside, claims for compensation, appeals or other challenges.

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Exploring Human Rights in the Context of an Application to Adjourn a Fraud Trial

Background

Christopher Hancock QC (sitting as a Judge of the High Court) recently handed down judgment in *RP Explorer Limited v Malhotra*.[4] The judgment provides guidance on the human rights considerations that may apply to an application to adjourn a trial where a Defendant is unable to attend or effectively participate in that trial, due to their incarceration.

Facts

RP Explorer Limited ("**RP**") issued a claim against Mr Malhotra and others for damages arising from alleged unlawful means conspiracy and deceit ("**the Claim**"). Following various procedural developments, the Claim against Mr Malhotra only was set for trial in November 2019.

Mr Mahotra had been in prison in Dubai since September 2017 (after the Claim was issued). He had failed to participate in any material way in the proceedings, despite

[4] Full citation: RP Explorer Ltd (formerly RP Explorer Master Fund) v (1) Sanjay Malhotra; (2) Gagan Rastogi [2020] EWHC 1225 (Comm) (04 June 2020).

being served with the relevant documents. This included failing to file a Defence to the Claim.

The Application

Shortly before trial, the Judge received an email from Mr Malhotra. The email stated that Mr Malhotra had not received service of any documents relating to the Claim, was not in a position to defend himself or instruct lawyers to do so and did not submit to the jurisdiction of the English Court. The Judge took this correspondence to be, in effect, an application to adjourn the trial.

RP's Position

RP opposed the adjournment application on the basis that Mr Malhotra had been aware of the Claim since mid-2016 and had been served with all relevant documents. RP submitted that it had done everything possible to keep Mr Malhotra apprised of the Claim, and that this was simply a late attempt to avoid judgment.

RP also argued that Mr Malhotra's inability to attend trial did not violate his right to a fair trial under Article 6(1) of the European Convention on Human Rights and that he had, in any event, waived any right to attend the trial by deliberately failing to engage with the proceedings.

Decision

The Judge firstly considered the application of Article 6(1) to an incarcerated party to civil proceedings.

Article 6(1) does not guarantee an absolute right to personal presence before a civil court, rather a more general right to present one's case effectively and enjoy equality of arms. The case-law of the European Court of Human Rights shows that the factors for the domestic court, when considering whether personal presence is required in order to uphold the fair trial guarantee, are:

1. Whether the nature of the case is such that the incarcerated person's testimony is required in order to guarantee their right to a fair trial.

2. Whether the incarcerated person has expressed a wish to attend the trial.[5]

The Judge found that, given the nature of the allegations made against Mr Malhotra, his defence would be largely based upon his first-hand knowledge of the facts. In particular, the deceit claim required RP to establish that Mr Malhotra knew that representations were made falsely or recklessly. As such, he should be in a position to put forward his

[5] See, in particular, *Yevdokimov and others v Russia* (app nos. 27236/05 and others) (ECtHR, 16 February 2016), at [36].

side of the story at trial. Although Mr Malhotra had previously failed to engage with the proceedings, his recent correspondence indicated a wish to now participate.

The Judge also considered and rejected RP's argument that Mr Malhotra had, by his conduct, waived his right to participate and attend the trial. Public trial and attendance rights under Article 6(1) are capable of being waived where such waiver is unequivocal and attended by the minimum safeguards commensurate with the importance of the right. However, in this case there had been no clear and unequivocal waiver by Mr Malhotra.

The Judge adjourned the hearing in order to set directions to determine what additional steps could be taken to ensure Mr Malhotra's participation or to establish that he had no intention to participate in the proceedings or trial.

Commentary

Practitioners may find this judgment surprising, particularly given Mr Malhotra's failure to engage with the proceedings until a few days before the trial and the last-minute nature of the adjournment application. The power to adjourn a hearing is found in CPR 3.1(2)(b) and must be exercised consistently with the overriding objective. Relevant factors will therefore usually include the effect of the proposed adjournment on the Court's and parties' time and resources. Such factors do not feature in this judgment. The importance of the Article 6(1) right to a fair trial was such that, notwithstanding the apparent factors weighing against Mr Malhotra, the matter had to be adjourned for the question of his participation to be investigated further.

The judgment also demonstrates that Claimants who have issued, or are considering issuing, proceedings against incarcerated Defendants should be mindful of the extent to which human rights arguments might be engaged, particularly where dishonesty allegations have been made.

Alice McDonald
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Fraud Under the Furlough Scheme

On the 20 March 2020, the UK Government's Chancellor, Rishi Sunak announced a number of measures to help employees and businesses through the COVID-19 pandemic crisis: one of them was the Coronovirus Job Retention Scheme ("**CJRS**"). As billions of pounds is paid in grants to companies, the temptation to exaggerate claims, lie, cheat or just make fraudulently claims will occur. New loopholes and opportunities for fraud have emerged.

Furlough Scheme: What is it?

The furlough scheme has been set up so businesses and employers can apply to Her Majesty's Revenue and Customs ("**HMRC**") for a grant to cover 80% of their employee's wages (up to a total of £2,500). Rather than being dismissed, employees are put on furlough and kept on the payroll. Thus the employee is on an "*enforced leave*".

The scheme opened for applications on 20 April 2020 (although it will cover backdated wages from 1 March 2020) and remains in place until the end of October. The take-up of the scheme is extraordinary. HMRC has said that by the 3 May 2020, a total of 6.3 million jobs had been temporarily laid off by 800,000 companies with claims amounting to £8 billion. 23% of the 27.9 million employees who were employed in mid-March have now been furloughed.

As the Government looks to find a way to roll back it's furlough scheme, efforts to claw back some of the money wrongfully and/or illegally claimed will soon be stepped up.

HMRC has said that any fraudulent claims made under the scheme are likely to result in criminal convictions. Its chief executive Jim Harra, told the Treasury select committee on 8 April 2020 that he expected it to be targeted by fraudsters stating:

"we are going to be paying out a vast sum of money in a rapid period of time. Any scheme like this is a target for organised crime. Any scheme that pays out I'm afraid attracts criminals that want to defraud it and people that are genuinely entitled to it who inflate their claims"[6]

Examples of fraudulent claims that could be made under the scheme include:

1. Where an employer places an employee on furlough, but instructs an employee to provide work or services that generate an income for them.

2. Where an employer allows an individual not usually employed by them to be classed as an employee in order for that employer to access funds from the furlough scheme that they would otherwise not be entitled to.

3. Where a company presents false information to HMRC in order to gain access to the funds available through the furlough scheme.

Charges

This article assesses three possible charges the Crown Prosecution Service ("**CPS**") may bring against those who are suspected of wrongfully claiming furlough funding:

1. General offence of Fraud and/or Theft;

[6] https://parliamentlive.tv/Event/Index/041436b2-2558-4b82-80a7-9fbd7d24c533.

2. Failing to Prevent Tax Evasion – this is a corporate criminal offence aimed at employees or associated persons who facilitate tax evasion;

3. Cheating the Public Revenue – this offence is targeted at individuals who defraud HMRC.

General Offence of Fraud/ Theft

The Fraud Act 2006 ("**the Act**") provides for a general offence of fraud with three ways of committing it:

i. by false representation,

ii. by failing to disclose information, and

iii. by abuse of position.

It is an offence to commit fraud by false representation . The representation must be made dishonestly . This test applies also to sections 3 and 4 of the Act. The current definition of dishonesty was established in Ivey (Appellant) v Genting Casinos replacing the 2 stage Ghosh test with the purely objective test: would the act conducted be one an ordinary, reasonable person consider to be dishonest?

The prosecution must also show that the person makes the representation with the intention of making a gain or causing loss or risk of loss to another . The gain or loss does not actually have to take place. The same requirement applies to conduct criminalised by sections 3 and 4 of the Act.

Directors, for example, who have made a false claim under the CJRS may breach section 2 of the Act, pertaining to fraud by false representation. Directors of companies, if found guilty, may be subject to a fine, community order and/or imprisonment depending on the severity of their fraudulent conduct. A conviction may also lead to possible director disqualification proceedings on the grounds of unfitness.

The Act also makes it an offence to commit fraud by failing to disclose information to another person where there is a legal duty to disclose the information. This may apply to furlough applications that deliberately omit information that would otherwise be material to the assessment in receiving the funds.

The maximum custodial sentence of 10 years is the same as for the main existing deception offences and for the common law crime of conspiracy to defraud . Ultimately, it is those sentencing guidelines that would be used to sentence any person found guilty of this offence.

Failing to Prevent Tax Evasion

Pursuant to the Criminal Finances Act 2017, it is a corporate criminal offence if a business fails to prevent its employees or any person associated with it from facilitating tax evasion . This is a strict liability offence. This means that the intent on the company's part does not have to be proved in order to obtain a conviction. The only thing that has to be proved is that that there has been criminal tax evasion that has been facilitated by a person or entity who performed services for or on behalf of the business.

However, a business cannot be criminally liable for failing to prevent the facilitation of tax evasion if the facilitator was acting in a personal capacity .

Furthermore, the offence cannot be made out if a person makes a mistake or is careless. It must be proved that the facilitator knows that they are committing the offence . Unwittingly facilitating the commission of the offence would not be enough.

A business will also have a defence if it can prove:

i. That it had put in place reasonable prevention procedures to prevent the facilitation of tax evasion taking place , or

ii. That it was not reasonable in the circumstances to expect there to be procedures in place .

HMRC Guidance

To this end, HMRC have published guidance that outlines six guiding principles of the process and procedures that businesses can put in place to limit the risk of representatives criminally facilitating tax evasion :

i. Risk assessment

ii. Proportionality of procedures

iii. Top level commitment

iv. Due diligence

v. Communication and training

vi. Monitoring and review

The extent to which these measures have to be in place during the COVID-19 pandemic will be a matter for the courts and are likely to be considered on a case by case basis. Difficult questions for the courts lie ahead when presented with these statutory defences.

What allowances, if any, will be given to the "*reasonable prevention procedures*" required to be put in place to prevent the facilitation of tax evasion taking place during the COVID-19 pandemic. Can it be reasonable in the circumstances to expect there to be procedures in place, or will courts expect them to already be in place given that the legislative requirements, and HMRC guidance have been in place since 2017?

The successful prosecution of this offence could lead to a significant fine . Confiscation must also be considered if either the Crown asks for it or the court thinks that it may be appropriate , but perhaps most detrimental to those convicted will be the reputational damage.

Cheating the Public Revenue

It is a common law offence to defraud or 'cheat' the general public. Cheating the public revenue requires the prosecution to show that the defendant has made a false statement with the intention of defrauding HMRC .

The offence is often used to charge individuals who use tax arrangements to avoid paying tax to HMRC. However, as nothing is noted in statute, it could be the preferred charge used by the CPS to charge individuals who they suspect to have used the furlough arrangements to defraud HMRC.

What matters in all fraud cases is whether you were behaving dishonesty (The Ghosh test), and intended to cause a loss to HMRC. The Court of Appeal held in R v Godir [2018] that recklessness was not sufficient to convict someone of this offence although wilful blindness as distinct from recklessness could be sufficient grounds to convict.

Deception, however is not necessary in order to commit the offence. In R v Mavji the court held that cheating did not necessarily require a false representation, either by words or conduct but could include any form of fraudulent conduct which resulted in diverting money from the Inland Revenue and depriving it of money to which it was entitled.

In this particular case the defendant had a statutory duty to make VAT returns and to pay the VAT due but had dishonestly failed to do either and no further act or omission were required to be alleged or proved in order to establish the offence of cheating the revenue.

To this end, this case indicates that an individual's failure to submit information pertaining to their financial circumstances when applying to the furlough scheme could amount to an offence.

The maximum sentence is life imprisonment, and/or unlimited fine as cheating the public revenue is a common law offence. However, following the case of Goldstein and Rimmington it is clear that statutory offences should be charged where applicable.

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Conclusion

Inevitably, as with any large grants scheme or project, corruption, fraud or even basic errors through ignorance and misunderstanding will follow. The same is to be expected under the CJRS Scheme. Employers, directors and shareholders, large and small companies, may be investigated and ultimately charged with the offences outlined above: avoiding being charged is one key factor and should be top of any person's list: failing that, defending the charge(s) will be the next goal.

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