Fountain Court

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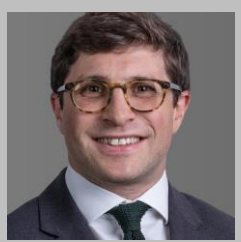

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FCA v (1) Papadimitrakopoulos (2) Gryparis [2022] EWHC 2792 (Ch) – Chancery Division rules on FCA powers over evidence gathered through mutual legal assistance channels

The Chancery Division (Mrs Justice Joanna Smith DBE) delivered a judgment on the proper construction of "use" in section 9 of the Crime (International Co-operation) Act 2003 in the context of ongoing FCA proceedings for alleged market abuse against two former executives of Globo Plc. The decision could have important implications for future FCA investigations into market abuse.

The First Defendant applied to strike out the FCA's claim as an abuse of process after it was revealed that it had employed material obtained through mutual legal assistance channels under the 2003 Act (the "**MLA Material**") in launching the civil proceedings, without first obtaining the express consent of the relevant overseas authorities. The First Defendant, supported by the Second Defendant as an interested party, asserted that the FCA's conduct amounted to a breach of s.9 of the 2003 Act which provides that evidence obtained pursuant to the Act *"may not without the consent of the appropriate overseas authority be used for any purposes other than that specified in the request"*.

In its defence, the FCA relied on a narrow construction of "use" to mean "adduced in evidence". On its case, s.9 of the 2003 Act did not prohibit the use of MLA Material for spring-board inquiries so long as the MLA Material was not adduced in evidence in the civil proceedings. The FCA's case was that its "dual track" investigation in this case was therefore permitted; such investigations, it said, were standard practice in market abuse cases and allowed its

investigators to consider potential criminal misconduct and civil law breaches in parallel, without the need for information barriers to be erected between segregated teams.

In rejecting the FCA's narrow construction, Joanna Smith J held that the statutory language, the underlying purpose of the 2003 Act, and relevant authorities each supported a broad construction of the word "use" in s.9. She also held that the unchallenged evidence of the FCA clearly established prohibited use of MLA Material, and that the FCA's standard form language in its letters of request to overseas authorities was not sufficient to establish that consent for collateral use of that material outside a criminal investigation had in fact been obtained from them.

Although ultimately the Court considered that this was not an appropriate case for strike-out, she made two significant rulings: first, that the consent of the Greek authorities should now be sought for continued use of the MLA Material obtained from them; and second, that in order to mark the Court's disapproval of the FCA's conduct, none of the MLA Material that had been used without consent would be admissible in the ongoing claim. The judge also indicated that she considered it *prima facie* appropriate for the FCA to pay the costs of the strike-out application.

The judgment therefore represents a clear statement on the scope of prosecuting authorities' powers under the 2003 Act and is likely to have serious implications for any "dual track" investigations and the ways in which authorities collect, manage, and deploy, evidence obtained from overseas authorities. The FCA have published a statement, including a link to the judgment, which can be found here.

Richard Power (led by Graham Brodie KC of 33 Chancery Lane) appeared for the First Defendant and Leonora Sagan (led by Andrew Hunter KC of Blackstone Chambers) appeared for the Second Defendant.[1]

Serious Fraud Office v Glencore Energy UK Limited - Sentencing Remarks (3 November 2022) – SFO secures largest ever confiscation order and fine

On 3 November 2022, Mr Justice Fraser, sitting in the Southwark Crown Court, sentenced Glencore Energy UK Limited ("**Glencore UK**") to a fine of £281 million after a Serious Fraud Office ("**SFO**") investigation revealed that Glencore UK had paid US$29 million in bribes to gain preferential access to oil in Africa. The case includes the first ever corporate conviction for a substantive bribery offence under the Bribery Act 2010, meaning senior individuals at Glencore authorised the bribery instead of simply failing to prevent it. The total sum the company will pay is the highest ever ordered in a corporate criminal conviction. It includes as one of its components the largest ever confiscation ordered (£93.5 million).

Fraser J noted at the outset of his sentencing remarks[2] that the case before him assessed the culpability of the company, but that there had not yet been any assessment of the culpability of individuals.

Glencore UK had pleaded guilty in June 2022 to seven counts of bribery, after an SFO investigation exposed that it had paid bribes to maximise its oil trading profits in five African countries. Counts 1 to 5 were offences of bribery, contrary to s. 1 of the

[1] This Case Summary also appears as a recent news item on the Fountain Court Chambers Website, and is reproduced here with the kind permission of Leonora Sagan.
[2] The judgment serves as a helpful example of the use of the relevant sentencing guidelines, available at: https://www.sentencingcouncil.org.uk/offences/magistrates-court/item/corporate-offenders-fraud-bribery-and-money-laundering/.

Bribery Act 2010 ("**2010 Act**"). Counts 6 and 7 were offences of failure of a commercial organisation to prevent bribery, contrary to section 7 of the 2010 Act. The offending conduct took place between 2012 and 2016, in relation to oil deposits in countries including Nigeria, Cameroon, and the Ivory Coast.

Summarising his approach, the Judge commented at [9]:

"*These counts in aggregate represent corporate corruption on a widespread scale, deploying very substantial sums of money in bribes. The sums in question are extremely large. The corruption is of extended duration, and took place across five separate countries in West Africa, but had its origins in the West Africa oil trading desk of the defendant in London. It was endemic amongst traders on that particular desk. Bribery is a highly corrosive offence. It quite literally corrupts people and companies, and spreads like a disease. Honest businesses miss out on legitimate opportunities, and honest employees and officials suffer, as a result of it. The proper and lawful conduct of business is seriously impacted and markets can be affected on a significant scale*."

Although the Court has the power to order compensation in cases of criminal offending, the SFO did not seek such an order in this case. That was for three reasons, with which the judge agreed: (i) the nature of the offences was not such that the amount of compensation can be readily and easily ascertained. Ascertaining losses caused by the trading in contracts that were granted to Glencore UK rather than other companies would be complex and potentially require contested evidence; (ii) identifying third parties that have suffered quantifiable loss was also very difficult; and (iii) potential victims were entitled to pursue claims for compensation in the civil courts, and those courts would be a more suitable as a forum for assessing the correct measure of compensation.

Fraser J held at [18] that Glencore UK's benefit from its general criminal conduct was £93.5 million, and ordered the entirety of this sum to be recovered by way of confiscation.

In terms of the criminal fine, Fraser J held that for offences under the 2010 Act, the appropriate figure used as the basis to calculate 'harm' will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. The parties had agreed in advance of sentencing a 'harm' figure of £81 million.

Fraser J explained at [22] that there are two assessments that must be made. The first is the relevant culpability; this is required to determine the relevant category range. Second, the multiplier(s) must be assessed within that category range. It need not necessarily be the same for each count. This arithmetic function (harm times multiplier) determines the fine level, which is then subject to (i) adjustment; and (ii) reductions - including for guilty pleas.

Fraser J considered that each of the counts of bribery were of a 'high' culpability [22-27]. He then applied different multipliers to each of the different counts of bribery, ranging from 250% to 375%: [36-51]. That led to a total interim fine of £274 million.

As to the 'adjustment' stage the Judge noted that the Sentencing Guidelines provide that *"the court should "step back" and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve: the removal of all gain, appropriate additional punishment, and deterrence*.": [52]. Applying these principles, the Judge declined to make any adjustment to the interim figure: [53-64].

Fraser J imposed the full reduction available for a guilty plea, of one third: [66-67]. Glencore UK had pleaded guilty at

the earliest opportunity to all seven counts and was given full credit for doing so, notwithstanding the seriousness of the offending. The result of this reduction was a fine of £183 million.

Fraser J ordered costs of £4.5 million in favour of the SFO. Understandably, Glencore UK did not challenge the principle of this order, and nor did it challenge the sum.

Accordingly, adding the £93.5 million confiscation order, the £183 million fine, and the £4.5 million costs, the total amount sum comprised £281 million: [74].

In recent years there have been several high-profile failures of SFO prosecutions, including for example the fraud trial of two former directors of Serco Geografix Limited which collapsed after it became apparent that the SFO had failed to disclose to the defendants certain relevant materials, rendering it unsafe for the prosecution to proceed. The Glencore UK case is a timely reminder of the possibility of major corporate prosecutions succeeding and of very significant fines being imposed. The Judge concluded with a warning: "*[T]his is a significant overall total. Other companies tempted to engage in similar corruption should be aware that similar sanctions lie ahead.*"

VTB Commodities Trading DAC v JAC Antipinsky Refinery [2022] EWHC 2795 (Comm) – High Court hands down important guidance on the General Licence for Legal Services under the Russia and Belarus Sanctions Regulations

On 4 November 2022 Mr Justice Foxton handed down a judgment in the *VTB* case, which included important and timely commentary on the General Licence under the Russia Regulations and the Belarus Regulations Int/2022/2252300 ("**General Licence**") issued by HM Treasury Office for Financial Sanctions Implementation ("**OFSI**"), on 28 October 2022. The judgment provides guidance for lawyers regarding the proper interpretation of certain ambiguities in the General Licence.

By way of illustration of the speed of events, a hearing in this case took place on 28 October 2022, the day on which (unbeknownst to the parties and Court during that initial hearing) OFSI issued the General Licence. The issue of the General Licence necessitated a further hearing on 2 November 2022, with the Judgment handed down just two days later: [2].

The Judge described the background to the application as a "*study in procedural complexity*". It is unnecessary for present purposes to discuss the full background facts to the dispute but in short it arose out of proceedings which VTB Commodities Trading DAC ("**VTB**") had originally commenced against JAC Antipinsky Refinery ("**Antipinsky**") under s. 44 of the Arbitration Act 1996, in which VTB sought injunctions in support of arbitral proceedings to prevent the alleged "double selling" of cargoes of vacuum gas oil by Antipinsky. Those injunctions included a worldwide freezing order and a mandatory injunction requiring Antipinskky to deliver the disputed cargo to VTB. The competing purchaser, a Swiss oil trader ("**Petraco**") intervened in the proceedings including by claiming damages under VTB's cross-undertakings given when obtaining injunctions.

A trial was ordered by Sir William Blair to take place in May 2023, to determine Petraco's application for damages.

VTB is in the relatively small category of institutions to have been subject to sanctions (in the form of capital markets restrictions) imposed by the UK (then under the EU regime) since the annexation of Crimea by the Russian Federation in 2014. However, immediately after the recent outbreak of hostilities, the UK Government imposed on VTB a new asset freeze on 24 February 2022. That asset freeze was the direct cause of the various issues which came before the Court in late

October 2022. As at the date of the hearing no specific licence had been granted to enable VTB to be represented.

The applications before the Court included:

1. By Mr Hutt, the Chief Executive Officer of VTB for permission to represent VTB at these hearings, the solicitors previously representing VTB having come off the record on 7 June 2022.

2. By VTB, albeit it had been unable to issue an application notice because of the sanctions in place to vacate the trial.

At the outset of his judgment, Foxton J commented that he was satisfied that VTB is not presently in a position to pay for legal representation in this jurisdiction, as a result of the asset freeze. He noted that neither VTB's previous firm of solicitors nor counsel were willing to undertake this hearing without remuneration (assuming that the provision of legal services without remuneration would not contravene the 2019 Regulations). Foxton J commented: "*nor can they be criticised for adopting that position*.": [3].

In his consideration of the General Licence, Foxton J made several important findings (which are explored at greater length in the article accompanying this case update):

First, as to Part A of the General Licence, which relates to legal services based on an obligation owed prior to the date that the Designated Person or its owner or controller was designated under one of the relevant sanctions regimes, Foxton J held that "*While matters are not as clear as they might be, the application of Part A would appear to be determined by the date that the relevant engagement was entered into, rather than when the particular fee became payable*": [33].

Second, Foxton J considered whether the limits in Part A of the General Licence can be combined with Part B (legal services not based on a prior obligation), posing the question: "*Where work is done under an existing retainer by the same law firm or counsel before and after the DP's designation, can these limits be combined?*": [37]. He answered in the negative: "*the better interpretation of the General Licence is that it does not allow "doubling up" of the limits in respect of work undertaken pursuant to the same engagement, before and after designation*": [40]

Third, as to the effect of the General Licence on the trial date, Foxton rejected the submission of Petraco that it was a "game changer", which enabled the trial to take place on its original timetable notwithstanding VTB's current lack of legal representation: [69]. The Judge's reasons included the following:

i. The General Licence does not appear to apply to cases in which the current estimate of fees will exceed £500,000 between 28 October 2022 (the date on which the General Licence took effect) and 28 April 2023 (the date on which the General Licence expires). In the present case, the end date of the General Licence was a week before the trial would begin. On any view, the level of costs required to bring the case to the eve of trial would be very substantially in excess of £500,000.

ii. The expenses limit of £25,000 under the General Licence would not seem anything like sufficient to cover an electronic disclosure platform provider, expert fees in Russian law and the oil market, application fees, printing, travel, couriers, searches and transcripts.

iii. Foxton J described as "*wholly speculative*" the submission of Petraco's counsel that the General Licence would reduce the volume of

work which OFSI faces, and increase the speed with which it can resolve applications for specific licences, such that it was possible a specific licence might be granted sufficiently in advance of trial.

In the premises, Foxton J concluded "*reluctantly*" at [70] that the trial should be adjourned, but only from May to November 2023. Importantly, for sanctioned entities, and despite its lack of legal representation, Foxton J emphasized that such adjournment did not absolve VTB of its obligations under the CPR / trial timetable, saying that his ruling did not mean "*VTB can sit and do nothing unless and until an OFSI license is granted. There are matters which can and should be progressed*.": [71]. This included complying with a Request for Further Information, relating to the Russian law causes of action relied upon. Foxton J warned at [75]:

"*More generally, VTB need to understand that if no licence is granted, or there is delay in providing it of an order which would threaten the new trial date, then there is every likelihood of that hearing proceeding, whether VTB is able to instruct lawyers or not. VTB needs to prepare on the assumption that it may not be able to instruct lawyers, and that it needs to take the steps which will enable it to do the best it can in November 2023, however unsatisfactory that might be*."

The *Antipinsky* judgment contained several other points which may be encouraging to those litigating against sanctioned persons. Foxton J explained at [58(iii)] that "*The legal fees exception extends to making a payment into court for security for the other side's costs, which is perceived as being different from paying security for damages into court."* In view of the foregoing, Foxton J commented: "*It would seem to follow that meeting the other side's costs in litigation is a licensable activity in itself*."

Noting, also at [58(iii)], that he was "*not… presently persuaded that VTB cannot apply for a license at this stage in anticipation of any future costs liability to Petraco, and would not be willing to order security for costs (were it otherwise appropriate to do so) without more information on this issue*", Foxton J proceeded to order VTB to make a contingent application to pay for any future adverse costs (at [78-80]).

The interpretations favoured by Foxton J in the *Antipinsky* judgment tend to restrict the utility of the General Licence for parties involved in high cost / high value litigation. The warning to VTB at the end of the judgment that even if VTB is unable to obtain representation a trial should go ahead is likely to be a matter of significant concern to sanctioned entities. It is perhaps unfortunate, albeit unavoidable, that a judgment of this importance to the legal community in the UK – touching as it does on the ability of parties to obtain legal representation – was made in circumstances where the sanctioned party was not legally represented. There is no suggestion, for example, that any arguments based on article 6 of the European Convention on Human Rights were brought to the attention of the Court, and the time for the Court's own consideration of the matters between the hearings and the handing down of judgment was necessarily brief. It remains to be seen whether Foxton J's approach will be adopted by other Courts, and indeed whether further guidance on the General Licence in light of the *Antipinsky* judgment is to be issued by OFSI.

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Robin is a leading commercial Silk well-known for working on high-stake disputes and investigations involving significant corporate clients, senior professionals and high net worth individuals. He is one of the handful of silks appointed in both civil and criminal law, and his caseload features numerous matters crossing commercial, criminal and regulatory law. Robin is described by *The Legal 500* as having "A class act with the brain of a commercial silk and the court-craft of a criminal one."

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Robin is an experienced junior specialising in commercial crime and financial regulation. He primarily acts for companies and individuals facing criminal and/or regulatory investigations, particularly in relation to corruption, money laundering, sanctions violations, and market manipulation. Robin started his career at the criminal bar and then joined Debevoise & Plimpton's White Collar & Regulatory Defence Group. Clients have described Robin as "excellent", "extremely hard-working and clever", "diligent", and "a safe (and smooth) pair of hands."

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Jacob has advised individuals, corporates and sovereigns in a variety of commercial matters involving both litigation, arbitration and issues arising from the UK sanctions regime. He has acted as sole counsel in the High Court, an LCIA Arbitration and the Court of Appeal. He is described by *The Legal 500* as "an outstanding junior barrister. Extremely engaged, responsive and hard-working. Turns round work very quickly and always to a very high standard."