Fountain Court CHAMBERS

Quarterly Commercial Crime Newsletter:

RECENT CASE UPDATES

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Introduction

This section of our quarterly commercial crime newsletter includes updates on recent cases and developments including in relation to:

- **Financial Conduct Authority – major sentence**: a summary of the sentencing remarks from *R (Financial Conduct Authority) v National Westminster Bank Plc*, following its guilty plea in respect of failures to comply with the Money Laundering Regulations 2007, resulting in a fine of over £260 million. This case represents the first criminal conviction of a bank under the Regulations.

- **Serious Fraud Office – appeal against conviction due to disclosure failings**: consideration of *R v Akle (Ziad)* [2021] EWCA Crim 1879, the successful appeal against conviction for bribery by an individual alleged to have conspired with Unaoil to bribe officials in Iraq.

- **Proprietary claims and confiscation proceedings**: a summary of *Aquila Advisory Ltd v Faichney & Ors* (CPS Intervening) [2021] 1 WLR 5666, in which the Supreme Court upheld a decision that the assignee of a company through which a fraud resulting in secret profits was conducted was entitled to assert its proprietary claim over those secret profits in priority to confiscation proceedings arising from the conviction of the individual controllers of the company.

- **Criminal restraint orders and civil freezing injunctions**: analysis of the decision in *AA v BB* [2021] 1 WLR 5378,

whereby the Court of Appeal held that the existence of a criminal restraint order does not in general mean that there is no risk of dissipation regarding the restrained assets, for the purposes of a civil freezing injunction application.

- **Private prosecution costs from central funds**: consideration of *R (TM Eye Ltd) v Southampton Crown Court* [2021] EWHC 2624 (Admin) concerning the circumstances in which it is appropriate to award a private prosecutor costs from central funds.

- **Account freezing orders and privacy**: the decision of the Divisional Court in *R (Javadov) v Westminster Magistrates' Court* [2021] EWCA Civ 2751 (Admin), concerning whether the Court should sit in private when hearing applications for account freezing orders.

I. Financial Conduct Authority – major sentence

In a previous edition of this newsletter, we drew attention to the commencement in March 2021 by the FCA of its criminal prosecution against National Westminster Bank PLC under regulation 45 of the Money Laundering Regulations 2007, in respect of various failures to comply with regulation 8 of those regulations.

On 13 December 2021, following NatWest's guilty plea at its first appearance on 7 October 2021, Mrs Justice Cockerill sentenced NatWest by imposing a confiscation order in the amount of £460,047.04, a fine in the amount of £264,772,619.95 (following reduction for guilty plea), and payment of the FCA's costs in the amount of £4,297,466.28. Mrs Justice Cockerill's sentencing remarks (available here) provide a welcome example of the Court's approach (and indeed is the first example) to sentencing a large corporation for criminal offences under the Money Laundering Regulations.

NatWest's guilty plea was offered pursuant to an agreed factual basis, to which Mrs Justice Cockerill referred in her sentencing remarks. The essential features of the conduct were as follows:

- The prosecution related to allegations that NatWest failed to adopt appropriate control mechanisms concerning its relationship with a company called Fowler Oldfield, during the period 2012-2016.

- Fowler Oldfield was taken on by NatWest as a customer in 2011, after its application was initially rejected due to risk reasons. The Relationship Manager (who advocated on behalf of Fowler Oldfield's application) described the company's business model in KYC documents as involving the buying and selling of gold pursuant to same-day agreements, in circumstances where the Bank would not handle any cash, and future sales were predicted to be £15 million per annum.

- In due course, Fowler Oldfield's risk profile was downgraded by the Bank from "high" to "low". Despite the Relationship Manager's assertion at the time of opening the account that the business model involved no handling of cash, during the five-year relationship with NatWest, the company deposited a total of £365 million with the Bank, of which around £264 million was in cash. As noted by Mrs Justice Cockerill at [37] "….*At the height of the activity on the account, Fowler Oldfield was depositing up to £1.8 million in cash per day with NatWest*….". Further:
"51. From late 2013, numerous branches started to receive millions in Fowler Oldfield cash. Staff in a number of branches and cash centres flagged concerns about the activity or submitted IMLSRs; however, staff in some other branches/centres did not do so. The non-notifiers included branches/centres which received sums between £12 and 43 million and situations which included the deposit of such large sums of cash that they were brought in in black bin bags, which tore because of their weight, and sums so large that the bank's safes were inadequate to store them."

- By 2016, an investigation into a large-scale money laundering operation via Fowler Oldfield had been commenced, and NatWest cooperated with the investigation, and notified the FCA about its concerns about its (by then former) customer's conduct.

> “For the purposes of assessing the financial penalty, the first step was to assess harm, and this was to be assessed by reference to the funds paid into Fowler Oldfield’s account during the indictment period…

- As a result, NatWest ultimately pleaded guilty to three offences (in each case, the relevant regulatory failings made criminal by virtue of regulation 45): (1) failing to comply with the requirement to conduct ongoing monitoring of a business relationship, contrary to regulation 8(1) of the MLRs 2007, (2) failing to comply with the requirement to determine the extent of ongoing monitoring on a risk-sensitive basis contrary to regulation 8(3), and (3) failing to apply enhanced monitoring to its business relationship with Fowler Oldfield, in a situation which by its nature presented a higher risk of money laundering, contrary to regulation 14(1).

In approaching the sentencing exercise, Cockerill J noted at [78] that NatWest was being convicted of strict liability offences, and it was not suggested that there had been any deliberate flouting of the rules or criminal intent, nor did the offences relate to a lack of commitment by the Bank to the principles underpinning the Regulations.

In the absence of any specific sentencing guidelines or appellate authorities concerning offences committed under the MLRs, pursuant to s.59(1) of the Sentencing Code, Cockerill J had regard to two relevant guidelines: the “General Guideline: Overarching Principles”, and the “Corporate offenders: fraud, bribery and money laundering”.

Applying those principles, Cockerill J decided:

- There was no basis for a compensation order, nor had any been suggested.

- A confiscation order should be made pursuant to s.6 POCA 2002 for a sum representing NatWest’s gain from its relationship with Fowler Oldfield; this was agreed to be £460,047.04.

- For the purposes of assessing the financial penalty, the first step was to assess harm, and this was to be assessed by reference to the funds paid into Fowler Oldfield’s account during the indictment period; the alternative of taking the turnover in the relevant area of business as the starting point would result in an unrealistically large figure. As such, the starting point for the financial penalty assessment was the sum of £287,794,887.06, representing the monies Fowler Oldfield had paid into NatWest accounts, up until 23 June 2016; sums paid in thereafter (totalling £66,527,680.87) were excluded from the harm figure on the basis that by that stage NatWest had begun to cooperate with the police.

- Cockerill J rejected the submission that the harm figure should be reduced because some of the funds paid into NatWest accounts by Fowler Oldfield might not have been the proceeds of crime, but accepted that a reduction was appropriate on the basis that there was a significant difference between the breaches of the MLRs for which NatWest had been convicted and substantive money laundering offences. As such, the harm figure was reduced by 40% to a sum of £172,676,932.23.

- Cockerill J found that some culpability factors fell in the high category, whereas others fell in the low category, such that the appropriate culpability level was “B”. The starting point for culpability level B is 200% of the harm figure, with a category range of 100% to 300%. The aggravating factors included some previous regulatory action

against NatWest, and the likely serious nature of the underlying criminal activity. As for mitigating factors, whilst NatWest had cooperated with the investigation, the significance of this was lessened because the majority of the evidence was obtained via the FCA's powers of compulsion. Further, although NatWest voluntarily reported the offending, this was only after it was informed by the police of their investigation, and NatWest was in any event required to report these matters to the FCA. As such, overall the aggravating and mitigating factors cancelled one another out, such that 200% was an appropriate harm multiplier, resulting in a figure of £345,353,864.47.

- It was then necessary to stand back and assess the proportionality of the fine as a whole. In that regard, Cockerill J concluded that it was necessary to adjust the fine upwards by 15% in order to pass a sentence "*which is of sufficient size that it will be felt by management and shareholders of the Bank*" ([121]), and the application of the mathematical formula would risk resulting in a fine "*not commensurate with the size and financial position of the offending organisation and the seriousness of the offence*." ([125]). That resulted in an uplifted figure of £397,156,944.14, to which NatWest was entitled to a 1/3 reduction for its guilty plea, resulting in a fine of £264,772,619.95.

II. Serious Fraud Office – disclosure failings and deal-making – appeal against conviction in Unaoil case

In *R v Akle (Ziad)* [2021] EWCA Crim 1879, the Court of Appeal (Holroyde LJ, Jeremy Baker J and Jay J) allowed an appeal against the conviction of Ziad Akle, an individual convicted of two counts of conspiracy to give corrupt payments contrary to s.1 of the Prevention of Corruption Act 1906. Mr Akle was charged as part of the SFO's longstanding investigation into the activities of Unaoil, a company which had employed Mr Akle as its territory manager for Iraq. The Crown's case was that Mr Akle was part of a conspiracy by which Unaoil paid a Mr Oday bribes to influence oil projects undertaken in Iraq (see the summary at [12]-[14]).

Mr Akle was convicted following a 66 day trial and sentenced to concurrent terms of five years' imprisonment. The appeal against conviction was based on three grounds: (1) that the Judge had erred in rejecting Mr Akle's application to stay the proceedings as an abuse of process, (2) in the alternative, that the prosecution had failed to comply with its disclosure obligations in respect of material capable of supporting the abuse of process argument, and (3) that having admitted the guilty pleas of another individual, Mr Basil Al Jarah (who was Unaoil's partner in Iraq), the Judge erred in refusing to permit the defence to adduce evidence that might have proved that Mr Al Jarah had not in fact been guilty.

Each of the grounds of appeal (and Mr Akle's abuse application and disclosure applications below) related to the dealings between the SFO and an individual named Mr Tinsley, a US citizen who ran a private intelligence and investigative company. Mr Tinsley was described as a *"fixer" seeking to negotiate between the Ahsanis [alleged co-conspirators of Mr Akle], the US authorities and the UK authorities"* ([25]).The SFO sought to adduce the guilty plea of Mr Al Jarah pursuant to s.74 PACE 1984, as evidence in support of the existence of a conspiracy. Part of Mr Akle's case was that the conduct of Mr Tinsley, and his role in allegedly procuring that guilty plea, rendered the guilty plea unreliable as evidence of the conspiracy. Mr Akle therefore served a notice under s.8 CPIA 1996 seeking disclosure of material supporting the argument that the plea was brought about through improper means and its admission would result in unfairness.

Although the schedules of unused material served by the SFO identified many items referring to activities of Mr Tinsley, the SFO declined to produce the materials referred to in the schedules.

At trial, the judge rejected Mr Akle's abuse of process application, but in so doing noted that he *"did not have the whole picture"* ([44]). The Court of Appeal described the nature of Mr Tinsley's interaction with the SFO (on the judge's findings) as involving (in essence) a proposal by Mr Tinsley to the Director of the Serious Fraud Office ("DSFO") that he would be able to assist in procuring guilty pleas

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from Mr Al Jarah and Mr Akle, which in turn would lead to convictions of others, and that the DSFO and others “*took the bait*”. The judge’s ruling (quoted at [45]) involved trenchant criticism of the SFO’s contact with Mr Tinsley, holding “*They should have had nothing to do with someone who had no official status, who was not employed by any US government agency, who was not the Ahsanis’ lawyer (not a lawyer at all), but a freelance agent who was patently acting only in the interests of the Ahsanis (whose interests could obviously potentially conflict with those of BAJ and ZA); and they should not have countenanced, let alone encouraged (if only tacitly) his contact with either BAR or ZA, who were throughout under investigation by the SFO, represented by UK lawyers, and formal proceedings for the offences set out in this indictment had begun…”*

Nonetheless, despite those criticisms, the Judge rejected the abuse of process application.

In considering the admissibility of Mr Al Jarah’s guilty pleas, the Judge granted the SFO’s application to place them before the jury, and held that Mr Akle had not satisfied the test under s.74(2) PACE 1984 to exclude them (i.e. proving that Mr Al Jarah had not been guilty of the offences to which he had pleaded), and also rejected the submission that the evidence should be excluded on fairness grounds under s.78 PACE 1984 ([52]).

The Judge further rejected an application of Mr Akle to adduce evidence concerning the involvement of Mr Tinsley with the SFO, Mr Al Jarah and Mr Akle, on the basis that (*inter alia*) it would not demonstrate Mr Akle’s innocence, nor would it call into question the validity of Mr Al Jarah’s guilty pleas.

The hearing of the appeal before the Court of Appeal took a somewhat unusual approach, in that prior to the substantive appeal hearing, the Court of Appeal accepted Mr Akle’s submission that there had been inadequate disclosure of unused material by the SFO concerning the contact between it and Mr Tinsley, and as such the Court of Appeal directed the SFO to produce certain documents identified in the unused material schedules, which were then supplied in advance of the substantive appeal hearing. As a consequence, the Court of Appeal was able to consider materials that had not been placed before the trial judge, because of the SFO’s previous stance that they did not require to be produced.

The newly disclosed materials (some of which are summarised in the Court of Appeal’s judgment at [69]-[88]), evidenced quite extensive contact between Mr Tinsley and the SFO. Mr Akle submitted that those materials demonstrated (in summary) that the SFO and Mr Tinsley had sought to procure the guilty plea of Mr Al Jarah behind the back of his lawyers, and that this was material which was plainly highly relevant to the abuse argument ([87]).

The Court of Appeal dismissed Mr Akle’s appeal against the judge’s abuse of process decision, on the basis that the judge did not err in reaching the decision that he did on the evidence available to him ([89]).

However, the Court of Appeal allowed the appeal on grounds 2 and 3, holding that the documents requested by Mr Akle pursuant to the s.8 notice were relevant to the issue of abuse of process, and were relevant to the issues relating to the admission or exclusion of evidence of Mr Al Jarah's guilty pleas, such that the SFO should have provided them, and the refusal was a "*serious failure by the SFO to comply with their duty*", and one which was "*particularly regrettable given that some of the documents had a clear potential to embarrass the SFO in their prosecution of the case*" ([97]-[98]). The Court of Appeal further held that had those been available to Mr Akle's counsel by the start of the trial, he would have had significantly stronger arguments available to him on the issues concerning Mr Al Jarah's guilty pleas. The reasons for this included that the documents "*illustrate very clearly why it was wholly inappropriate for the SFO to have any dealings with Tinsley in relation to the pleas of [Mr Al Jarah] and Akle…*" ([99]). Overall, therefore, the Court of Appeal accepted that there had been a material failure of disclosure which had "s*ignificantly handicapped*" the defence in arguing that the evidence of Mr Al Jarah's previous convictions should be excluded pursuant to s.78 PACE 1984 ([105]).

The Court of Appeal therefore quashed the convictions and considered arguments as to whether a retrial would be appropriate. It held that it would not, in particular because the application for a retrial was made in a context in which the appeal had been allowed due to prosecutorial fault, and a retrial would inevitably involve substantial delay in circumstances where Mr Akle was in poor health, and he had already spent a significant time in prison in the unusual circumstances of the pandemic ([114]).

III. Proprietary claims and confiscation proceedings

In the commentary section of this newsletter, we consider some of the implications of the Supreme Court's decision in *Aquila Advisory Ltd v Faichney & Ors (CPS Intervening)* [2021] 1 WLR 5666 for the interrelationship between civil and criminal proceedings arising out of the same allegations of fraud. Here, we provide an overview of the authority and the Court's reasoning.

Mr Faichney and Mr Perrin were directors of a company, Vantis Tax Ltd ("VTL"), and were convicted of the crime of cheating the public revenue by dishonestly facilitating and inducing others to submit false claims for tax relief, pursuant to unlawful tax avoidance schemes. The sum of £4.55 million represented the benefit obtained by Mr Faichney and Mr Perrin from those crimes, and the CPS sought confiscation orders pursuant to POCA 2002 in respect of the sums of £809,692 (in the case of Mr Perrin) and £648,000 (in the case of Mr Faichney) representing the respective available amounts for confiscation purposes. However, Mr Faichney's and Mr Perrin's conduct also amounted to breaches of the fiduciary duties they owed to VTL, such that (in light of the Supreme Court's judgment in *FHR European Ventures LLP v Mankarious* [2015] AC 250) the sum of £4.55 million also represented a secret profit held on constructive trust by Mr Faichney and Mr Perrin for VTL.

Aquila had acquired VTL's rights, and as such, Aquila sought to assert its proprietary claim over the £4.55 million, with the result that if it succeeded, no assets would remain available for confiscation. At first instance, Mann J held that Aquila could assert its proprietary rights notwithstanding the confiscation orders, and made a declaration that the £4.55 million was held on trust for VTL (and thus Aquila, who had acquired VTL's rights).

The Court of Appeal dismissed the CPS's appeal, holding that it was common ground that unless the conduct of Mr Faichney and Mr Perrin was to be attributed to VTL in this context, such that a defence of illegality would be available against Aquila's proprietary claim, then there was no basis upon which the confiscation order could take priority over Aquila's proprietary rights, and the question of attribution had been decided against the CPS by the Supreme Court's judgment in *Bilta v Nazir* (No 2) [2016] AC 1, which applied in the case of Aquila's claim.

Lord Stephens JSC (with whom Lord Jones, Lord Sales, Lord Burrows and Lady Rose

JJSC agreed) gave the judgment of the Supreme Court. The Supreme Court began by setting out the legislative scheme of POCA 2002, holding (at [33]) that the "*overarching principle*" of POCA is that neither confiscation orders, civil recovery orders, nor the money laundering provisions interfere with existing third-party property rights.

The CPS advanced two grounds of appeal: (1) that the Court of Appeal had been wrong to hold that there was no attribution of the directors' conduct to Aquila in circumstances where Aquila's claim was in respect of the proceeds of crime, and (2) that the Court of Appeal's decision was inconsistent with the POCA regime, which was not intended to permit third parties to benefit from the actions of criminals.

The Supreme Court rejected both grounds of appeal.

As to the first, the Supreme Court characterised the CPS's case as essentially seeking to fashion an exception to the principle in *Bilta*, on the basis of a distinction between claims where the claim was for loss suffered by the company caused by the director's breach of duty to the company (*Bilta*) versus a claim by the company to retain benefits which it was intended that the company would receive as a result of the fraud (i.e. the present case). The Supreme Court rejected that argument, on the ground that the reasoning in *Bilta* was based on a consideration of the rationale behind the relevant rule for which attribution was being considered. The rule was concerned with the duty owed to the company by the directors, not the type of remedy sought, and it made no difference whether the claim was for loss suffered by the company or for gains made by the director – as the CPS's claim to the £4.55 million could only be as good as Mr Faichney's and Mr Perrin's, the argument was misconceived: "*it simply cannot lie in the mouth of a director to assert that the director should retain a secret profit on the basis that a part of the director's scheme was that the company would benefit from it*" ([72]). Accordingly, the attribution argument failed because the reasoning in *Bilta* applied equally to the present case.

As to the second ground of appeal, the Supreme Court held that (as it had noted at [33]) the scheme of POCA involved the preservation of pre-existing property rights, and thus any question of whether those rights should be overridden, fell to be determined in accordance with the provisions of POCA itself, not by reference to wider considerations of public policy ([83]). Further, there were various steps the CPS could have taken to seek to recover the funds notwithstanding Aquila's proprietary claim, but did not do so (including adding VTL to the indictment and seeking a confiscation order against it, if convicted), or adopting other routes to recovering the proceeds of crime, such as civil recovery under Part 5.

IV. Criminal restraint orders and civil freezing injunctions

In the commentary section of this newsletter, we consider some of the implications of the

> "… the Supreme Court characterised the CPS's case as essentially seeking to fashion an exception to the principle in *Bilta*…

Court of Appeal's decision in *AA & Ors v BB & Anor* [2021] 1 WLR 5378 for the interrelationship between civil and criminal proceedings arising out of the same allegations of fraud. Here, we provide an overview of the authority and the Court's reasoning.

The issue raised by this appeal was whether in circumstances where a criminal restraint order ("CRO") had been made over all the assets of the appellants pursuant to s.41 of POCA 2002 and remained in force, that meant there was no real risk of dissipation of assets, so as to justify the making of a civil freezing order against the appellants.

The Court of Appeal's judgment contains limited reference to the factual background to the allegations of fraud, in light of the reporting restrictions that were in place, and anonymisation of the Court's judgment. In any event, as the appellants' position was that they did not contend that (i) the applicants for the freezing injunction could not establish a good arguable case, and (ii) but for the submission based on the CRO, the applicants could establish a real risk of dissipation, the underlying facts were of no significance to the issue raised by the appeal.

Insofar as is known, therefore, the claimants (and respondents to the appeal) were two companies and their administrators, alleging that the defendants (appellants to the appeal) had been involved in the misappropriation of substantial sums of money.

Prior to the grant of civil freezing orders, the SFO sought and obtained CROs against the appellants, which remained in force as at the date of the appeal. Thereafter, the claimants made an application for worldwide freezing orders, without giving notice to the SFO or the defendants. The Deputy Judge hearing the without notice application made worldwide freezing orders, but declined to make proprietary injunctions.

At the return date before Meade J, the appellants did not dispute that the claimants could establish a good arguable case in respect of their claims, nor that the nature of the alleged dishonest acts in respect of which a good arguable case was conceded and alleged disposals of assets prior to the CRO, would support an inference that, but for the CRO, there was a real risk of dissipation. However, the appellants contended that the presence of the CRO meant that there was no real risk of dissipation.

The Judge considered the impact of the CRO and held (in passages quoted by the Court of Appeal at [11]) that whilst on one reading of the first instance authorities, it was arguable that as a matter of principle a CRO can never stand in the way of a worldwide freezing order, it was unnecessary to decide that point, because, on the facts of the present case, the CROs did not remove the real risk of dissipation. That was so having regard in particular to (i) the absence of any provision for the claimants to be informed in good time to take appropriate steps to protect their position, if the CROs were discharged, and (ii) the related risk that variations could be made to the CRO in good faith by the SFO, which would in turn prejudice the claimants' position, but without the claimants having an opportunity to make submissions. The Judge did not consider that an undertaking to keep the claimants informed about the progress of the criminal proceedings would be sufficient to remove that risk.

The appellants raised four grounds of appeal against that decision. However, in the judgment of Sir David Richards (with whom Simler LJ and Nugee LJ agreed) the Court of Appeal focused on what it identified as the "point of principle", namely that the Judge should not have made the order at the without notice hearing, on the basis that the existence of a prior CRO removed any real risk of dissipation ([14]).

In considering this, the Court of Appeal held (considering submissions based in large part on a previous decision of the Court of Appeal, *In re Stanford International Bank Ltd* [2011] Ch 33) that there was no principle such that the court should *prima facie* refuse to make a civil freezing order or CRO where another restraint order is already in force ([27]). Whilst the existence of a prior CRO is clearly material to the question of whether there is a risk of dissipation, there is no principle such that its existence establishes a presumption against a risk of dissipation ([29]). This was consistent

> *…the Court of Appeal did not consider that this failure gave rise to any basis for an appeal by the appellants, given that the notice provision was there for the SFO's benefit…*

with the approach taken in various first instance cases, to which Meade J referred in his judgment, including *Cancer Research UK Ltd v Morris* [2008] EWHC 2678 (QB), and the Court of Appeal quoted and endorsed the observations of King J in that case about the differences between the two regimes (see [30]-[32]):

> *"There is a fundamental difference between the two sets of contemplated proceedings. Restraint proceedings instigated by the CPS will, subject to the overall control of the court, be under the control of the CPS, a public body whose primary duty is to act in the public interest and not in any private interest. In contrast, the claimant in these civil proceedings is seeking to protect its own private interests by the making of a proprietary claim in respect of funds said to have been wrongfully obtained from them. I see no reason why in these circumstances the claimant should be denied relief in private law proceedings in proper protection of those interests which would otherwise be appropriate."*

In the absence of such a principle establishing a presumption that the existence of the CROs meant there was no risk of dissipation, there was no basis to say that Meade J (who had taken into account the existence of the CRO in making his decision on risk of dissipation) had erred in his assessment ([36]).

The judgment is also notable for two other reasons. First, it confirms that pursuant to s.58(5)-(6) of POCA 2002, the applicants for the freezing injunction should have notified the SFO before making the without notice application, albeit the Court of Appeal did not consider that this failure gave rise to any basis for an appeal by the appellants, given that the notice provision was there for the SFO's benefit (see [43]-[45]). Secondly, Sir David Richards took the opportunity to comment on the burdens that the concurrent existence of two such orders can impose on a single party, holding that "*Serious consideration should be given to arranging joint management in cases such as the present*", despite the failure of such efforts in the present case.

V. Private prosecution costs from central funds

In *R (TM Eye Ltd) v Southampton Crown Court* [2021] EWHC 2624 (Admin), the Divisional Court (Holroyde LJ and Cutts J) considered a judicial review challenge against a Crown Court judge's decision not to award a private prosecutor its costs of a successful private prosecution pursuant to s.17 of the Prosecution of Offences Act 1985 ("POA 1985"). The judgment provides welcome guidance as to the circumstances in which it is appropriate not to grant such orders, and also represents a cautionary tale about the need to ensure that such applications are properly articulated and evidenced.

The private prosecution was brought by TM Eye Ltd (also the Claimant to the judicial review proceedings). TM Eye was a firm of private investigators whose work included carrying out investigations into, and in some cases private prosecutions against, persons selling counterfeit goods in the UK. TM Eye carried out that work pursuant to powers of

attorney granted by the brands, and TM Eye's remuneration in respect of its private prosecution work was derived from awards under s.17 POA 1985, rather than from the brands it acted for. Indeed, awards in favour of TM Eye represented a significant proportion (around 9%) of the total of costs awards paid from central funds during 2019-2020 in respect of private prosecutions.

The defendant to the private prosecution, Ms Peters, pleaded guilty to four offences of unauthorised use of a trademark contrary to s.92 of the Trade Marks Act 1994, and was given a suspended sentence of six months' imprisonment. Ms Peters was impecunious, and the Judge thus declined to make an order for costs against her. The judge also declined to award the private prosecutor its costs out of central funds pursuant to s.17 POCA 1985, and TM Eye Ltd sought to challenge that decision (which comprised the judge's initial refusal, and subsequent ruling declining to reconsider that decision) by way of judicial review.

The transcript of the hearing of TM Eye's application (set out at [19]-[24]) recorded that:

- The submission was made to the judge that unless the Court concluded that the proceedings were vexatious, or the prosecution was inappropriate, then the Court should make an order under s.17.

- The judge (apparently under the misapprehension that the brands themselves constituted the prosecutor and would receive any costs, rather than TM Eye) queried the appropriateness of the taxpayer funding large companies to prosecute impecunious defendants.

- The judge indicated that he did not see the basis in the text of s.17 POA 1985 for TM Eye's submission that the discretion was circumscribed in the way suggested.

- In declining to order prosecution costs under s.17, the judge gave as his reasons that *"…whilst I see the merits of an application for costs of private prosecution, in the circumstances of this case, with those three losers, doesn't seem to me it's appropriate that the taxpayer should bear the burden of financing this prosecution."*

TM Eye then sent a letter before claim to Southampton Crown Court indicating an intention to seek judicial review of the judge's decision, inviting the judge to reconsider the order under the slip rule, and asserting (*inter alia*) that "*in the absence of misconduct*" an order for costs should be made in favour of the private prosecutor.

The judge then gave a written ruling, drawing attention to authority (*R (Virgin Media Ltd) v Zinga* [2014] EWCA Crim 1823) in which the Court of Appeal had emphasised that the Court may have regard to whether the private prosecutor had taken steps to involve the state prosecuting authorities in the private prosecution, and other matters, which had not been canvassed before the judge. The judge declined to revisit his earlier ruling, drawing attention to the deficiencies in the application made to him, holding:

"Where an application is made for £23,751.17 (or £28,501.40) to be paid from central funds it is incumbent on the prosecution to advance properly prepared and comprehensive submissions, referring to relevant authorities. Regrettably, that did not happen in this case. I decline to revisit unprepared and incomplete submissions."

The basis for the judicial review challenge was that the judge had relied on an irrelevant consideration (namely, his assumption as to the wealth of the brand owners), which was not relevant, but even if it had been, the judge had no evidential basis for concluding that that factor should weigh against the making of the order ([34]). The challenge was made to both the initial decision at the sentencing hearing, and the judge's subsequent decision not to reconsider, reflected in his written ruling.

In its analysis, the Court of Appeal endorsed the judge's concerns about the way in which the application was prepared and presented, holding (at [50]), that the judge was *"correct to say that the application for costs was made in the expectation that it would be granted "on the nod". It seems to us that the Claimant and*

its legal representatives prepared and presented the case on the basis that an application for "the usual order" was all that was required. That is not a correct approach to an application by a private prosecutor for an award of costs from central funds…."

In considering the principles applicable to an application for costs under s.17, the Court of Appeal rejected TM Eye's submission that the court could only decide to award the private prosecutor less than the full amount in cases of misconduct; rather, the Court had a discretion that enabled it to make a case-specific decision as to whether it was appropriate to award costs from central funds at all, and if so, to what extent ([53]). Nor is a judge considering an application under s.17 faced with a binary choice as to whether to grant or refuse costs, as the quantum of costs sought could be relevant to the exercise of the discretion in deciding whether to award costs at all ([58]). As a consequence, the Court of Appeal held at [59] that a *"private prosecutor should be ready to provide the court with all such assistance as may be required if the court is considering refusing, or limiting, an award of costs from central funds. A prosecutor who is not in a position to do so may find that the court is unwilling to grant an adjournment to enable further information to be provided."*

As to the two decisions challenged, whilst the Court of Appeal emphasised the difficulty the judge was placed in by not being provided with the relevant information or correct principles to enable him to reach his decision (including as a result of the misstatement of the legal position made to him), nonetheless, the Judge did err, as (at [66]):

> *"the actual or apparent wealth of the prosecutor (still less, of the presumed prosecutor) cannot in itself be a proper reason for refusing an application under section 17. It would not be right to refuse an order for costs from central funds which would otherwise have been made solely on the basis that the prosecutor had substantial resources. Nor would it be right to refuse an order which would otherwise have been made solely because there was a complete mismatch between the resources available to the prosecutor and the defendant respectively."*

Accordingly, the judge did fall into error in reaching his first decision. However, the Court of Appeal considered that the judge's second decision was not based on that same error, but was also founded on a further reason, namely because the application that had been presented to him had been "*unprepared and incomplete*", and there was no reason for him to revisit it in those circumstances ([74]-[76]). That was a decision the judge had been entitled to reach.

The Court of Appeal therefore refused the claim for judicial review, on the bases that (1) the Court would not exercise its discretion to grant judicial review in circumstances where TM Eye had contributed to the judge's error through its misstatements of the law and preparation of the application, and (2) the judge had been entitled to decide in his subsequent ruling that the application could be refused on the basis that it had not been properly prepared.

VI. Account freezing orders and privacy

In *R (Javadov) v Westminster Magistrates' Court* [2021] EWCA Civ 2751 (Admin), the Divisional Court (Fulford LJ and Johnson J) resolved an important issue of principle concerning whether applications for Account Freezing Orders ("AFOs") pursuant to s.303Z1 POCA 2002 can be held in private, and if so, in what circumstances.

Under s.303Z1 POCA 2002, an enforcement officer can apply for an AFO in circumstances where there are reasonable grounds to suspect that the money held in an account is recoverable property or is intended by a person for use in unlawful conduct. Such applications are heard in the Magistrates Court (unlike substantive civil recovery claims, which are heard in the High Court), and thus fall outside the privacy regime reflected in CPR 39.2 applicable to civil proceedings (which imposes a presumption that all hearings will be in public, subject to specified exceptions engaging a test of necessity, including that publicity would frustrate the purpose of the hearing). Nor do the Criminal Procedure Rules apply to such applications. Under s.303Z1(4) POCA 2002, applications for AFOs can be made without notice where notice would prejudice forfeiture steps in

respect of recoverable property.

In the present case, multiple AFOs had been made on notice on 31 July 2018 at the application of the National Crime Agency ("NCA"), and were subsequently extended on 10 December 2018 prior to the expiry of the six month period. Both the initial grant of the AFOs and the application to extend them were heard in open court, without the respondents present, and no application was made for the hearings to be in private.

In advance of the next expiry of the AFOs, steps were taken to list an application for fresh AFOs to be made. This followed correspondence with the respondents' solicitors in which they had indicated that any extension would be opposed. Shortly before the hearing, a letter was sent to the NCA by the respondents' solicitors stating that the AFOs would not be contested if the NCA could agree terms, including that the NCA "*confirms that it will request a private hearing, and will not publicise or disclose the applications or any ancillary documents to journalists or members of the public."* Reference was made to a risk of adverse publicity and substantial reputation damage, in circumstances where the NCA had not yet proven its case.

The NCA responded, indicating that it did not consider there to be any statutory basis for the hearing to be in private, in light s.121(4) of the Magistrates Court Act 1980 ("MCA 1980"), which provides that:

> "*(4) Subject to the provisions of any enactment to the contrary, a magistrates' court must sit in open court if it is:*
>
> *…*
>
> *(d) hearing a complaint."*

The hearing of an application for an AFO is (as the Divisional Court held at [20]) a hearing of a complaint within the meaning of s.121(4) MCA 1980, such that the provision apparently mandating a public hearing applied.

In the event, the Respondents did not attend the hearing, albeit the letter to the NCA which indicated their desire for a private hearing was placed before the judge. The judge sat in public and (according to the NCA's note) observed "*if they want to make assertions they should be here to make representations*."

The respondents to the AFO sought to challenge the judge's decision to sit in public by way of judicial review, on four grounds, namely (1) whether it is possible for the Magistrates' Court to sit in private to hear an application for an AFO, (2) whether the decision made by the judge rested on the false premise that the respondents had consented to a public hearing, (3) whether assuming that the Magistrates Court did have power to sit in private, the decision to sit in public was Wednesbury unreasonable, and (4) the judge had failed to provide adequate reasons for his decision.

Those issues raised an important point of principle because there is no specific rule empowering the Court to sit in private on an application for an AFO, and thus the only relevant provision is s.121(4) MCA 1980, which appears to dictate publicity.

As to the first ground, the Divisional Court considered the statutory framework, and held that, applying a purposive approach, it must be the case that s.121(4) MCA 1980 permits the Court to sit in private (see [24]-[25]). That is because (i) the possibility of applying for an AFO without notice would make little sense without the ability to sit in private, as publicity could mean that steps were taken to frustrate the order made without notice before it could be enforced, (ii) s.303Z1(4) POCA 2002, which permits the Court to hear an application without notice must necessarily imply that such hearings can be in private, (iii) as a consequence, s.303Z1(4) is a "*provision of any enactment to the contrary*" within the meaning of s.121(4) MCA 1980 that thus permits derogation from the general rule of open justice.

The Divisional Court also found support for its conclusion in the approach taken in other applications concerning proceeds of crime recovery under POCA, including DOs, PFOs and UWOs (see [26]-[27], albeit in the case of UWOs, the position is more straightforward because those fall within the province of the

privacy regime in CPR 39.2.

As to the second ground, the Divisional Court considered this to be wholly without merit, as it was plain from the sequence of correspondence and the note of the judge's remarks that, far from proceeding on the basis that the respondents had consented to a public hearing, the judge was well aware that they had expressed a desire for the hearing to be in private, but instead considered that it was for them to make representations should they wish to argue for such a result.

As to the third ground, the Divisional Court rejected the proposition that the decision to sit in public was Wednesbury unreasonable, given that save for bare assertions of reputational damage, there was no evidence or argument before the Court that could possibly justify a derogation from the open justice principle.

The fourth ground was dealt with very shortly. In the absence of any application for the hearing to be in private, there was no need for the judge to give detailed reasons for sitting in public.

Despite the Divisional Court concluding that there was no basis for privacy in this case, the Court nonetheless gave guidance about the circumstances in which it may be appropriate for an application for an AFO to be heard in private. The Court gave a clear steer that where applications for AFOs are made without notice, it will ordinarily be appropriate for such applications to be heard in private ([35]). In general, however, the Court will need to weigh the competing considerations, and be astute to the possible violation of a right under the ECHR (and in particular, Article 8) if the hearing is in public (see [33]). The Court endorsed observations made in other contexts that the presumption is open justice, and in order to displace that, something more severe than merely embarrassment or humiliation must be established ([55]). The justification for privacy must be *"sufficiently strong":* [58].

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