THE YFLA WINTER NEWSLETTER 2017/18

Young Fraud Lawyers Association

Dear members,

Welcome to the 2017/2018 YFLA Winter newsletter. Details of our upcoming events can be found on our new and improved website www.yfla.com We hope you enjoy the Newsletter.

In this issue:

Notification injunctions. Another nuclear weapon added to the litigator's armoury?

Following the handing down of the trial judgment in the final instalment of the Holyoake v Candy litigation, Mr Holyoake is reported to have stated "Anyone reading today's judgment will see that there are currently no winners here". The judgment is certainly scathing of all parties and itself serves as a helpful reminder of the reputational risks of litigation.

However, it is not all doom and gloom for civil fraud litigators who might cast their minds back to the February 2017 judgment of Gloster LJ of in which she provided a helpful analysis of notification injunctions and the appropriate principles to apply when seeking such an order.

Mr Holyoake sought a notification injunction against the defendants because of his concerns that there was a real risk that the defendants would make it difficult or impossible to enforce a judgment against them and considered that a freezing order was more than reasonably necessary to protect his position.

Despite there being no explicit basis in the CPR for the granting of notification injunctions, Nugee J at first instance held that the court had jurisdiction pursuant to s37 of the Senior Courts Act 1981 to grant such an order and since a notification injunction was less stringent than a freezing injunction, a lesser degree of risk of dissipation of assets was required to be shown. Consequently, Nugee J considered that there was such a risk of dissipation as to justify the relief sought and a notification injunction was ordered.

"*Notification injunctions may be a more commercial remedy than the conventional freezing order*"

Following, this decision, we were left with some uncertainty as to what "real risk of dissipation" meant in the context of notification injunctions.

Gloster LJ allowed the defendant's appeals against the notification order. She held that notification injunctions are modified versions of freezing orders and not a distinct type of injunction on the basis, inter alia, that the function, operation and machinery of the notification injunction were essentially equivalent to those of a freezing order; both forms of injunction involve a draconian interference with rights and carry reputational stigma; and, in practice, the two types of order are likely to be indistinguishable from a third party's perspective. As a result, the risk of dissipation test was the same as for a conventional freezing order (and had been incorrectly applied at first instance). On the evidence, Gloster LJ held that there was no real risk of dissipation and the balance of convenience was against the grant of a notification injunction.

So where does this leave us? Applicants will have to consider whether the relief they seek is tantamount to a freezing order, in which case they can expect to face the same onerous hurdles as that type of order. However, the intrusiveness of relief will remain material to the question of whether it is just and convenient to grant the relief and notification orders which are limited to a particular asset or class of assets may more easily persuade a judge that the balance of convenience weighs in the applicant's favour.

Notification injunctions may also be a more commercial remedy than the conventional freezing order: it does less damage (in principle) to the respondent's business and reputation and may reduce the risk of pushing the respondent into insolvency. It is also likely that damages payable by an unsuccessful claimant on its cross undertaking are likely to be lower than if the defendant's assets had been frozen. Indeed the initial cross undertaking required may also be lower.

Nuclear weapon or not, notification injunctions are no doubt a useful tool in the litigator's armoury.

Bethany Histed
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Dishonesty in Ivey: 'a simple, if occasionally imprecise, English word'

A 'seismic shift' in the law relating to dishonesty occurred when the Supreme Court gave their judgment in *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67 on 25 October 2017.

The case arose out of a civil claim brought by Mr Philip Ivey against an exclusive London casino. Mr Ivey used a sophisticated 'edge-sorting' technique as he played Punto Banco. Claiming to be superstitious, he persuaded the croupier to turn around 'lucky' cards and not to change card packs. Mr Ivey won £7.7 million in one night; the casino refused to pay out.

The question was whether Mr Ivey had 'cheated' within the meaning of s 42 Gambling Act 2005. The casino said he had cheated and was therefore not entitled to the winnings; Mr Ivey said that 'cheating' requires dishonesty, and he had not been dishonest within the meaning of the second limb of *Ghosh R v Ghosh* [1982] QB 1053 as he merely played his honest advantage.

"Ghosh did not represent the true position in law"

The Supreme Court held that Mr Ivey had cheated, but that 'dishonesty' was not a necessary component of that offence.

Importantly, the Supreme

Court went on to hold that *Ghosh* did not represent the true position in law. The application of the test in

Ghosh had led to the perverse outcome where the more 'warped' the Defendant's standards of dishonesty, the more likely he was to be acquitted.

Rather, as set out in paragraph 74 of the Judgment given by Lord Hughes, juries should be directed to consider:

1. What was the Defendant's state of mind or belief at the time? Is this a genuine belief?
2. Was the conduct and the Defendant's state of mind dishonest by the standards of ordinary decent people? There is no requirement in law that the Defendant appreciate that his actions were dishonest.

The Supreme Court relies on the common sense of juries, describing 'dishonesty' as a concept that is 'like the elephant, characterised more by recognition when encountered than by description'.

This is a profound change that simplifies the test for dishonesty, uniting the criminal law with civil law. Further, the decision has significant potential consequences for trials – a defendant can no longer rely on his own assessment of his actions. The long-term effects of the decision remain to be seen.

Sara Wyeth
Goldsmith Chambers

Follow the money: how to identify your client's money when it has been converted into cryptocurrency

Most (if not all) cryptocurrencies use blockchain technology. Blockchain technology enables a register of all transactions involving that particular cryptocurrency to be created and maintained. Each new transaction involving that cryptocurrency adds another record to the ledger. Each transaction is authenticated by a network of computers. It is impossible to fake an addition to the chain, and relatively easy to verify a new transaction.

The process is completely transparent, save for one major exception: it allows for anonymity. When a person purchases any form of cryptocurrency, they are effectively buying the unique code that is then linked to a coin or token. No identifying information is attached to the code, meaning that (in theory at least) the owner of the code can remain anonymous.

One can see why the fact that ownership is anonymous would be attractive in many scenarios for business and individuals alike; equally it makes the use of cryptocurrency an attractive vehicle for hiding money obtained fraudulently, as well as laundering proceeds of crime generally. Exchanges will therefore need to ensure that their internal procedures are such that they do not fall foul of any money laundering obligations to which they are subject. Any disclosure order required by an exchange should therefore hopefully provide useful information, both about the identity of the individual and the transaction(s) in question.

"there is no reason why the conversion of assets into cryptocurrency should mark the end of a tracing exercise"

In circumstances in which misappropriated money has been used to purchase cryptocurrency, what can be done to trace funds into that cryptocurrency and possibly secure those assets?

If national ("fiat") currency has been used to purchase cryptocurrency there is likely to be a record of that transaction with one of the cryptocurrency exchanges. If you are able to identify the exchange used (from bank statements or electronic records) it may be possible to obtain disclosure orders against that exchange to disclose the wallet (used to store, send, and receive cryptocurrency) into which the cryptocurrency was

transferred. If you can identify the wallet, then you can try to use the blockchain ledger to trace the assets and/or identify what it is you wish to freeze or secure. There is no reason why the conversion of assets into cryptocurrency should mark the end of a tracing exercise and no reason why a freezing or proprietary injunction should not apply to a cryptocurrency wallet.

Katie Allard
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No nexus to the UK? Not suspected of a crime yourself? No matter.

Unexplained Wealth Orders ("**UWO**") came into effect on 31 January 2018 as part of the Criminal Finances Act 2017. UWOs enable UK authorities to obtain the evidence needed in order to freeze and recover assets acquired using illegal funds.

A UWO requires a person who is reasonably suspected of involvement in, or of being connected to a person involved in, serious crime to explain the nature and extent of their interest in particular property, and to explain how the property was obtained, where there are reasonable grounds to suspect that the individual's income would be insufficient to allow them to obtain the property.

This type of civil order is another tool through which UK enforcement authorities can exercise their investigative powers (with the High Court's sanction). It is an addition to the powers already available in the Proceeds of Crime Act 2002 ("**POCA**") to investigate and recover the proceeds of crime, and is likely to be used in conjunction with such powers. The ability to apply for a UWO is currently limited to the SFO; NCA; HMRC; FCA; and the CPS, and then, only for cases that meet specific criteria.

UWOs have a broad scope. A suspect does not have to live in the UK, nor does the property forming the subject of a UWO have to be in the UK. If an authority believes a suspect has property (real estate, funds or other assets) valued in excess of £50,000 that appears disproportionate to the suspect's source of legitimate income, it can apply for a UWO.

For individuals outside of the EEA, UK enforcement agents can also investigate politically exposed persons ("**PEPs**"), and those suspected of being connected to a crime. A UWO made in relation to a non-EEA PEP would not require suspicion of serious criminality. A UWO requires the respondent to provide information on certain matters (their lawful ownership of property, and the means by which it was obtained). Failure to provide a sufficient response may give rise to a presumption that the property is recoverable via civil action through Part 5 of POCA.

If evidence is produced in response to a UWO, then a decision will be made on how to proceed using that material, including possibly referring the evidence to another body to consider criminal or civil action. However, evidence compelled under a UWO cannot normally be used against the person who provided it in any subsequent criminal prosecution.

In responding to a UWO, a person commits an offence if they make a statement that they know to be false or misleading in a material way, or if they recklessly make a statement that is false or misleading in a material way. A person guilty of an offence is liable to conviction on indictment to imprisonment not exceeding two years and/or a fine; or on summary conviction, to imprisonment not exceeding twelve months and/or a fine.

The creation of UWOs further demonstrates the type of onerous tools that the UK Government is bestowing on enforcement authorities to prevent the City of London, and the UK, from becoming a centre for money laundering. It is also an illustration of the UK's commitment to supporting international transparency. The global reach that the designated enforcement agents now have to impose UWOs on

foreign individuals (PEP or otherwise) and companies confirms that no one is beyond reach when it comes to explaining their financial means.

It is anticipated that UK enforcement authorities will be obliged to seek increased cooperation from foreign agents, via mutual legal assistance, to freeze any suspected foreign property pending a satisfactory response to a UWO. The key question is to what extent foreign agents will provide the requested assistance, particularly in respect of PEPs who are not suspected of any criminality, and when an individual's right to privacy comes into play.

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THE FRENCH DPA: THE SAME BUT DIFFERENT

On 14 November 2017, the Cour D'Appel de Paris approved the first French 'DPA' between HSBC Private Bank (Suisse) SA ("PBRS"), the Swiss private banking unit of HSBC, and the French National Financial Prosecutor, Parquet National Financier ("PNF"). The investigation undertaken by the PNF revealed that between 2006 and 2007, PBRS had offered certain banking services while it had access to information enabling it to know or suspect that certain French clients used those services in order to conceal their assets from the French tax authorities. Pursuant to this DPA agreement, PBRS undertook to pay a total of €300 million, made up of a public interest fine totalling €157,975,422 and €142,024,578 in damages.

This 'DPA' was the first of its kind under the new French anti-corruption framework, Sapin II, which entered into force in December 2016. A particularly interesting feature of the French DPA model is that it appears to more closely mimic the DPA framework established relatively recently in UK law, than the well-trodden regime in the US. As in the UK, but unlike in the US, a DPA under Sapin II requires approval by the courts. The French Court does appear to be following the example set in the UK by carefully scrutinising the terms of the agreement. Although the French DPA is in its infancy however, we can already see some differences emerging. For example, a DPA in the UK depends on good cooperation. In Rolls-Royce, the SFO was able to overlook the fact that the company did not self-report and reached an agreement because of the company's extremely cooperative approach during the investigation. By contrast, although PBRS did not self-report and thereafter offered "minimal cooperation", an agreement was nevertheless reached; the conduct impacted instead upon the financial penalty. It is important to note however, that PBRS may turn out to be a rather exceptional case on the basis that the legal framework for cooperation was not in place when the investigation started. Further cases will no doubt provide a clearer insight into the importance of cooperation going forward.

PNF evidently plays a major role in tackling anti-corruption involving French nationals or non-French nationals ordinarily resident in France, but it remains to be seen what role they will play in cases which tick multiple jurisdictional boxes. As of October 2017, the investigation into Airbus which is already underway in the UK and in France, has threatened to extend to the US. Perhaps this will give us the first glimpse into how PNF will interact with UK and US authorities to reach global settlement settlements.

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