Quarterly Commercial Crime Newsletter:

RECENT CASE UPDATES

OCTOBER 2021

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Introduction

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

- Serious Fraud Office – Major Settlements: an outline of two major cases in which the SFO entered into settlements with companies under investigation for corruption. Both settlements provide clarifications on the application of the relevant sentencing guidelines.

- Financial Conduct Authority – Enforcement of Regulated Activities by Unauthorised Persons: an overview of the Court of Appeal's decision in *Financial Conduct Authority v Avacade Ltd (t/a Avacade Investment Options)* [2021] WLR(D) 481, relating to findings of regulatory contraventions of various provisions of FSMA.

- Private Prosecutions: consideration of two recent cases which provide clarification on various issues which may arise in the context of private prosecutions.

- International investigations / Privilege: an outline of *The State of Qatar v Banque Havilland SA and Vladimir Bolelyy* [2021] EWHC 2172 (Comm) which considered a claim of litigation privilege in internal investigation materials, in light of recent case law.

- Contempt of Court: an overview of *A-G v Crosland* [2021] UKSC 15 which relates to a contempt against the Supreme Court and the dividing line between civil and criminal contempts.

Serious Fraud Office – Major Settlements

The Serious Fraud Office ("SFO") recently entered into two major settlements with companies under investigation for corruption. The settlements shed light on the two principal forms of settling SFO investigations: the Deferred Prosecution Agreement ("DPA") and the Plea Agreement, and also provide clarification on the application of the relevant sentencing guidelines.

On 1 July 2021, Edis LJ (sitting as a Crown Court judge) gave final approval to the DPA entered into by the **Serious Fraud Office ("SFO")** and **Amec Foster Wheeler Energy Limited ("AFWEL")**. By entering into the DPA, AFWEL accepted that its predecessor entities had used corrupt means to secure oil and gas support services contracts in Africa, the Middle East and Asia between 1996 and 2014. The indictment suspended by the DPA contains ten counts: nine counts of conspiracy to make corrupt payments under the pre-Bribery Act 2010 legislation, and one count of failure to prevent bribery, contrary to section 7 of the Bribery Act 2010.

In his judgment (unreported but available here) Edis LJ makes three important clarifications with respect to the DPA regime and the judiciary's approach to them:
First, it is made clear that the court in considering whether to approve a proposed DPA will not go behind the facts (or their qualification) presented to it by the parties:

the court is concerned with two areas of factual material: that concerning the commission of the offences; and that concerning the situation and conduct of the suspect after the offences were committed, during the investigation and its current situation. In neither area can the court make any findings of fact. It is dependent on the information with which it is supplied, and relies on the prosecutor to make enquiries and to satisfy itself that the court is being asked to proceed on an accurate statement of the relevant facts. [12]

It follows from this that, as Edis LJ had already made clear, *"the court does not make findings of fact in the present exercise"* and, in particular, *"no process has taken place by which the culpability of individual people has been determined or assessed."* While it was necessary to consider the actions of the individuals involved, *"[t]his judgment deals with the culpability of the company … and not that of any individual person. That culpability is determined by reference to agreements reached between AFWEL and the SFO and documents supplied by those parties."* [1]

This approach contrasts with *dicta* in previous judgments approving DPAs, notably Sir Brian Leveson P in *SFO v Standard Bank plc* [2015] 11 WLUK 804 and *SFO v Tesco Stores Ltd* [2017] 4 WLUK 558, which suggested that the approving court provided independent oversight also of the sufficiency of the underlying evidence. Edis LJ has now made clear that in approving a DPA it has no more endorsed the prosecution's analysis of the evidence than would the magistrates' court in sending the same case for trial.

The second clarification relates to the assessment of whether a DPA is in the interests of justice. Having found that the agreed conduct *"amounted to very significant and systemic corruption"* [23], Edis LJ nevertheless found that it was. In this regard,

> "His Lordship emphasised that *"the widespread and high level culture of criminality, which is accepted to have existed, does not in fact taint the modern company"…*

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Edis LJ considered that his role was not to sentence AFWEL but rather to verify that the DPA included *“an agreed financial penalty which is ‘broadly comparable’ to the fine [which would be imposed by way of a fine on guilty plea]”* and concluded that it did.

His Lordship emphasised that *“the widespread and high level culture of criminality, which is accepted to have existed, does not in fact taint the modern company”*, adding that *“[t]he criminal activity accepted by AFWEL is so serious that if those who were individually responsible for it had any continuing connection with or interest in the company a DPA would not be appropriate.”* [29]

As Richard Lissack QC points out in our separate commentary piece (see here), corporate enforcement action almost invariably deals with historic (in this case very) conduct which means that it will tend to target a “different” company to the one that was responsible for the misconduct. Edis LJ’s reasoning can be said to give force to this observation, in that AFWEL is only deemed eligible for a non-conviction disposal because it was fundamentally a different company to the one responsible for the serious criminality identified.

The third and final important clarification relates to the methodology for calculating the financial penalty agreed (£46 million). Considering whether this number was “fair, reasonable and proportionate”, Edis LJ took issue with many aspects of the methodology used to calculate it (at [49]), stating that he was *“confident that no sentencing judge would approach it in the way in which the SFO has done.”* In particular, His Lordship took issue with a 25% reduction to the financial penalty on account of no previous convictions, noting that “when the offending is as protracted and widespread as this”, this merely meant the company *“[had] been getting away with it for years”* as well as *“failed to report its discoveries of apparent criminality”* in the past.

The SFO was also criticised for having given a discount on account of AFWEL being the result of two mergers since the offending (50%), as well as its co-operation (16.7%), stating that these factors *“would be taken into account as relevant guideline factors reducing seriousness but the court would be careful to avoid double counting since they are closely connected.”*

Finally, Edis LJ took issue with a 10% “Totality reduction”: *“There is no automatic right to a reduction where multiple offences have been committed, especially where their result is to show that fraudulent activity was endemic within the corporation for many years. That is an aggravating and not a mitigating feature.”*

Nevertheless, Edis LJ considered that his role was not to sentence AFWEL but rather to verify that the DPA included *“an agreed financial penalty which is ‘broadly comparable’ to the fine [which would be imposed by way of fine on a guilty plea]”* and concluded that it did. [50] His Lordship took the fact that *“the company which would be prosecuted and fined if convicted is now an entirely different entity from that which committed the offences”* to be highly relevant at Step Five of the Guideline fine calculation, when a sentencing court considers adjustments to the fine arrived at by the operation of the preceding, more actuarial, steps. While the financial penalty had to *“make a real economic impact on the company”* there was *“no purpose in undermining unnecessarily the commercial position of a company which has entirely reformed and which has co-operated in the investigation to the extent it has.”*

It must be expected that the SFO will

incorporate Edis LJ's criticisms of the methodology applied when calculating the financial penalty in this DPA in future settlements of this kind.

Direct guidance on the application of the sentencing guidelines came with the 4 October 2021 sentencing in ***SFO v Petrofac Ltd and David Lufkin*** by HHJ Deborah Taylor, the Recorder of Westminster (Southwark Crown Court). This was the first time a company fell to be sentenced for offences under section 7 of the Bribery Act following a plea agreement with the SFO. Petrofac had previously pleaded guilty to seven counts of failing to prevent the payment of approximately USD 44 million in bribes in relation to contracts worth approximately USD 3.67 billion between October 2011 and May 2017.

David Lufkin, Petrofac's former Group Head of Sales and Senior Vice President Business Acquisition, had previously entered guilty pleas to a total of fourteen counts of bribery contrary to section 1 of the Bribery Act 2010. These counts related to some USD 81 million in bribes paid in relation to contracts worth a total of approximately USD 8.4 billion awarded to Petrofac in Iraq, Saudi Arabia and the United Arab Emirates between October 2011 and 2018. The seven counts of failure to prevent that Petrofac pleaded to covered some of the same contracts. HHJ Taylor found that Mr. Lufkin had been "*at the centre of the scheme for corrupt payments to agents*" but that he had been "*working on the instructions of those senior to you, and that they were in positions where complaint or refusal to comply would have been difficult, and would have exposed you to risks to your livelihood.*" [21].

Having found that the appropriate starting point, taking into account culpability and harm, as well as aggravating and mitigating circumstances, was six years and nine months' imprisonment, [22-24] HHJ Taylor addressed Mr. Lufkin's cooperation with the SFO which had been formalised in an agreement pursuant to section 73 of the Serious Organised Crime and Police Act 2003. She found that this had "*required a considerable degree of moral courage*" on his behalf, and also that it was "*undoubtedly the case that Petrofac would not have pleaded guilty to the seven offences it has, had you not provided the detailed co-operation you did.*" [25] This earned Mr. Lufkin a "*reduction in your sentence for the assistance you have provided which should act as an encouragement to others to do the same.*" [27] This led to a reduction in the sentence to 3 years' imprisonment which, with full credit for guilty pleas at the earliest opportunity of 1/3, resulted in a sentence of 2 years' imprisonment, suspended for 18 months.

In relation to Petrofac, HHJ Taylor went through the sentencing guidelines for corporate offenders step-by-step. At **Step 1**, the judge declined to make an order for compensation: "*There is no direct evidence that the contracts won by corrupt means had their contract prices artificially inflated, nor is there direct evidence that Petrofac Group subsidiaries did not perform the work for which they had been contracted to the extent that compensation would be warranted.*" [32]

In relation to confiscation (**Step 2**), HHJ Taylor acknowledged that "*the process of accurately reconstructing the flow of funds with respect to the profitable contracts from the relevant subsidiaries to Petrofac would be highly complex, and is not realistically possible.*" She therefore accepted to apply "*an alternative method of calculation … taking the contracts on the Indictment as a representative sample of the full set of contracts entered into by each relevant subsidiary.*" This meant that "*as some contracts made a profit and others a loss, this same pattern would have occurred across the totality of contracts entered into by the subsidiaries, reducing overall profits to Petrofac as the parent company.*" HHJ Taylor relied on *R v Powell* [2016] EWCA Crim 1043 for the proposition that "*the benefit is the property obtained by the convicted defendant, and not the property obtained by a subsidiary company.*" [35] On this basis, the benefit which accrued to Petrofac from the profitable contracts on the indictment was set at USD 24.5 million. To this HHJ Taylor added USD 6 million saved by not having in place adequate procedures to prevent bribery, and almost USD 900,000 on account of inflation according to the CPIH index, to arrive at a confiscation figure of USD 31,399,945.63 (or GBP 22,837,985.04). [36-37]

At **Step 3** an assessment has to be made of a

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… HHJ Taylor found the appropriate fine to be USD 96 million, which was further reduced by 1/3 to take into account Petrofac’s guilty plea, for a final fine of USD 64 million.

company’s culpability. Here it was agreed that Petrofac fell within the highest category because: “*Petrofac played a leading role in failing to prevent bribery and corruption [and] as the parent had responsibility for implementing adequate procedures designed to prevent bribery across the Petrofac Group. The offending took place over a sustained period of time.*” [39] As for calculating the harm figure, with respect to profitable contracts, HHJ Taylor took the gross profit, after deductions agreed by the SFO for certain costs of sale. [42] In relation to unprofitable contracts, or ones on which Petrofac did not in the end bid, the judge adopted the approach of Dame Victoria Sharp P approving the DPA in *Director of the Serious Fraud Office v Airbus SE* [2020] 1 WLUK 435, namely *“the value of the corrupt payments*”. [43] This resulted in a total harm figure of USD 99,532,065 (or GBP 65,778,379). [45]

To arrive at the appropriate multiplier (**Step 4**), HHJ Taylor noted that the guideline starting point for high culpability cases is 300%, with a range of 250-400%. [46] She found a number of the guideline aggravating features to be present, but also by way of mitigation that “*the offending was committed under previous executive management and those named in the charges no longer work at the company … Petrofac has engaged in an extensive programme of corporate reform [and there] has been some co-operation with the investigation since the start of 2021, albeit there was no voluntary or early admission made.*” [47] Settling on a global harm multiplier of 325%, [48] HHJ Taylor arrived at a basic fine of USD 323,479,209 (or GBP 213,779,729). [49]

Arrived at **Step 5**, “Adjustment of fine”, HHJ Taylor deemed it appropriate to consider also totality (**Step 9**) in addition to “*the corporate reform of Petrofac and the Petrofac Group, and the financial position of Petrofac, including its value, worth and available means, the impact of a fine on Petrofac’s ability to implement effective compliance programmes, and the impact of a fine on the employment of staff, service users, customers and the local economy.*” [52]. HHJ Taylor accepted as a “*significant cross check in the light of the agreed financial position of the company*” that if one averaged the starting point harm figures within each of the three countries concerned taking into account whether the contracts on the indictment had been profit- or loss-making, the total basic fine would be almost 1/3 of the one arrived at at Step 4. [55-56]

Petrofac had submitted that in view of its need to refinance to meet existing liabilities, including an undertaking to the UK Treasury to repay a Covid Corporate Financing Facility, it only had USD 90-110 million available to discharge any financial orders imposed. [56] HHJ Taylor concluded that “*[d]espite the very serious offending in this case*” and given that Petrofac had taken “*steps to improve, and has accepted and addressed its past offending*”, it was not “*necessary for the company to be put out of business and therefore, a fine must be imposed which, whilst being painful for the company, is one which it can pay.*” [58]

Working back from the available sum of USD 110 million, HHJ Taylor found the appropriate fine to be USD 96 million, which was further reduced by 1/3 to take into account Petrofac’s guilty plea, for a final fine of USD 64 million (or

GBP 47,197,640), to which was added the confiscation amount plus GBP 7 million of SFO costs. The total financial order imposed on Petrofac therefore amounted to USD 104,891,945,65 (or GBP 77,035,625.04).

Petrofac clearly illustrates the material benefits of co-operating with the SFO, even if a DPA is not available. Here the company and the SFO arrived in court not only with pre-agreed accounting, but also with joint submissions on sentencing methodology. While not in any way binding on the court (recalling Thomas LJ's (as he then was) powerful *dicta* in *R v Innospec Ltd* [2010] 3 WLUK 784), *Petrofac* shows that such a joint approach may well commend itself to a sentencing judge.

Financial Conduct Authority – Enforcement of Regulated Activities by Unauthorised Persons

What constitutes a regulated activity is sometimes not entirely clear and the consequences of getting it wrong are potentially severe. In ***Financial Conduct Authority v Avacade Ltd (t/a Avacade Investment Options)*** **[2021] WLR(D) 481** the Court of Appeal (Sir Geoffrey Vos MR, Peter Jackson and Popplewell LLJ) considered an appeal against findings of regulatory contraventions of various provisions of the Financial Services and Markets Act 2000 ("FSMA") by companies and individuals involved in schemes aimed at securing transfers of pensions into self-invested personal pensions ("SIPPs") which then made high risk investments which resulted in commissions to those companies. Of general interest is the purposive approach taken by the Court of Appeal to interpreting the statutory and regulatory framework.

The two schemes at issue in the case can be described as follows: Individuals were contacted by telephone on behalf of the respondent companies who secured authorisation to obtain information on their current pension position. Pension reports would be produced which included a number of options, including a transfer of the existing pensions into a SIPP. The respondent companies would then contact the individual by telephone and advise that transfer into a SIPP was the best option and, if agreed, the respondent companies would prepare the transfer forms for the individuals to sign and return. During a subsequent telephone call, the respondent companies would advise the individuals as to which investments to be made with the funds transferred, invariably advising investing in products from which the respondent companies would receive commissions. The respondent companies managed the paperwork and co-ordinated with the investment product providers and the SIPP administrator. Most products involved investments directly into property (such as trees or commercial office space) and were therefore not regulated investments for the purposes of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 ("the RAO"). In the first scheme, where investments were to be made into bonds, regulated under the RAO, the respondent companies referred the investors to an authorised representative of an independent financial adviser that, the trial judge found, did not provide independent advice on the suitability of the investment. Such a referral took place in all instances in the second scheme, but the advice was found to have been equally deficient.

A large number of modest savers lost millions as a result of the poor performance of the investments made, and the respondents secured millions in commissions.

The FCA brought proceedings for regulatory contraventions against the respondents in respect of alleged violations of sections 19 (general prohibition of regulated activities by unauthorised persons) and 21 (financial promotions by unauthorised persons) of FSMA, and section 89 of the Financial Services Act 2012 (and, for conduct predating 1 April 2013, section 397 of FSMA; making misleading statements to investors). The FCA was successful at trial, and restitution orders totalling almost £15 million had been imposed

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at first instance.

One issue related to when making changes to investments held within a SIPP amounted to dealing with the SIPP itself (a regulated security). Prior to the hearing of the appeal, the FCA conceded that neither the divestment of cash from within a SIPP nor the acquisition of an investment product did. This was on the basis of the Court of Appeal decision in *Adams v Options UK Personal Pensions LLP* [2021] EWCA Civ 474 where it had been held that where the structure of the SIPP expressly provided that the investor had no proprietary claim to any of the investments made within the SIPP, changes to the underlying investments did not involve dealing with the SIPP itself. While bound by this concession, Popplewell LJ (with whose judgment the other two judges agreed) in detailed *obiter dicta* expressed serious doubt that it had been correctly made. In the instant case, His Lordship found that the SIPP arrangements differed in a critical respect from those at issue in *Adams*. Unlike in *Adams*, here the individual SIPP investor was a trustee of the investment property itself. It followed that not only would the acquisition of regulated products involve the individual saver buying a regulated security, but so would the acquisition of an unregulated asset because it involved acquiring new ownership rights held under the terms of a SIPP (itself a regulated security). Popplewell LJ stated:

I would not find it a surprising result if the involvement of a personal pension scheme were to bring investment in unregulated products within the scope of regulation. The designation … of rights under a personal pension as a regulated investment … no doubt reflects a policy that personal pension savings are of a kind which deserve particular protection for financially unsophisticated individuals against high risk investments, protection which does not apply to the same investments which consumers can afford without recourse to the savings which are to support them in old age. This is of importance following the liberalisation of the pension regime, as a result of which investments made within personal pensions are no longer necessarily made on the judgment of pension trustees and administrators who are themselves regulated. [35]

The second issue of interest revolved around whether the respondent companies' actions in the scheme had involved *"[m]aking arrangements with a view to a person who participates in the arrangements buying, selling, subscribing for or underwriting [regulated] investments … (whether as principal or agent)"*, pursuant to article 25(2) of the RAO. Dismissing the suggestion that because violating these provisions could result in penal sanctions they should be interpreted narrowly, Popplewell LJ held that *"the regulatory purpose of the statutory framework … in particular that of protection of consumers"* meant that it was *"not appropriate to adopt a narrow construction on the grounds that s. 23 FSMA imposes penal sanctions for contraventions. What is required is simply a fair reading of the ordinary meaning of the words in the light of the overall purpose of the section in its statutory framework."* [46]

His Lordship then proceeded to hold that the words "with a view to" in article 25(2) of the RAO targeted the intended end state, without requiring that the particular arrangements in question were directly causative of bringing about that end state. [48] In the instant case, he rejected the argument that the respondent companies' activities did not fall within article 25(2) of the RAO because the acquisition of the investment products themselves had not involved making regulated investments (as per the FCA's concession), and that this had been the respondent companies' sole objective. Rather, Popplewell LJ agreed with the trial judge's finding that:

the schemes were an indivisible and seamless set of arrangements as a whole, of which entry into the SIPPs was a necessary and critical part because access to pension pots was the essential source of funding for the investments. … Moreover, because all the steps formed part of an indivisible single set of arrangements, it is inappropriate to compartmentalise the steps in the arrangements for the purposes of article 25(2). [52]

Popplewell LJ also noted that the respondents could not rely on the exclusion to article 25 of the RAO contained in article 29(1), namely that the transactions were to be carried out "through an authorised person". This was

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because of the proviso in article 29(2)(b) that the exclusion does not apply if the relevant person receives a pecuniary reward by making the arrangements for which she / he does not account to the client. Even accepting that the acquisition of the investment products themselves had not involved making regulated investments, here *“as is inherent in the whole business model, entering into the SIPP was not an end in itself but a stage in the process of earning the commission as a result of the subsequent and consequent investment in the products. The commission arose out of making the arrangements, as a whole, and the arrangements as a whole were with a view to the purchase of securities because they involved entry into the SIPPs.”* [65]

This decision is significant in that it endorses a purposive approach by the courts to interpreting the highly technical framework established by FSMA, particularly in relation to classes of investors, such as pensions savers, whose interests the framework is designed to protect.

Private Prosecutions

Two recent cases provide further clarification on various issues that may arise in the context of private prosecutions.

In ***Asif v Ditta* [2021] EWCA Crim 1091**, the Court of Appeal (Dame Victoria Sharp P, Jay and Cockerill JJ) upheld a decision to stay a private prosecution as an abuse of process. The appeal provided an opportunity for the Court to provide further guidance on how essentially commercial disputes involving criminal allegations ought to be handled. In addition, the Court of Appeal set out the principles governing costs to be ordered against a prosecutor in these circumstances.

The proceedings had been brought by Mr. Asif, a Pakistani resident businessman whose UK ventures were handled by his cousin, Mr. Gohir. The first defendant, Mr. Ditta, a UK resident businessman, had, on the prosecution evidence, been introduced to Mr. Asif by Mr. Gohir. The second defendant, Mrs. Riaz, was Mr. Ditta's wife. In very short summary, the indictment charged a number of offences of fraud, money laundering, and theft arising out of a number of poorly (if at all) documented joint business transactions which, the prosecution claimed, had resulted in Mr. Asif being dishonestly deprived of money he had advanced to Mr. Ditta.

In the Crown Court, HHJ Tomlinson had stayed the prosecution on the grounds of the second limb of abuse of process (as identified in *R v Beckford* [1996] 1 Cr App R 94), namely that it would be unfair for the defendants to be tried, singling out two features of the case to justify his decision:

1) He concluded that Mr. Asif had brought the proceedings as a proxy for Mr. Gohir. Mr. Gohir had a colourful background, including a 2015 German conviction for a multi-million Euro MTIC fraud arising out of transactions concurrent with the indictment period.

2) HHJ Tomlinson also noted that no civil proceedings had been brought against the defendants in what amounted to a commercial dispute largely around alleged oral agreements and representations. This led him to conclude that the prosecution had been brought purely as a more cost-efficient and less risky means of securing the recovery of money.

Giving judgment for the Court, Dame Sharp P noted that it is *"well established that a private prosecutor can have another motive as well as being motivated by a public interest factor"* [75] but rejected a submission that it followed that in considering an abuse application brought on the basis of improper motive *"the test is whether there was a sole improper motive."* [81] Her Ladyship noted the failure to bring a civil claim and the absence of *"any evidence that the prosecution is brought with any public interest rationale"*, and went on to find that: *"While a dominant public interest is not required, … the absence of any expression of a public interest rationale, taken together with the clear expression of an oblique motive is telling."* [86]

Dame Sharp P also found that HHJ Tomlinson's conclusion that Mr. Asif was a front for Mr. Ditta *"would itself provide a valid reason for the conclusion which the judge reached."* [92] Because *"there was an advantage to be gained from using a proxy prosecutor"* in that Mr. Gohir's criminal background could be said to weigh less *"in any criminal proceeding where he appeared as a witness, than in civil proceedings in which he was a claimant"*, it reinforced the impression that the prosecution lacked a public interest rationale.

Dame Sharp P concluded that *"this prosecution is being used for private tactical and oppressive reasons and the judge made no arguable error in staying the proceedings as an abuse."* [94]

The defendants applied for costs against Mr. Asif under section 19(1) of the Prosecution of Offences Act 1985 on the basis that the prosecution amounted to "an unnecessary or improper act or omission", for third party costs against Mr. Gohir under 19B of the 1985 Act on the basis of "serious misconduct" by him, and for wasted costs against Mr. Asif's solicitor under section 19A of the Act.

Having concluded that the Court of Appeal could determine the issue of costs (without needing to remit back to the Crown Court) [128 et s.], Dame Sharp P concluded that there had been "serious misconduct" by Mr. Gohir as *"not only was the wrong process used but also that there was a deceptive approach"* by using a proxy prosecutor and that a cost order against him was appropriate. [140]

The applications for wasted costs against Mr. Asif's solicitor were dismissed in light of the evidence which suggested that he *"acted properly when conducting this litigation"*, it being noted that he faced a disadvantage responding to the allegations in the absence of waiver of privilege, and the appearance that the claim against him was *"based on the Defendants' desire to find a party who will pay the costs."* [144]

In relation to the principles applicable in relation to Mr. Asif, Dame Sharp P noted the conclusion in *R (Aisling Hubert) v Manchester Crown Court* [2015] EWHC 3734 (Admin) that *"ordinarily a prosecutor should expect to have to bear the costs of a defendant in criminal proceedings where, on proper analysis, the prosecution never had any prospect of success and thus should never have been brought."* [109] Her Ladyship then cited Coulson J's conclusion in *R v Cornish* [2016] EWHC 779 (QB) (approved by the Court of Appeal in *Najib and Sons Limited v CPS* [2018] EWCA Crim 1554) that *"the granting of a s.19 application will be very rare and will be restricted to those exceptional cases where the prosecution has made a clear and stark error as a result of which a defendant has incurred costs for which it is appropriate to compensate him".* [110-111]

Mr. Asif, the Court found, had failed to live up to the *"highest standards, as 'a Minister for Justice'"*, with reference to the *dicta* of Lord Thomas CJ in *R v Zinga* [2014] EWCA Crim 52. [145] It also found that the private prosecution had been *"abusive, and in and of itself improper"* as it had been chosen over civil proceedings, *"the more appropriate forum"*, *"for personal advantage to him and Mr Gohir."* Further abuse was found in Mr. Asif having acted as a proxy prosecutor. [145]

The detailed assessment of the costs against Mr. Asif and Mr. Gohir was referred for enquiry by the Lord Chancellor and the Registrar of Criminal Appeals, for later assessment by the Court of Appeal. [150]

In ***R v Sally Jones* [2021] EWCA 1195** the Court of Appeal (Males LJ, Goose J, HHJ Dhir QC) was faced with an appeal against a conviction following a private prosecution raising two grounds:

1) the prosecution was an abuse of process as brought contrary to a compromise agreement, and

2) materials obtained pursuant to a Norwich Pharmacal order (*Norwich Pharmacal Co v Customs & Excise Commissioners* [1974] AC 133) should not have been admitted against the defendant.

The appellant had been convicted of a fraudulent scheme whereby she and two senior executives of DAS Legal Expenses Insurance Company Limited ("DAS"), a

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litigation costs insurance provider, had procured DAS to contract with a company owned by them ("Medreport") for the provision of medical reports thereby securing hidden profits. When suspicions arose around the apparently uncommercial nature of the relationship, the two senior executives one after the other sold their interests in Medreport, leaving the appellant in control. DAS terminated Medreport's contract not knowing of the secret ownership and, when Medreport sued, settled for £800,000 in 2013. The settlement agreement, to which the appellant was a party as a Medreport director, included a clause whereby the parties agreed "not to sue, commence, voluntarily aid in any way, prosecute or cause to be commenced or prosecuted against any other Party, any action, suit or other proceeding … in this jurisdiction or any other."

In 2015, DAS applied for and obtained a *Norwich Pharmacal* order against Medreport and the appellant. In support of the application, DAS' solicitor explained that DAS was looking for redress as against the two senior managers in respect of an alleged concealed beneficial ownership in Medreport. The appellant was at this point described as having acted as a trustee for the two senior managers and thereby "facilitated and/or become mixed up in wrongdoing". The order was granted on the condition that documents only be used for the purposes described in DAS' solicitor's statement. Documents produced in July 2015 revealed the beneficial ownership of shares in Medreport. In September of that year DAS commenced civil proceedings against Medreport and the two senior executives, the appellant being joined to the claim in March 2016.

The private prosecution of the appellant and the two senior executives commenced in June 2016, was stayed by the Crown Court judge in April 2017, a decision then reversed by the Court of Appeal ([2017] EWCA Crim 1172). In March 2018, the new trial judge rejected a renewed application for a stay by the appellant based on arguments which now formed the grounds of her appeal against conviction. He subsequently ruled that that *Norwich Pharmacal* documents were admissible against the appellant.

Males LJ for the Court approached ground one against the agreed position that *"it may be an abuse of process to prosecute a defendant for conduct in respect of which he has been given an assurance that no prosecution will be brought."* [37] His Lordship cited the review of the applicable authorities in *R v Abu Hamza* [2006] EWCA Crim 2918, including Lord Phillips CJ's conclusion in that case (at para 54) that:

it is not likely to constitute an abuse of process to proceed with a prosecution unless (i) there has been an unequivocal representation by those with the conduct of the investigation or prosecution of a case that the defendant will not be prosecuted and (ii) that the defendant has acted on that representation to his detriment. Even then, if facts come to light which were not known when the representation was made, these may justify proceeding with the prosecution despite the representation.

In the present case, Males LJ found that it was *"not obvious that Sally Jones ever believed that the Settlement Agreement included a promise by DAS not to bring criminal* *proceedings against her or that she acted on any such belief, whether by acceding to the Norwich Pharmacal application or at all, and she chose not to give evidence that she did."* [39]

In addition, and for good measure, the Court of Appeal found that the relevant clause of the settlement agreement was, in any event, *"concerned only with civil proceedings."* [40] Importantly for the drafters of settlement agreements, Males LJ stated *that "in circumstances where the law is clear that any promise of immunity from criminal prosecution must be unequivocal, and the drafter can reasonably be expected to have known that, any doubt should be resolved in favour of holding that a statement which is less than unequivocal does not amount to such a promise."* [43]

In relation to the admissibility of the *Norwich Pharmacal* documents, the argument on behalf of the appellant centred on the fact that she had not been identified as a potential criminal defendant (or civil respondent) and therefore had been deprived of the possibility of raising the privilege against self-incrimination. Here the Court found that *"there was no evidence that Jones ever believed that there would be no criminal proceedings against her or that she had been misled by the terms of the Norwich Pharmacal application and, as we have already indicated in relation to ground one, the circumstances in which this point came to be taken strongly suggest that she had no such beliefs."* [53] In the event, therefore, there was no need to decide *"whether a claim for privilege, if made, would have succeeded."* [54]

> “ the Judge considered that, absent evidence of any subsequent change of purpose, what mattered was *“the position … when PwC was instructed to carry out its work and to produce its report.”*

International Investigations / Privilege

In ***The State of Qatar v Banque Havilland SA and Vladimir Bolelyy* [2021] EWHC 2172** (Comm) the High Court (David Edwards QC) considered a claim of litigation privilege in internal investigation materials, in light of recent case law (in particular *Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2018] EWCA Civ 2006) clarifying the relevant principles.

In the substantive claim, the claimant alleged that the defendants had been parties to an unlawful conspiracy to damage the Qatari economy in furtherance of the blockade of the Gulf state by much of the Arab world starting in 2017. Following the online publication of an article making these allegations, Banque Havilland instructed PWC, through its Luxembourg lawyers, to carry out an internal investigation. PWC’s terms of engagement were contained in a letter to the lawyers and described their instruction as being “to proceed, as subcontractor under legal privilege, with the capture of the professional computers or any other electronic device of the suspected individuals, and perform a deep analysis to retrieve information around the data leakage and file creation.”

The Judge provided a fulsome account of the relevant principles arising out of the case law and found that the circumstances of the present case were close to those considered in *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6, *R v Jukes* [2018] EWCA Crim 176, and ENRC, *“each of which involved an investigation, or a potential investigation, by a regulatory or prosecuting authority.”* [105]

Ordering Banque Havilland to disclose the PWC report, the Judge considered that, absent evidence of any subsequent change of purpose, what mattered was *“the position … when PwC was instructed to carry out its work and to produce its report.”* [162] In this regard, the Judge found that the statement by the bank’s Deputy CEO *“that it was obvious to him that these matters ‘could have significant legal, regulatory and legal consequences’ [was] far too general to support the claim for litigation privilege.”* [165] Quoting from *United States of America v Philip Morris Inc.* [2004] EWCA Civ 330, the Judge held that something *“more concrete”* than “*the ‘mere possibility’ of litigation”* or *“‘a distinct possibility that sooner or later someone might make a claim’”* was required. [166]

In addition, the Judge found that *“the documents and evidence provide little support for contemplated adversarial proceedings being the sole or dominant purpose of PwC’s instruction”* [183] but that, rather, Banque Havilland had been focused on answering the question of how an internal document had found its way into the hands of the online publication and, critically, to answer questions from its Luxembourg regulator, the CSSF. [179]

Although, as the authorities make clear, determinations of claims of litigation privilege will always be fact specific, *Banque Havilland* is further illustration that in the absence of clear evidence that preparing for and / or defending specified types of litigation was a purpose behind the commissioning of an internal investigation, the courts will not readily read it in.

Contempt of Court

***A-G v Crosland* [2021] UKSC 15** is significant mainly because it relates to a contempt against the Supreme Court, and because it discusses the dividing line between civil and criminal contempts.

Mr. Crosland was an unregistered barrister who had represented the charity Plan B Earth in the judicial review proceedings which resulted in the Supreme Court judgment in *R (Friends of the Earth Ltd) v Heathrow Airport Ltd* [2020] UKSC 52 validating the Airports National Policy Statement, ("the ANPS") and, principally, its provision for the construction of a third runway at Heathrow Airport. As such, Mr. Crosland had received a draft copy of the judgment to be delivered according to the usual practice and, as the Court put it, "*for the specific purposes of enabling the parties to make suggestions for the correction of errors, prepare submissions on consequential matters and to prepare themselves for the publication of the judgment."* [41] Pursuant to paragraphs 6.8.3 to 6.8.5 of Practice Direction 6, the draft judgment was strictly confidential to the parties and their representatives.

On the day preceding the handing down of the judgment, Mr. Crosland publicised the outcome by contacting media and also by social media.

There was little dispute as to the circumstances of the violation of the conditions under which the draft judgment was provided to Mr. Crosland and his defences were not only rejected but are also of limited general interest.

What is of interest is the discussion of whether this constituted a civil or criminal contempt. In this regard, the Supreme Court recalled the *dicta* of Lord Toulson in *Director of the Serious Fraud Office v O'Brien* [2014] UKSC 23: *"A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice".* In relation to whether the contempt amounted to an interference with the administration of justice, their Lordships noted that the contempt did not involve *"a breach of an order by a party to litigation where the order has been made at the instance of an opposing party and its purpose is simply to protect the private rights of that other party."* The Supreme Court concluded that Mr. Crosland's conduct involved violating an order "*made in order to protect the administration of justice and its breach involves a general interference from which the administration of justice must be safeguarded".* This meant that *"the respondent has interfered with the court's control of its own proceedings … the publication of the outcome of the appeal in breach of the embargo was an interference with the proper administration of justice."* [23]

In relation to seriousness, the Supreme Court found the threshold for criminal contempt passed for four reasons: First, it is *"vital for the authority of the court and in the interests of legal certainty that its judgments should be delivered at a time of its choosing and in a definitive form. … Leaks of draft judgments could undermine the authority of the court and its judgments."* [24]

Second, their Lordships emphasised the

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importance to the administration of justice of the practice of circulating draft judgments to the parties and their representatives in advance of handing down. [25] Third, they found that it *"was clearly the intention of the respondent to publish the result and his comments on it as widely as possible"* [26], and, fourth, his *"statements were in terms which defied the authority of the court and which could encourage others to disobey the prohibition on publication and to disclose this or other draft judgments."* [27]

A fine of £5,000 was imposed.

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