

A&O SHEARMAN

Landmark UK ruling on money laundering risks in supply chains involving modern slavery

2 July 2024

A landmark English court judgment highlights money laundering risks for companies where they have identified potential forced labour / modern slavery in their supply chains.

The Court of Appeal upheld an NGO's appeal in [R \(on the application of World Uyghur Congress\) v National Crime Agency](#) that the decision by the UK National Crime Agency (the NCA) to refuse to investigate the import of cotton into the UK value chain, from particular regions where modern slavery was alleged to be a risk, was based on an mistaken interpretation of key elements of the UK's money laundering regime.

NGO pushes for a money laundering investigation

A non-governmental organisation (NGO) had gathered evidence concerning alleged forced labour and human rights abuses in certain regions. It provided the evidence (including names of specific suppliers and importers) to the NCA to try and persuade the NCA to start a money laundering investigation under the UK Proceeds of Crime Act 2002 (POCA). The NGO argued that the cotton and cotton goods were 'criminal property' (being the proceeds of modern slavery). The NCA declined to do so, and the NGO launched a judicial review of its decision.

The decision of Dove J, overruled on appeal, had supported the NCA's justification of its decision (i) not to investigate alleged offences under POCA and (ii) not to commence a civil recovery investigation. Dove J had found that the NCA had not misdirected itself in law when contending that:

- The NCA needed specific proof for each particular consignment that an alleged offender knew or suspected the goods were criminal property, and there was not specific proof of the origins of any consignments of cotton.
- In any case, the payment of market value or 'adequate consideration' by a purchaser (P) of the goods would provide a 'defence' to a s329(1) money laundering offence (namely the acquisition, use and possession of criminal property) and would effectively 'cleanse' the criminal property so as to preclude, under civil recovery powers, its recovery from anyone who subsequently acquires it, or the recovery of the proceeds of its onward sale.

Court of Appeal ruling on 'adequate consideration'

The Court of Appeal's ruling on how the adequate consideration 'exemption' (so confirmed, rather than a defence) operates is significant. It suggests a much narrower interpretation than relied on by the NCA:

- The adequate consideration exemption does not have any impact on the status of the property in P's hands. If it was criminal property at the point of acquisition, albeit the adequate consideration exemption

applies to protect P, it remains criminal property in P's possession.

- It only exempts P from the offence under s329(1), and only whilst they still have the property in their possession. Any onward transfer by P, where they know it is criminal property, would give rise to a different money laundering offence for P (for example under 327(1), (d) or (e), such as transferring the criminal property). The ability of P, in a long supply chain, to rely on the exemption does not 'cleanse' the criminal property for everyone else in the chain. So, if P sells the property to a third party (TP) who is also aware that it might be criminal property, the TP could commit a s329(1) offence unless they have their own adequate consideration exemption. This finding is very important in the context of international or national supply chains, and overturns some previous case law.
- The exemption does not operate as a defence to civil recovery under Part 5 POCA. Whilst a true bona fide (ie no knowledge or suspicion of modern slavery) purchaser for value will have a defence to a civil recovery claim, simply paying adequate consideration is not enough to defend against a civil recovery claim by the NCA if the purchaser does have knowledge or suspicion.

The Court of Appeal did not address what is meant by 'adequate', nor the comments on this by Dove J at first instance. Dove J had agreed that the adequate consideration defence applies to transactions 'at market value', that the adequacy of consideration is an objective question, and the prosecution would be required to prove that the cotton had been purchased for significantly less than its value or by some other measure for consideration which was not adequate.

Dove J had, though, not considered questions about how the market value of goods may be impacted by forced labour, such as to keep the value low for international trade, or indeed the applicability or otherwise of s329(3) POCA, which states that 'the provision by a person of goods or services which he knows or suspects may help another to carry out criminal conduct is not consideration.'

The threshold at which a money laundering investigation can be opened

The Court of Appeal found that there was "legitimate concern" that the High Court's judgment could be read as supporting the view that there is a need to establish criminal conduct or criminal property before the commencement of an investigation under POCA.

During the Court of Appeal process the NCA conceded that:

- It can commence an investigation into proceeds of crime before specific criminal property (or recoverable property) is identified.
- It is no bar to the commencement of an investigation if there is only evidence of criminality in a general sense and at a high level.
- Money laundering can be proven in a criminal trial without proof of a specific offence carried out by a particular person, provided that the general type of crime (e.g. fraud) is established or, if that cannot be

shown, the alleged criminal property was “dealt with in such a way as to give rise to an irresistible inference that it is the proceeds of crime”.

- It is never a bar to an investigation under POCA that there is a possibility that payment was made in return for the acquisition of the property (even if it constituted adequate consideration).

The ruling, together with the NCA's concessions, reinforce the position that an investigation can be opened before specific criminal conduct or property has been identified. Neither affect what needs to be proved at trial to secure a successful conviction – that the criminal conduct is clearly and specifically identified and that the resultant property is specifically identified. Hypothetical scenarios and presumptions would not be sufficient.

The NCA has been asked to reconsider its decision not to investigate in this case. The ruling was confined to interpreting the explanations given in a letter from the NCA to the NGO which had justified its decision in this case. This judgment may lead to the NCA opening an investigation in this matter, or it may seek to justify its decision not to do so on other grounds. The NGO accepted that the NCA is entitled to take the view that there was insufficient evidence from which to develop an investigation which had any realistic prospect of bearing fruit. If the NCA were to open an investigation, it may not share the decision publicly pending the outcome.

Other claims

At first instance the NGO had also challenged (unsuccessfully) decisions by HMRC and the UK Border Force not to investigate under the Foreign Prison-Made Good Act 1897 and s139 Customs and Excise Management Act 1979. These points were not appealed.

Impact on supply chains

POCA was amended in 2018 to make it easier to seek recovery from those who deal with the proceeds of overseas ‘gross human rights abuses’.

Money laundering challenges are being used by those seeking to exert pressure on businesses involved in supply chains with allegations of human rights abuses. In addition to this case, in March it was reported that two human rights groups have launched judicial review proceedings against the London Metal Exchange for failing to consider its UK money laundering obligations when deciding which brands of metals to allow on its exchange.

This ruling will put more pressure on the NCA to take action as it substantially limits the scope of the adequate consideration exemption in supply chains. Where P buys goods while knowing or suspecting that they may be the proceeds of crime, P could commit a money laundering offence or be subject to civil recovery. The adequate consideration exemption is very narrow in application and certainly does not ‘break the chain’:

- P will need to consider how to protect itself when doing anything with the property – eg selling, transferring, moving, through for example, seeking a Defence Against Money Laundering (**DAML**). It cannot rely on the adequate consideration exemption to cover these steps.
- Any onward purchaser (**TP**) will need to consider whether it has its own defences – it can not rely on the goods having been cleansed by P paying adequate consideration.
- The exemption does not protect P or TP from civil recovery.

Officers and employees involved in working on the transactions will want to consider their own exposure too. Furthermore, recent [changes brought about by the Economic Crime and Corporate Transparency Act 2023](#) mean that the actions of senior managers which amount to money laundering offences can be used to prosecute the company itself.

The ruling is important for a company considering whether to seek a DAML from the NCA if it discovers supply chain issues of this nature, either in its own operations or those of a soon-to-be acquired target.

Most companies are already considering supply chain issues, and taking steps to address issues such as the risk of modern slavery. Large companies with an annual turnover of over GBP36m are already required to prepare slavery and human trafficking statements with a view to ensuring that slavery and human trafficking are not happening in their supply chains. To the extent that instances arise, they will make companies more vulnerable to potential money laundering offences for onward transfers of criminal property, and to potential civil recovery investigations.

Businesses face increasing pressures and obligations globally in respect of supply chain due diligence and modern slavery disclosures. The [EU Council Corporate Sustainability Due Diligence Directive](#) was approved by the EU Council on 24 May; it will introduce a duty on EU and non-EU companies meeting certain turnover thresholds to undertake human rights and environmental due diligence, starting from 2027. The obligations apply with respect to a company's own operations and those of its subsidiaries, plus those carried out by a company's "business partners" in the company's "chain of activities". Read about how companies can prepare.

Accountability for workers in a company's value chain was one of the key themes explored in the 2024 edition of the [A&O Shearman Cross-border White Collar Crime and Investigations Review](#).