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FiftyOne

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Welcome to the second edition (Autumn 2020) of *FiftyOne*, which I have the great pleasure of guest editing. Whilst this has been an unprecedented few months for all, we hope that there is some level of normalcy on the horizon, and that we are able to come out of these troubling times stronger and further united as individuals and as a society.

This edition carries an exciting array of highly topical articles. Richard Reichman and Sihana Cara discuss the issue of the legal risk to businesses of all sizes arising from potential employee exposure to Covid-19. It provides an excellent overview of the law and how businesses may take steps to avoid liability, particularly so in a difficult financial climate.

Ellen Peart and Daniel Jackson provide an interesting account of the potential impact of Covid-19 upon jury trials, and describe a jury trial at the Central Criminal Court that ran under the new Covid-19 protocols in which their client was acquitted.

In light of the present clamour for greater regulation of social media platforms and the UK Government's new Digital Market Taskforce which aims to advise on a new regulatory regime for digital markets, Julian Hayes and Greta Barkle discuss the key issues in this area including criminality perpetrated through social media platforms, sanctions presently available, and what direction the Government may take once its Taskforce reports.

With the coming into force of The Global Human Rights Sanctions Regulations 2020, John Binns discusses whether the present approach of the UK Government is a prudent one, describing the potential pitfalls of the present trajectory.

Anoushka Warlow and Cindy Laing have co-authored an article on private prosecutions which describes some of the shortcomings in procedural safeguards for defendants in these cases, along with their 'mission-creep' in seeking to secure damages for private individuals.

The final article in this edition of *FiftyOne* is by Harry Travers, Greg Mailer and myself, which analyses the approach of HMRC in tax investigations that companies and individuals may face in the near future, particularly in light of the Covid-19 pandemic.

We hope that you find the articles in this edition interesting and informative. If there is anything you would like to discuss that has been raised in this edition, or indeed an alternative matter, we would be delighted to hear from you; our contact details can be found on the back of this edition or our website.

Umar Azmeh
Editor

Umar Azmeh is a solicitor at BCL, specialising in business crime, financial crime, and regulatory investigations. He has significant experience of criminal investigations involving money laundering and bribery, and has worked with clients on sanctions, tax, and proceeds of crime issues. He has expertise in commercial litigation, including civil fraud with an international dimension, and particularly where there is a criminal aspect. He has also advised both corporations and individuals on potential liability under the Proceeds of Crime Act 2002, the Fraud Act 2006, and the Bribery Act 2010, which includes drafting relevant policies for corporate clients.

uazmeh@bcl.com

Covid-19: risks to businesses from exposure at work

Richard Reichman and **Sihana Cara** discuss Covid-19 and if there is a risk of businesses being shut down or prosecuted for exposure at work.

The HSE's web pages contain guidance on complying with health and safety duties. There is more extensive industry and sector specific Covid-19 guidance available on the Government web pages. The available guidance is indicative of what is reasonably practicable, such that any deviation would require justification. Businesses will need to carefully monitor the evolving guidance in this fluid situation to ensure that they remain compliant.

Since the Covid-19 lockdown eased further on 4 July 2020, more businesses have been able to recommence operating, or operating closer to how they did pre-lockdown. As this and further future adaptations take place, employers will be keen to ensure the safety of their employees and members of the public, and understand the risks if they fail to do so.

The UK Government and Health and Safety Executive ('HSE') have made it clear that businesses will be regulated under existing health and safety legislation for risks to safety posed by Covid-19 at work. In its guidance regarding making workplaces *"Covid-secure"*, the HSE says that *"as an employer, you must protect people from harm. This includes taking reasonable steps to protect your workers and others from coronavirus"*. The Health and Safety at Work etc Act 1974 ('the Act') places duties on employers to ensure the health, safety and welfare of employees in connection with work. Employers and the self-employed are also obliged to conduct their businesses in a manner that does not expose the public to health or safety risks. Importantly, these duties are both qualified by the phrase *"so far as is reasonably practicable"* (a concept of balancing risk and cost, analogous to the pandemic response globally).

Although the HSE's analysis is not determinative, it considers Covid-19 to be a *"substance hazardous to health"* by virtue of it falling within the definition of a *"biological agent"* under the Control of Substances Hazardous to Health Regulations 2002. It appears that the HSE is seeking to treat Covid-19 differently from other diseases in general circulation; the position of the boundary between exposure from mere presence at work on the one hand, and work-related exposure on the other hand is unclear.

For most employers, a risk of exposure to Covid-19 is not created by its work activities; it is a disease common in the community to which employees are similarly exposed outside of work. Accordingly, there may be challenges to the use of health and safety legislation to address Covid-19 risks.

There is, of course, a pressing need for there to be regulation in place to control the risks of the current pandemic. However, the existing legislation sets the compliance bar high with stringent penalties in default and does not appear to have been previously used in this way. Employers will reasonably worry that with governments around the world struggling to respond coherently to the pandemic, they may be viewed unduly harshly with the benefit of hindsight.

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If enforcement action is considered appropriate, an HSE inspector can issue an improvement notice or a prohibition notice. An improvement notice requires contraventions to be remedied within a specified period. A prohibition notice can only be served if there is a risk of serious personal injury and requires the relevant activities to be ceased until the situation is rectified, potentially leading to temporary closure. The contravention of an enforcement notice is an offence and can result in prosecution.

Enforcement notices can be appealed to the Employment Tribunal and we may see challenges, for example based on the evolving understanding of the risks posed by Covid-19.

If convicted of the main health and safety offences under the Act, corporates face a maximum penalty of an unlimited fine. If offences by corporates are committed with senior officers' consent or connivance, or are attributable to their neglect, these individuals themselves can be fined or imprisoned for up to 2 years.

Employers could also be prosecuted for corporate manslaughter. Under the Corporate Manslaughter and Corporate Homicide Act 2007, an organisation is guilty of an offence if the way in which its activities are managed or organised causes the death of a person and amounts to a gross breach of a relevant duty of care. The way in which its activities are managed or organised by its senior management must be a substantial element of the breach. Individuals cannot commit the offence of corporate manslaughter, but senior officers and other individuals remain liable of being prosecuted for gross negligence manslaughter.

The HSE's comments to date are indicative of a measured enforcement approach, at least initially. During a Work and Pensions Committee hearing in May 2020, the HSE indicated that employers were being given the opportunity to correct mistakes through informal advice. Following the hearing, the HSE confirmed that only two improvement notices and no prohibition notices had been served.

However, attitudes can change over time and with external pressure. For example, there were recently demands for Tönnies' factory in Germany, Europe's largest meat-processing plant, to be held to account after 1,500 of its workers contracted Covid-19 in a mass outbreak. The public and businesses in a region which, for example, needs to return to stringent lockdown measures are likely to be vociferous in demanding action. Indeed, the HSE is already facing pressure from the Department for Work and Pensions to *"send a clear message to the public that raising concerns with HSE does result in action against employers where necessary".* In addition, consistency between the regulatory authorities is a concern.

The HSE is liaising with PHE and would appear to have more readily available expert input; local authorities have responsibilities for enforcing the legislation in lower-risk workplaces but they are less equipped but resourced.

It may be said that the courts will ensure that correct decisions are made. However, challenging an enforcement notice or defending a criminal prosecution is a time-consuming and costly process, which businesses particularly need to avoid at this challenging time.

Bearing in mind all the present circumstances, an influx of Covid-19-related enforcement action, particularly for companies acting reasonably and attempting to follow the available guidance, is considered unlikely. However, the likelihood may rise over time. Whilst companies and individuals are exposed to the risk of prosecution, it is presently anticipated that prosecutions will generally be reserved for the most egregious cases, for example where guidance and warnings have been deliberately ignored and large numbers of people have been affected.

Richard Reichman is a Partner specialising in corporate crime, financial crime and regulatory investigations. He has extensive experience in a broad range of regulatory offences, such as health and safety (generally following major or fatal incidents), environmental, food safety, fire safety and trading, as well as financial offences such as fraud, bribery, insider dealing and money laundering.

rreichman@bcl.com

Sihana Cara is a legal assistant in the Corporate Crime & Regulation Team. She has been involved in FCA and EA investigations concerning market abuse and environmental crime.

scara@bcl.com

Are jury trials in Crown Courts going to become a virtual or a distant reality?

Ellen Peart and **Daniel Jackson** review the future of jury trials in England and Wales as a result of the Covid-19 pandemic.

> It has been suggested that defendants should be able to decide to be tried by a judge alone, in a similar way that that defendants can elect crown court trial for *either* way offences. The LCJ has commented that he believes this to be worthy of consideration by policymakers to legislate.

In March 2020, new and ongoing jury trials were halted in England and Wales by the Lord Chief Justice ('LCJ') until they could be conducted safely, due to the Covid-19 pandemic.

We represented a defendant in the first new trial to commence at the Central Criminal Court on 18 May 2020 under the new safety measures, which concluded on 28 May 2020 and resulted in our client's acquittal.

As Crown Courts endeavour to comply with the necessary safety requirements, much focus has been on the extensive backlog of cases, and how the crown courts are going to address this issue.

We consider the proposals being discussed and provide an insight into our first-hand experience of a functioning Crown Court during these extraordinary times.

A brief history

The long tradition of a jury trial has grown over centuries in England and Wales; the English jury has its roots in two institutions that date from before the Norman conquest of England in 1066, namely the 'inquest' and a 'jury of accusation'.

It was in the 12th Century that Henry II took the significant step in developing the jury system that we know today when he set up a system to resolve land disputes involving juries (comprising 12 men), however, it was the Roman Catholic Church's removal of support for 'trial by ordeal' in 1215 that pressed for the development of the jury in its contemporary form.

The earliest Juries Act was in 1825, and it was not until 1920 when women first served on juries in England.

During the Second World War, the Administration of Justice (Emergency Provisions) Act 1939 authorised trials with only seven jurors, except in cases of treason or murder, in order to accommodate for the pressures of national conscription.

Of note, Crown Courts were not actually established until 1956. As legislated in section 17 of the Juries Act 1974, there are to be 12 jurors at the start of any Crown Court trial, permitting the reduction to a minimum of nine throughout the course of a trial.

The coronavirus outbreak - new jury trials suspended

It is reported that the first confirmed cases of coronavirus in the UK were on 31 January 2020. This led to an early spread in February 2020, and by early to mid-March we saw closures and cancellations across the UK.

On 13 March 2020, HM Courts & Tribunals Service ('HMCTS') responded to the public health emergency by confirming that they were 'working hard to keep our justice system functioning'.

With a public 'lockdown' being announced by the Prime Minister on 23 March 2020, the LCJ confirmed: *'My unequivocal position is that no jury trials or other physical hearings can take place unless it is safe for them to do so. A particular concern is to ensure social distancing in court and in the court building.'* The message conveyed that no new trials were to start, efforts to bring existing jury trials to a conclusion should continue and, if it was necessary, part-heard trials should be adjourned for a short period to put those safety measures in place.

In April 2020, concern started to increase at the mounting backlog of cases, and the LCJ referred to the fact that 'radical measures' might be necessary, such as limiting the number of jurors to seven (as occurred during the Second World War) or moving cases to larger buildings (such as university lecture halls). As a result, the judiciary formed a 'working party' with The Law Society and Bar Council to assess potential ways to restart jury trials if social distancing measures were to continue.

Exploring virtual jury trials

In April-June 2020, JUSTICE, a law reform and human rights organisation, tested whether technology could support virtual jury trials, particularly if they could be fair and efficient. The organisation reported that the mock virtual trials showed 'promise', but also acknowledged that 'some trials will not be suitable for the virtual court'.

Many of those involved in the virtual mock trials would no doubt point out the irrefutable benefits, such as not having to battle the morning rush-hour traffic to get to court for a 10am start, but there are fears that any advantages would be outweighed by the disadvantages, one shortcoming being the lack of jury engagement.

Those lawyers who spend their working day staring at a screen will know how exhausting that can be - imagine having closely to assess the facial expressions of witnesses who appear smaller than the screen on your mobile phone. A respected source who was involved in one of the mock virtual trials described it as a *'migraine-inducing nightmare'.*

Jury trials resumed

On 11 May 2020, the LCJ determined that new jury trials could start in a few courts in the week commencing 18 May 2020 under special arrangements to maintain the safety of all participants in line with Public Health England and Public Health Wales guidelines. The LCJ similarly supported the recommencement of adjourned trials where this could be done safely.

The first courts in which new juries could be sworn included the Central Criminal Court and Cardiff Crown Court. Our client's trial was originally due to be heard at the Central Criminal Court on 14 April 2020 and had previously been vacated on 25 March 2020. We received communication from the Central Criminal Court on 11 May 2020 to advise that our case had been identified as suitable to commence on 18 May 2020, subject to the availability of counsel, the defendant and witnesses.

We had only a week to ready ourselves for trial, having previously expected the case to be heard later in the year after it was vacated and next due to be listed for a Pre-Trial Review hearing on 19 May 2020.

From the announcement by the LCJ on 11 May 2020, we were aware that arrangements were due to be in place to allow appropriate social distancing to be maintained at all times, including providing a second courtroom linked by CCTV (to enable reporters and others to watch the proceedings), and another courtroom to use for jury deliberations. Further, court staff would ensure that entrances and exits were carefully supervised, and that all necessary cleaning took place. The trials would be conducted under the same legal standards and procedures as before the Covid-19 pandemic, with 12 jurors.

In advance of the trial, we obtained a 'checklist' published by HMCTS on 15 May 2020 entitled *'Our commitment to running jury trials safely',* which included a table setting out commitments and requirements to keep everyone involved safe.

During the trial at the Central Criminal Court, everyone was expected to remain two metres apart as they entered the building and passed through security; hand sanitiser was available and expected to be used; and security at the entrance wore face masks and rubber gloves. Once persons had passed through security, jurors were directed to take a seat, no less than two metres apart from each other, outside the designated courtrooms.

As we had previously contacted the court to pre-book a conference room, we attended the court office to obtain the key to the room. Unfortunately, the room was too small to perform the recommended social distancing (as we had been forewarned) and was located on the third floor, whereas our court was located on the ground floor. There was also an absence of the allocated room being cleaned to the standards that one would expect following the public health guidance. As the court was not busy with other cases, when we (the defence team) needed to speak privately, we tended to gather in quiet areas of the court building on the ground floor.

To the surprise of most, a jury was empanelled, and no one from the jury pool expressed any concerns about the need to travel to or be at court for the duration of the trial. We started with 12 jurors and ended with the same 12 jurors. It was evident that efforts had been made to communicate with those expected to attend for jury service in advance of their arrival for the first day, with a large number of people identified and asked to attend court.

A lot of emphasis seemed to be placed on the jurors during the trial, specifically how they entered/exited the courtroom, where they were positioned, and their daily travel needs. Although others in the courtroom were expected to be positioned two metres apart, this seemed to become more relaxed as the trial progressed.

Due to the availability of two prosecution witnesses, their evidence was given by way of video link from what appeared to be their home addresses. Ordinarily they would have been expected to give live evidence in court or be located somewhere else in the court building to give evidence through a live link following a successful application for special measures.

Although the trial lasted longer than expected (seven days instead of four) largely down to shorter sitting days because of the availability of prosecution witnesses, justice prevailed, and our client was acquitted of the charge. We felt that the jury listened carefully to the evidence and were not distracted by fact that they had been summonsed for jury service during a pandemic or were noticeably uncomfortable about the environment they found themselves in and/or their own personal safety.

As our client's legal representatives, we were conscious of the safety measures that were in place and of the need

to practice social distancing, where practicable. However, our sole focus was to continue to provide the best possible service to our client.

What next?

The backlog of criminal cases waiting to be heard was already at a two-year high of 37,500 at the start of 2020. In June 2020 it was reported that the backlog in crown court cases stood at 41,000. This is of huge concern, but what of the magistrates' courts, where figures of cases 'waiting' are close to 500,000?

There has been wide-ranging discussion from all corners of the legal profession about potential resolutions to clear the backlog in Crown Court cases. As raised by the LCJ in March 2020, juries with lesser numbers and the use of public buildings as courtrooms (referred to as 'Nightingale' courts) would likely assist to lessen the caseload.

Other possibilities include 'judge-only trials' (a judge and two magistrates – as is the case with appeals against conviction from the magistrates' courts) for 'less serious' Crown Court cases. Obviously, there are presently limited circumstances where a Crown Court trial can proceed in the absence of a jury, such as in cases of suspected jury tampering and some complex frauds, but these are few and far between. How would the policymakers measure the seriousness of an offence when dictating the need for a jury? This is arguably an impossible task.

It has been suggested that it should be left to defendants to decide whether they wish to elect trial by judge-alone, in a similar way that they can elect to be tried in the Crown Court for either-way offences. The LCJ has commented that he believes this to be worthy of consideration by policymakers to legislate, but only for a 'short time'.

In June 2020, the Lord Chancellor and Secretary of State for Justice Robert Buckland QC MP commented that temporary legislative changes could be 'imminent' to permit trials without juries, specifically for either-way offences. He also suggested that trials involving a judge and two magistrates would potentially only apply to cases where the maximum sentence available is two years' imprisonment. Other information relayed by the Lord Chancellor indicated that longer sitting hours and opening courts at weekends were also being considered as options to reduce the backlog. An increase in sitting hours or weekend courts is an unpopular move with the London Criminal Courts Solicitors' Association and other bodies, who are campaigning for more sensible alternatives to assist tackling the backlog of cases. Many legal professionals will recall the efforts to fast-track court cases following the London Riots in 2011.

At the beginning of July 2020, HMCTS published a progress update on its recovery plans, which set out the 'building blocks for recovery' for the short and medium term. Expanding on the above, the Lord Chancellor said he had identified 10 additional sites for 'Nightingale' courts; was looking at whether courts would need to stay open for longer; new technology being rolled out across all courts; and exploring means of getting jury trials moving at pace once more.

The HMCTS update document included plans to: complete reopening of all staffed and suspended courts; start to operate in some alternative venues and then rolli out to further alternative venues; start to have expand operating hours of Crown Courts to increase the number of sittings and then expand extended operating hours to support coronavirus recovery; completing CVP roll out into all Crown and magistrates courts; and maximising judicial capacity including the full use of fee paid judiciary.

In our view, the prospect of juries with less than 12 members and the use of other suitable buildings to hold trials are realistic options to aid the backlog of cases. Talk of abandoning the jury system for certain 'less serious' offences and having 'judge-only trials' would be, in our view, a mistake and illogical. When defendants elect to have their trial before a jury in theCrown Court, it is an important decision because the large proportion of people facing a criminal allegation and prospect of a trial take the whole process and their own case very seriously indeed.

Particular safeguards that could be implemented if the size of juries were reduced to seven could be the removal of majority verdicts, and requiring unanimous verdicts in all cases where 12 jurors are not permissible. Bearing in mind that offences of treason or murder were excluded during the Second World War, the policymakers might also consider that offences carrying sentences of life imprisonment would also merit exclusion from any temporary legislative changes.

We should remember that when jury trials resumed in some courts under the new safety arrangements in May 2020, the Judiciary reiterated that *'the practice of trial by jury sits at the heart of our criminal justice system'*, and of course famously for Lord Devlin, trial by jury was *'the lamp that shows that freedom lives*'.

Ellen Peart is a partner specialising in serious and general criminal matters representing individuals facing allegations of sexual offences, assault, homicide, dishonesty, harassment, firearms and computer misuse. She often represents high-profile individuals and is sensitive and experienced in dealing with reputation management issues.

epeart @bcl.com

Daniel Jackson is an associate specialising in serious and general criminal litigation. He has extensive experience of acting for individuals being investigated and prosecuted for sexual, dishonesty, violence, drugs and road traffic offences. Daniel defends professional clients facing high-profile and complex criminal matters. He regularly provides expert legal advice and assistance to those being interviewed under caution by the police and other investigatory bodies.

djackson@bcl.com

Social media regulation: a new champion steps up

Julian Hayes and **Greta Barkle** discuss how social media platforms are used by fraudsters, the criminal sanctions already available to tackle the problem, and how regulators are joining forces to clean up the online space.

> The CMA will be armed with new powers to seek 'online interface orders' from the courts to force website operators to remove online content, display warnings to consumers and disable or restrict access to online platforms.

When President Donald Trump issued his now infamous tweet threatening military force against Black Lives Matter protesters, few would have predicted the vehement ensuing corporate backlash. But with household names including Coca-Cola, Starbucks, Ford and Diageo leading the flight, hundreds of firms withdrew their advertising from Facebook in protest at its stance towards misinformation and hate speech. While the advertising boycott forced concessions from the social media giant, regulatory change was already underway across the world, including the UK where the Government has restated its commitment to rein in misinformation and other online harms. Despite pleas from financial institutions, politicians and law enforcement, however, economic harms will be excluded from forthcoming UK measures. Partially addressing this gap, the UK's Competition and Markets Authority ('CMA') has now stepped into the hotly contested debate over social media regulation.

In response to a rising tide of illegal and harmful internet material, established models of online regulation are under review in many countries, and the 'safe harbours' enjoyed by tech companies against liability for material posted by others on their platforms are in the legislators' sights With potentially Europe-wide consequences, the European Commission too has launched a consultation on a proposed Digital Services Act, hinting heavily at increased accountability of online platform providers whose sites have become de facto public spaces in the online world.

In the UK, the Government is facing increasingly shrill calls to bring forward its long-awaited draft online harms legislation.

The Minister of State for Digital and Culture has insisted that there is no delay to the proposals and that the Government's ambition is to bring a Bill forward and hold pre-legislative scrutiny in the current Parliamentary session. Yet giving evidence to the Home Affairs Committee, the Minister defended the exclusion of economic harms from the scope of the 2019 Online Harms White Paper on the grounds that other work was underway addressing this problem and the Government wished to avoid creating a legislative behemoth. Nevertheless, the increasing prevalence of cyber-enabled economic crime (traditional crimes whose scale or reach is augmented by information communications technology) has led many, including the National Crime Agency and Action Fraud, to call for its inclusion within the scope of the harms from which online providers should be duty-bound to keep their users safe.

Cyber-enabled economic crime on social media takes various forms but often involves misinformation of some kind. It includes sports stars and celebrities surreptitiously buying armies of fake 'bot' followers on Twitter, LinkedIn and other platforms, falsely inflating their apparent worth as 'influencers' to secure more lucrative bookings and endorsement deals. It also includes shadowy, share-price shifting disinformation campaigns against corporate rivals using false social media accounts like that discovered by Facebook in February 2020 implicating several major South East Asian telecoms providers. More prosaically, cyber-enabled economic crime also takes in fake positive reviews online, covering everything from consumer goods to top-ranked restaurants.

With estimates suggesting £23 billion of UK consumer spending is influenced by online reviews, the potential to mislead

is huge, with consumer group Which? last year attacking TripAdvisor for failing to do more to tackle "blatantly" phoney hotel reviews. In 2018, Italian courts jailed the owner of one company selling fake review packages to Italian hospitality businesses.

Specific UK consumer regulations already exist criminalising misleading commercial practices such as false or untruthful endorsement of traders or products and, subject to due diligence and innocent publication defences, those publishing such endorsements also risk prosecution. More generally, those involved in dishonestly making false online representations for profit could face fraud charges. Theoretically, at least, online platforms which become aware that they are hosting fraudulent reviews but take no action could fall under suspicion of assisting the perpetrators under the Serious Crime Act 2007. Importantly, the safe harbour immunity which they normally enjoy as "mere conduits" of such material would not protect against such allegations. However, establishing corporate liability in England & Wales is notoriously difficult and prosecutions for it are rare.

Against this background, the CMA has now entered the field as the consumer's champion. Although at first blush an unlikely regulator of the digital world, in fact the increasing dominance of a small cohort of tech titans has long attracted competition authority attention both here and overseas. In June 2019, the CMA opened a consumer enforcement case into the communications sector following concerns over fake and misleading online reviews, and swiftly secured the agreement of Facebook and eBay to crack down on false material which had gone undetected on their platforms. The CMA has now followed up with a further investigation of whether major websites displaying online reviews are taking sufficient measures to protect consumers from fake and misleading write-ups.

To assist it, the CMA will be armed with new powers to seek 'online interface orders' from the courts to force website operators to remove online content, display warnings to consumers and disable or restrict access to online platforms. Online interface orders may be granted where there is a serious risk to collective consumer interests and there is no other means of stopping or preventing breach of specific legislation, including provisions targeting misleading advertising. Interim orders may be sought without notice where a breach is anticipated.

Cementing its credentials as a regulator in the digital sphere still further, on 1 July 2020, the CMA published its detailed findings after conducting a year-long market study of online platforms and digital advertising. The report calls for a new regulatory regime to promote online competition and announced the teaming-up of the CMA, the Information Commissioner and the future online harms regulator, Ofcom, to create a Digital Markets Taskforce to advise on how a new regulatory regime for digital markets might be designed.

Setting a punishing timetable, the new Taskforce aims to deliver its advice to the Government by the end of 2020. By that time, though, it may be jockeying for attention with a crowded field of priorities, including the end of the Brexit transition period and a predicted second wave of Covid-19 infections.

And with the Secretary of State for Culture, Media and Sport expressly looking to the £149 billion digital sector to create jobs and power the UK out of the coming recession, there are suspicions that the Government will be reluctant to toughen digital regulation if it jeopardises inward investment into the UK tech industry. Facing such countervailing economic and regulatory crosswinds, we will soon learn where the Government's true priorities lie in the online sphere.

Julian Hayes is a partner specialising in corporate crime, financial offences, and information law including computer misuse, data protection and surveillance. He advises individuals and corporates in relation to fraud and corruption investigated by the SFO, enforcement action by the FCA (insider dealing and market abuse) and investigations by the CMA for breaches of competition legislation. As well as expertise in relation to cybercrime, Julian also specialises in advising data controllers and others in relation to the Data Protection Act 2018, the GDPR (including breach reporting) and Communications Service Providers as regards their obligations under the Investigatory Powers Act 2016 and the forthcoming Crime (Overseas Production Orders) Act 2019.

jhayes@bcl.com

Greta Barkle is is a New Zealand qualified lawyer specialising in corporate and financial crime, regulatory investigations and Interpol matters. Greta regularly advises clients in relation to fraud and corruption investigations by the SFO and criminal investigations into tax avoidance and evasion by HMRC. She is experienced in having Interpol red notices removed. Greta also has particular expertise in large scale, cross-border commercial litigation matters.

gbarkle@bcl.com

Is the UK starting to get tough on Russian money?

John Binns discusses the recent headlines that have focused on whether the UK Government's new sanctions regime is doing enough to tackle 'dirty' money from Russia. But is this even the right question to ask?

> Once a country has been listed as high-risk, it does require banks and others in the regulated sector to apply enhanced due diligence measures on any transactions with individuals and entities based in such countries.

An agenda against Russian wealth?

The UK's new Global Human Rights Sanctions Regulations 2020 have been heralded as our equivalent of US' and other countries' 'Magnitsky laws' – a way of imposing asset freezes and travel bans on the perpetrators of human rights abuse and corruption, named for the lawyer who died in prison after investigating offences in the Russian public sector. Perhaps not coincidentally, they were announced in the same month that a long-delayed report from Parliament's Intelligence and Security Committee ('ISC') was finally published, calling attention to (among other things) the threat of tainted Russian assets being spent and laundered here.

Predictably, press coverage of the two issues has been focused on the perceived deficiencies of government action. It has also helped to stoke burgeoning anti-Russian sentiment, mixed with long-standing suspicions about interference in elections. But the reality about the use of sanctions to tackle Russian money is more complicated that the coverage implies.

What can proceeds of crime and sanctions laws do?

As a means of freezing the assets of people accused of wrongdoing, the new 'Magnitsky' Regulations are of course not without precedent. The EU sanctions regimes, by which the UK is still bound, impose asset freezes and travel bans on a variety of targets. In the UK, the Anti-Terrorism, Crime and Security Act 2001 ('ATCSA') allows sanctions to be imposed where individuals outside the UK pose a threat to the life of one or more UK residents.

The Proceeds of Crime Act 2002 ('POCA'), meanwhile, allows the restraint of assets belonging to criminal suspects, and the civil freezing and recovery of property that represents the proceeds of unlawful conduct (even without a criminal case). It also provides for various investigative powers, including Unexplained Wealth Orders ('UWOs'). Notably, though, the civil scheme cannot target the proceeds of crimes that took place over 20 years ago.

The use of sanctions against Russian targets

A number of measures have been taken under these various laws that target Russians in particular. Since 2014, EU sanctions have targeted a number of individuals and entities said to be involved in the annexation of Crimea. Since 2016, the UK has used ATCSA to impose unilateral sanctions against the suspected killers of Alexander Litvinenko. Since 2018, an EU sanctions regime targeting the use of chemical weapons has included targets said to be associated with the Salisbury attack on Sergei and Yulia Skripal. And in 2020, Russian targets were among those named in the EU's new sanctions regime aimed at the perpetrators of cyber-attacks.

The new UK Regulations are targeted against a broad range of people that ministers 'reasonably suspect' of being associated with violations of the most fundamental human rights (the rights to life, and to be free of torture or forced labour). Over half of the first set of targets are Russians, said to have been associated with the mistreatment and death of Sergey Magnitsky himself.

Russians and 'unexplained wealth'

Significantly, though, in contrast to other countries' equivalents, the UK's 'Magnitsky' law does not itself target corruption. The ISC Russia report endorsed a criticism of this approach from the National Crime Agency ('NCA'), which also criticised UWOs as a problematic tool to tackle Russian wealth – specifically, because the response from potential Russian targets would often be that their wealth was very fully explained, due to a long-standing audit trail.

On the face of it, of course, this latter criticism is somewhat strange: why should POCA tackle wealth that has been adequately explained? The thinly veiled implication is surely that the explanations are false, and that somewhere under the audit trail is an original offence, perhaps some time ago, for which the evidence is hard to find. A similar scepticism is to be found from critics of political donations from 'Soviet-born' individuals, even those who have fled Russia as refugees, and have since acquired UK citizenship.

An anti-Russian crusade?

There is undoubtedly a risk here of anti-Russian prejudice. Not everyone who was born in or near Russia is an ally of President Putin; nor should an association with Russia trigger negative assumptions that a person's assets are the proceeds of crime. Much of the rhetoric about the new Regulations and the ISC Report has veered towards a crusade against Russian wealth in general, which is neither warranted nor a fair description of what either the Regulations or the Report are trying to do.

The other risk, in calling for ever broader powers and regimes, targeting ever more people, is that laws are strengthened on paper, but hardly ever used or enforced. The NCA's lack of resources to bring cases under POCA was another problem identified by the ISC report. If there are indeed high-end London properties that have been bought with laundered money, from Russia or elsewhere, then it is axiomatic that the NCA should be adequately resourced to investigate them.

An attractive option?

In the absence of adequate resources to investigate under POCA, a strategy of using sanctions regimes and designations to be seen to do something about 'dirty' Russian money may seem attractive to UK ministers. Not only would it attract positive press coverage, but the cost would largely be borne not by law enforcement but, in effect, by the private sector - the vast general population of UK individuals and businesses that are obliged to comply with sanctions laws.

That approach would, however, be short-sighted in the extreme. Unlike the EU sanctions regimes, UK sanctions have an effective system of challenge and court reviews, which will enable anyone who is unfairly targeted to test the evidence that ministers' suspicions about them are 'reasonable'. That, if not a basic commitment to justice and due process, should help make ministers think twice about over-using these new Regulations, whether against Russian targets or more generally.

John Binns is a partner specialising in all aspects of business crime. He has particular expertise in the myriad legal provisions of the Proceeds of Crime Act 2002, and regularly advises suspects and third parties affected by restraint and confiscation orders. He is also experienced in advising on the Act's provisions on civil recovery, money laundering and investigative powers, and on related areas such as the obligations of the regulated sector under money laundering regulations, terrorist financing, and financial sanctions. He regularly represents suspects, defendants and witnesses in cases invoking allegations of bribery and corruption, fraud (including carbon credits, carousel/MTIC, land-banking, Ponzi and pyramid scheme frauds), insider trading, market abuse, price-fixing, sanctions-busting, and tax evasion. He has coordinated and undertaken corporate investigations and defended in cases brought by BEIS, the FCA, HMRC, NCA, OFT, SFO and others.

jbinns@bcl.com

Private prosecutions: a blurred line between recovery of damages and public justice?

Anoushka Warlow and **Cindy Laing** discuss the safeguards surrounding the use of private prosecutions and their role in obtaining damages.

> The jurisprudence has arguably opened the gates of the criminal courts to private claimants seeking a low-risk mechanism for obtaining compensation for damages.

On 7 July 2020, the House of Commons Justice Committee heard evidence in connection with its inquiry into whether there are enough safeguards in place to prevent miscarriages of justice in private prosecutions. The inquiry followed a request made by the Criminal Cases Review Commission ('CCRC') arising out of concerns surrounding the safety of convictions secured in private prosecutions conducted by the Post Office.

Since 1999, the Post Office has privately prosecuted around 900 of its sub-postmasters and counter staff for, primarily, offences of theft, fraud and false accounting based on evidence emanating from its 'Horizon' computer system. However, it is now clear that, amongst other problems, Horizon was liable to technical errors which gave the appearance of accounting shortfalls. Notwithstanding these known issues, the Post Office continued privately to prosecute individuals seemingly without investigating or providing disclosure concerning the essential fallibility of the primary evidence relied upon.

When referring 47 of the resulting convictions for appeal earlier this year, the CCRC stated: *"...in the context of [the Post Office's] combined status as victim, investigator and prosecutor of the offences in question – the CCRC considers that there are reasons for significant concern as to whether [the Post Office] at all times acted as a thorough and objective investigator and prosecutor..."*.

Sufficient safeguards

Any individual or company has the right to bring a private prosecution. That right, now found within section 6 of the Prosecution of Offences Act 1985, has long been justified as a 'historical right' which acts as a *"useful constitutional safeguard against capricious, corrupt or biased failure or refusal of authorities to prosecute offenders against the criminal law"* (Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435). More recently, private prosecutions have been cited as an important remedy for victims who find that public authorities, as a consequence of financial cutbacks, are unable to investigate or pursue crimes committed against them.

Whilst the Justice Committee's inquiry will focus on cases brought by large organisations, any private prosecution carries by nature an inherent risk of unfairness to a defendant. A private prosecutor will almost by definition have a personal interest in the outcome of the case. That personal interest may result in prosecutions being pursued for improper purposes, may affect a private prosecutor's ability to pursue all reasonable lines of enquiry (including those pointing away from a defendant) or to comply with fundamental disclosure obligations. Put simply, the objectivity and impartiality of a state prosecution will be absent in every case.

When considering the safeguards available to counter these risks, the Justice Committee's attention was brought to the recent Code of Conduct (the 'Code') published by the Private Prosecutors' Association which provides a benchmark of best practice for all participants in the private prosecution process. The Code reminds private prosecutors (and their representatives) that they are Ministers of Justice *"required to observe the highest of standards of integrity and of regard for the public interest"*. Whilst compliance with the Code is not mandatory, and is in any event open

to potential abuse insofar as there will always remain an element of trust in the private prosecutor, there are significant costs consequences for those who proceed improperly.

Whilst its findings are awaited, the Justice Committee may well (and reasonably) conclude that adherence to the Code, together with the instruction of competent legal representatives and the ability of the DPP to take over where appropriate, offers sufficiently robust protection against potential unfairness. Perhaps, however, the more fundamental question is whether private prosecutions are increasingly being permitted for the wrong reasons, thereby fulfilling a function for which they were never intended.

Criminal justice as a means to obtain damages

The criminal justice system is concerned with the guilt or innocence of a defendant, and if guilty, their punishment, whereas the civil courts seek to remedy wrongs suffered by injured parties.

As such, an individual or company seeking to recover misappropriated sums would ordinarily be expected to seek redress via civil proceedings. Such proceedings are not without risk: most significantly, the costs liabilities that may arise if the proceedings fail. However, a private prosecutor:

- has the right to seek a compensation order: *R v Somaia* [2016] EWCA Crim 2267;
- is permitted to have 'mixed' motives in commencing proceedings (including in relation to compensation). It is only where a motive is 'oblique', i.e. so dominant and so unrelated to the criminal proceedings that it renders them an abuse of process: *R (G) v S and S* [2017] EWCA Crim 2119; and
- is able, even in the event of an acquittal, to recover investigation and legal costs reasonably incurred from central funds (i.e. public resources). Recoverable costs are not limited to those which the CPS would have incurred had it brought the case: *Fuseon Limited v Senior Courts Costs Office* [2020] EWHC 126 (Admin).

Whilst a prosecution commenced for the sole reason of obtaining a compensation order may be improper, a prosecution commenced with financial recovery as its primary motivation may be permissible so long as the prosecutor can also argue, for example, that his motivation is allied with the public interest in seeing criminals brought to justice and deprived of the proceeds of their offending. That is not a particularly difficult hurdle.

The above jurisprudence has arguably opened the gates of the criminal courts to private claimants seeking a low-risk mechanism for obtaining compensation for damages, with the costs being met from public resources even in the event of an acquittal. Indeed, private prosecutions – increasingly advertised as a cheaper and more attractive 'alternative' to civil proceedings – are gaining popularity.

Whilst of course victims of alleged wrongdoing should be able to seek compensation, the use of the criminal justice system for this purpose is far removed from the original justification for private prosecutions as an important constitutional safeguard against inactivity or partiality by the state.

When viewed from the easily-forgotten perspective of a defendant who, even if acquitted, may face devastating consequences and will be able to recover only a fraction, if anything, of their defence costs, the Justice Committee may wish to consider whether private prosecutions continue to perform a necessary function, or whether the focus should instead be on ensuring that public authorities are properly resourced to investigate and prosecute all cases of criminal wrongdoing.

Anoushka Warlow is a solicitor at BCL specialising in corporate and financial crime, principally cases involving international bribery and corruption, commercial fraud, and money laundering. Anoushka advises both individual and corporate clients and has been involved in a number of high-profile domestic and international investigations conducted by the SFO, the U.S Department of Justice, HMRC, the FCA and the NCA.

awarlow@bcl.com

Cindy Laing is a solicitor specialising in business crime and serious and general crime. Cindy has had particular experience in advising high-profile individuals facing complex criminal investigation and prosecution for sexual offences brought the CPS, as well as fraud, bribery and corruption offences brought by the SFO and the FCA.

claing@bcl.com

An overview of HMRC's approach to tax fraud

Harry Travers, **Greg Mailer** and **Umar Azmeh** review HMRC's approach and argue that its failure to produce meaningful statistics should not mask the fact that it is criminally prosecuting low-hanging fruit.

As a result of the Covid-19 pandemic, income to the Exchequer has been hugely reduced due to a combination of unemployment, tax deferrals, and the absence of penalties resulting from investigations.

Introduction

In common with all other areas, the overwhelming focus of the industry this year has related to the impact of the Covid-19 pandemic. In April 2020, HMRC announced that it would largely suspend tax avoidance investigations, partly to allow its investigators to focus on managing the government Coronavirus Job Retention Scheme (the furlough scheme), along with dealing with taxpayers who needed additional time to settle outstanding tax bills. As a result of the Covid-19 pandemic, income to the Exchequer has been hugely reduced due to a combination of unemployment, tax deferrals, and the absence of penalties resulting from investigations. By the middle of the year, UK tax receipts had decreased by approximately 50% at the same time as the budget deficit rose from a forecasted £55bn to a record £370bn. In June 2020, HMRC announced that it would be resuming its investigations.

Over the last fifteen years the tax gap has been steadily closing, falling from 7.5% in 2005/6 to a record low 4.7% in 2018/19, when more than 95% of tax due was paid. However, this downward trend will clearly be halted by the Covid-19 pandemic. Accordingly, it is highly likely that the next year will see HMRC significantly intensify its focus on tax avoidance and evasion in order to close the huge gap in the public finances. It is anticipated that there will be an increase in profitable settlements, particularly under the Contractual Disclosure Facility ('CDF')/Code of Practice 9 ('COP9'). Additionally, it is inevitable that HMRC's criminal investigation teams will be required to address the criminal activity that will no doubt flow from the Covid-19 pandemic itself. For example, HMRC has set up an online facility for the public to report suspected abuse of the Job Retention Scheme, in respect of which HMRC's CEO Jim Harra expressed concerns about the potential for fraud. The next year will almost certainly see a consequent increase in tax enquiries and reviews, followed by criminal investigations, COP9 enquiries and prosecutions.

HMRC Process and Procedure

In the meantime, the Covid-19 pandemic has also impacted upon a number of proposed tax measures, including a power evaluation exercise which was due to take place during 2020. In December 2018, the House of Lords published a report into HMRC's powers, titled "Treating Taxpayers Fairly". In response to that report, in mid-2019, HMRC published a written statement regarding its powers and taxpayer safeguards. It expressed a wish to address some of the issues raised in the House of Lords report, and to focus on its commitment to increasing transparency and enhancing public trust by publishing more data and information about the exercise of its powers. In November 2019, HMRC published some data, including the number of closed civil and criminal compliance checks, total prosecutions and criminal sentences, as well as the outcomes of court decisions. Further data is also contained within its annual report. In 2020, a "Deep Dive" was due to take place in order to evaluate HMRC's transparency efforts; however, the Covid-19 pandemic has delayed that process.

The data provided by HMRC is at a very high level: it is difficult to discern from the information provided whether HMRC's powers are being used appropriately or fairly. Basic figures are provided setting out the number of prosecutions, charging decisions, custodial sentences, closed criminal

investigations, closed compliance checks, and wins and losses in the tribunal. However, much more detail would be required to be able adequately to assess the use by HMRC of its powers. In particular, there is no analysis as to the nature of the convictions. Practitioners have long suspected that the number of HMRC prosecutions has been inflated by the prosecution of a raft of cases that are both less serious and more easily proven. This approach is intrinsically unfair. HMRC operates a (published) selective criminal investigation policy, supposedly reserving criminal investigation *"for cases where HMRC needs to send a strong deterrent message or where the conduct involved is such that only a criminal sanction is appropriate"*. COP9 is meant to be used for the other cases. There used thus to be a prosecution rather than a criminal investigation policy, which was meant to be selective so that not all cases of tax fraud were prosecuted, and the "criteria of selectivity" were said to be the "badges of heinousness". This approach was upheld by the High Court in *ex parte Mead and Cook* [1993] 1 All E.R. 772. However, since *Mead*, it is apparent that the criteria of selectivity appears to have been all but abandoned, such that the underlying conduct of those subject to COP9 is often far more serious than that of those criminally investigated.

HMRC has more recently indicated that it has started putting more resource into the more serious cases - often involving alleged offshore evasion as well as the (controversial) borderline between tax avoidance and tax evasion. It remains to be seen whether their published data reflects that indication. That said, in July 2020, following Freedom of Information ('FOI') requests, HMRC published some information in that regard in respect of its 2019 figures. In 2019, HMRC investigated 430 sophisticated tax evasion cases, a 26% rise from the previous year. Given the official target set by HMRC in 2019 of 100 prosecutions from criminal investigations into serious and complex tax crime by 2020, transparency and trust would clearly be better addressed if a breakdown as to the type of prosecutions were provided by means other than FOI requests.

Tax offences

The new offence of offshore tax evasion in section 166 of the Finance Act 2016 came into force on 7 October 2017 in respect of tax year 6 April 2017 to 5 April 2018 onward. A little earlier, Part 3 of the Criminal Finances Act 2017 had come into force creating the new corporate offences of failure to prevent the facilitation of tax evasion. It was anticipated that 2020 would see a substantial upturn in the number of corporate investigations, particularly given the target announced in the 2015 budget of tripling the number of complex tax crime investigations by 2020. Under the new offshore evasion offence, taxpayers can be imprisoned for six months for mere carelessness. This is a matter of huge contentiousness, as tax evasion should only ever be an offence of dishonesty.

With regard to the corporate offences, as is well known, it is very difficult for prosecuting agencies successfully to prosecute corporates due to the "identification principle". HMRC's published guidance states that a corporate will be held criminally responsible where it fails to take reasonable steps to prevent associated persons from aiding, abetting, or being knowingly concerned in, the fraudulent evasion of tax by another person. In order to establish a defence to the new offence, the corporate will have to prove on the balance of probabilities that it had "reasonable procedures" to prevent the facilitation.

Following a number of FOI requests, in February 2020, HMRC for the first time released figures as to the number of corporate criminal offence ('CCO') investigations (nine), and the further anticipated investigations (twenty-one). As alluded to above, data regarding the number of corporate criminal investigations would be welcome without the need to resort to FOI requests; it has been indicated that the number of live cases will be published twice a year.

The comparative lack of activity in relation to both the offshore tax evasion and CCO offences is telling. Given the issues outlined above, it does appear that HMRC seems to be somewhat reluctant to use the new legislation, and in the opinion of many practitioners, the offences have no place on the statute books. Significantly, there is no analysis in relation to the use by HMRC of the COP9 procedure. The essence of COP9 is that an individual is told he or she is suspected of fraud but is not told anything about the nature of the fraud that is suspected or the grounds for suspicion. The individual is then invited to "own up" to their "deliberate conduct" within 60 days, in return for which HMRC will not pursue a criminal investigation into that conduct. If the individual makes a disclosure of fraudulent conduct, he cannot therefore be criminally investigated in relation to that conduct. He is, however, vulnerable to criminal investigation in relation to tax irregularities – disclosed or otherwise – which he does not admit are deliberate.

HMRC indicates that in 2019 it raised £3bn from tackling organised crime, but HMRC's published figures do not indicate the amount of tax and penalties that was obtained via civil settlement under COP9/CDF or indeed the proportion of COP9 investigations into suspected tax fraud or deliberate tax evasion that resulted in penalties for deliberate conduct. Many in the industry take the view that COP9 is being used inappropriately in order speculatively to seek evidence of suspected tax irregularities, without there being reasonable grounds for suspecting that tax fraud has been committed. The rationale is that by "shaking the tree", HMRC is often able to receive substantial settlements. Full transparency in relation to the use of COP9 would help to counter that suspicion, and it is hoped again that FOI requests will not be necessary in that regard.

A new and dishonest approach?

The Covid-19 pandemic has also prompted a significant development in relation to HMRC's approach to *'enablers'* who devise and market ineffective tax avoidance schemes. The All-Party Parliamentary Group on Anti-Corruption and Responsible Tax called for new measures to curtail *"aggressive tax avoidance"* facilitated by *'enablers'*, and published a policy paper proposing what they somewhat euphemistically call a *"streamlined"* dishonesty test for criminal prosecutions of tax avoidance, and also a lower threshold for civil penalties.

Under the new *"threshold test"*, the requirement for dishonesty would be removed, and an enabler of aggressive tax avoidance schemes would be guilty *"where it would not be reasonable to consider that the scheme was a reasonable one"* (the 'double reasonableness test').

In her introduction to the paper, Dame Margaret Hodge stated that *"to shoulder the fiscal burden of the coronavirus crisis, we must all pay our fair share. Now more than ever it is essential that we crack down on those that do not. It is absolutely the right time for us to be even tougher on aggressive tax avoidance...The enablers of failed tax avoidance schemes are breaking the law, plain and simple."* It is worth noting that Dame Margaret Hodge (and she is not the first politician to do so) seems deliberately to be blurring the distinction between tax evasion (criminal and unlawful), and ineffective tax avoidance (ineffective for tax purposes, but not criminal).

That paper argues that promoters of aggressive tax avoidance schemes have not been pursued in criminal investigations. However, that is not correct. HMRC has invested huge resources in criminally investigating the promoters of aggressive schemes, for example the Vantis and Montpelier schemes, and certain film schemes, and has obtained convictions in some of these cases. Indeed, the crackdown has been so effective that some in the industry believe that HMRC has intentionally caused even legitimate advisers to be *in terrorem* of promoting avoidance schemes.

To remove the requirement to prove dishonesty from the common law offence of cheating, or conspiracy to cheat, would be a huge step with far reaching consequences possibly in other areas of the criminal law. The mere fact of being criminally investigated can be enough to destroy a person's career. But the idea that one can be guilty of tax fraud or cheating without being dishonest is fundamentally misconceived.

The need for the prosecution to prove dishonesty is a crucial safeguard for an accused. Furthermore, the use of the double reasonableness test could cause serious difficulties because it would be extremely difficult for the jury to understand and apply: if the Crown are to prove tax fraud, they must have to prove dishonesty.

Dame Margaret Hodge, in the foreword to the paper, says that *"without documentary evidence to prove dishonesty"*, enablers *"can insist they believed their schemes would work, and plead innocence"*. From that, the report makes the quantum leap that it should no longer be necessary for dishonesty to be proven. But in fact, dishonesty – if it exists – is typically proved by inference from conduct. The law is perfectly capable of identifying and penalising dishonesty without removing the need to prove that crucial element.

Harry Travers is a Partner at BCL specialising in all aspects of business crime and regulation. His core focus is representing high net worth individuals caught up in financial crime and international corruption and tax investigations. He has substantial experience representing individuals who have been the subject of high-profile fraud and corruption investigations conducted by the SFO, FCA, HMRC, CMA and their foreign counterparts.

htravers@bcl.com

Umar Azmeh is an associate at BCL specialising in business crime, financial crime, and regulatory investigations. He has significant experience of criminal investigations involving money laundering and bribery, and has worked with clients on sanctions, tax, and proceeds of crime issues.

uazmeh@bcl.com

Greg Mailer is a senior associate at BCL specialising in corporate crime, financial crime, and regulatory investigations. He has experience in investigations and prosecutions by the SFO, the CPS, the CMA, the ICO and the FCA. Greg has particular expertise in assisting clients in relation to investigations by HMRC, especially with regard to the issues of tax avoidance and evasion.

gmailer@bcl.com

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BCL Solicitors LLP

51 Lincoln's Inn Fields
London WC2A 3LZ

Telephone +44 (0)20 7430 2277
Fax +44 (0)20 7430 1101
law@bcl.com

www.bcl.com

BCL Solicitors LLP