ARNOLD & PORTER (UK) LLP

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# UK Economic Crime Group

# Enforcement Update

## High Court rules information provided by third parties to SFO can be disclosed to claimants in civil proceedings

Giving judgement in an application brought by the SFO in its ongoing litigation with the Tchenguiz brothers, Justice Eder ruled there was no general bar that could be read into the Criminal Justice Act 1987 (CJA), preventing the SFO from making disclosure of material obtained as part of its criminal investigation to a party to civil proceedings. The SFO has therefore been given the green light to hand over any such material which its own review determines to be disclosable, under the usual civil disclosure rules.

The third parties who had provided the documents to the SFO argued that implicit in the CJA was a requirement that documents provided to the SFO by third parties would not be disclosed in civil proceedings such as these. The third parties expected the documents to remain with the SFO, or at the very most be used as evidence in future criminal proceedings only: section 3(5) of the CJA expressly allows for the use of such documents in criminal proceedings but there is no similar provision dealing with their use in civil proceedings.

This ruling may require that recipients of section 2 CJA Notices consider seeking undertakings from the SFO limiting the use of the material to the criminal proceedings. Such undertakings are commonplace when the SFO seeks evidence from overseas.

The judgment is available at http://www.bailii.org/ew/cases/EWHC/QB/2013/2128.html.

## High Court considers scope of litigation privilege

Justice Eder granted an application made by the Tchenguiz brothers seeking disclosure of five reports prepared by Grant Thornton as liquidator of Oscatello Investments Ltd. These reports were relied upon by the SFO when obtaining its ill-fated search warrants.

The court considered whether any of the documents attracted litigation privilege (advice privilege not being available to documents prepared by accountants). Given that litigation had not been commenced at the time, the question was whether the *dominant purpose* of

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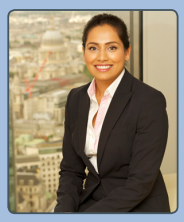

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the documents was to provide advice with regards to litigation that was reasonably in prospect. On the facts, the court found that the liquidators could not assert such privilege.

Whilst this decision does not change the law on litigation privilege or the dominant purpose test, it does provide a helpful reminder that the bar to establishing privilege over such documents is a high one and that the courts will look closely not only at the contents but also at the history and circumstances of any documents when determining whether they may attract privilege.

The judgement is available at http://www.bailii.org/ew/cases/EWHC/QB/2013/2297.html.

## SFO Director supports proposals for legislative change to make it easier to establish corporate criminal liability

Speaking at the Cambridge International Symposium on Economic Crime, David Green QC repeated his support for the idea of introducing an offence, similar in effect to section 7 of the Bribery Act, to cover other forms of offending. The change would make it easier to bring prosecutions against companies whose employees commit fraud for the benefit of the company that employs them.

## Charges brought in LIBOR investigation

In June, former USB and Citibank trader Tom Hayes was charged with eight counts of conspiracy to defraud in relation to his role in the alleged manipulation of LIBOR. This was followed by similar charges against two brokers, Terry Farr and James Gilmour, both formerly of R P Martin Holdings.

Earlier in the year, David Green asked MP's that his SFO be judged on how it handles the LIBOR matter. Despite the continued Tchenguiz fall out – and now the BAE data issue – it will be the SFO's performance in this investigation that will be the measure of its success under David Green.

## Guaranty Trust Bank (UK) fined £525,000 by FCA

Continuing a process that was stepped up in the wake of the FSA's general review of banks and money laundering risk in 2010, the enforcement and financial crime division of the FCA fined Guaranty Trust Bank (UK) £525,000 for failures in its anti-money laundering controls.

Under the leadership of Tracey McDermott a growing number of financial institutions (including RBS, Coutts and EFG Private Bank) have faced enforcement action for breaches of the Money Laundering Regulations or under the Financial Services and Markets Act. We understand that at least two more similar actions are pending. As the FCA's Anti-Money Laundering Annual Report 2012/2013 makes clear, money laundering compliance remains a key part of the FCA's enforcement work. The FCA continues to negotiate at EU level in relation to the Fourth Money Laundering Directive.

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*If you have any questions about any of the topics discussed in this Enforcement Update, please contact your Arnold & Porter attorney or any of the following attorneys:*

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