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Corker Binning
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Welcome to The Knowledge

Welcome to the Winter edition of the Corker Binning newsletter. In this edition, our lawyers examine the challenges confronted by individuals facing criminal exposure in multiple jurisdictions; the presumption that serious criminal sanctions should only result from a guilty mind; the crackdown on reporting money laundering and sanctions breaches; the political neutrality of INTERPOL; and the impact of a recent Supreme Court case on interviews in corporate internal investigations.

Additionally, we have included a seasonal greeting and details of Corker Binning's charitable work from the past year.

Andrew Smith
Editor

Lane & Letts - Unintentionally funding terror and the implications for professionals

Nick Barnard

Consider the following statements:

1. It is wrong to fund terrorism.

2. It is right to criminalise those who intentionally fund terrorism.

3. It is right to expect citizens to take reasonable care to avoid unintentionally funding terrorism.

4. It is right to criminalise those who carelessly albeit unintentionally fund terrorism.

The first three will receive universal approval, but the fourth requires some thought.

Whilst (4) may be an effective means of enforcing (3), it tramples on the presumption that serious criminal sanction should only result from a guilty mind, whether that is characterised as intention, knowledge, recklessness or suspicion.

The Supreme Court judgment in *R v Sally Lane and John Letts (AB and CD) [2018] UKSC 36*[1] makes clear that providing financial support for terrorism is an offence, where Parliament intended to create criminal liability notwithstanding the absence of any of the above four types of *mens rea*.

The judgment has implications far removed from any terrorist scenario. In particular, for regulated professionals, who may encounter an analogous scenario in the form of their obligations to report knowledge or suspicion of money laundering under s330 Proceeds of Crime Act 2002 ('POCA'). This article will explain why.

Ms Lane and Mr Letts ('the Defendants') were charged with entering into funding arrangements connected with terrorism

[1] https://www.supremecourt.uk/cases/docs/uksc-2017-0080-judgment.pdf

contrary to s17 Terrorism Act 2000 ('TACT'). They sought dismissal of their prosecution which the trial judge rejected. They launched an interlocutory appeal concerning the judge's ruling on the meaning of s17 TACT. The Court of Appeal upheld the first instance decision and the matter came before the Supreme Court on 19 April 2018.

Section 17 TACT reads as follows:

17. Funding arrangements.

A person commits an offence if -

(a) he enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and

(b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

The question for the Supreme Court concerned (b) and whether *'the accused must actually suspect, and for reasonable cause, that the money may be used for the purposes of terrorism? Or is it sufficient that on the information known to him there exists, objectively assessed, reasonable cause to suspect that may be the use to which it is put?'* (per Lord Hughes at para 4).

The Defendants argued that the presumption that an offence-creating provision should be construed to include a *mens rea* was not displaced by the wording of s17 TACT, and so the former was the correct interpretation. This was particularly so given that the offence was a serious one in comparison with minor and/or regulatory offences, where it was obvious that Parliament had intended to impose strict liability. The words were capable of either meaning and so the court should resolve the ambiguity in their favour.

Having considered the authorities on the presumption of *mens rea* relied upon by the Defendants, Lord Hughes turned to the evolution of terrorist funding offences in the UK. Such offences were introduced by the Prevention of Terrorism (Temporary Provisions) Act 1976, which made no reference to 'reasonable cause' for suspicion. Rather, a defendant had to actually know or suspect the eventual use of the property for terrorism purposes in order to be convicted.

This drafting survived the subsequent 1984 statute but was revised by the Prevention of Terrorism Act 1989, which provided for guilt where the defendant made assets available *'knowing or having reasonable cause to suspect'* that they would or might be use for terrorism purposes. This change, considered Lord Hughes, could only have been deliberate and showed an intention by Parliament to widen the scope of the offence and *'remove the requirement for proof of actual suspicion'* (para 19). Such drafting had remained in TACT, and it was *'not open to the court to ignore this kind of clear Parliamentary decision'* (ibid.)

Lord Hughes compared the wording of s17 TACT to that of s18 TACT, which concerns laundering property connected to terrorism and includes a defence of not knowing and not having *'reasonable cause to suspect'*, and s19 TACT, which concerns failure to report suspicions of terrorism and can only be committed where the defendant *'believes or suspects'*. Parliament had clearly given some thought to the differing mental states which should apply to the various TACT offences. He held that had it been intended that s17 could only be committed by those with actual suspicion, the wording of s19 would have been applied.

The point was further emphasised by the drafting of a subsequent addition to TACT (s21A, added by the Anti-terrorism, Crime and Security Act 2001), which created an offence for those operating in the regulated sector of failing to disclose information suggesting terrorist offences committed by another. The first condition required to commit the s21A (2) TACT offence is as follows:

"(2) The first condition is that he -

(a) knows or suspects, or

(b) has reasonable grounds for knowing or suspecting, that another person has committed or attempted to commit an offence under any of sections 15 to 18."

Lord Hughes held that *'it is plain beyond argument that the expression "has reasonable grounds for suspicion" cannot mean "actually suspects"* (para 22).

Lord Hughes rejected the argument that his construction of the offence meant that it was one of strict liability. He observed that it could not be committed where the defendant was completely ignorant of the circumstances that formed the *actus reus* of the offence. Rather, the relevant exercise for the jury was to consider the information the defendant had at the time of the alleged offence and to decide whether this should have given a reasonable person grounds for suspicion. For this reason, s17 TACT was not an offence of strict liability because the mind-set of a person with such knowledge could not be *'accurately described as in no way blameworthy'* (para 24).

As such, the Supreme Court concluded that the Crown Court and Court of Appeal were correct in their interpretation of s17 TACT, and so it was open to the jury to convict even if they conclude that the Defendants did not actually know or suspect the eventual use of the funds.

Implications for failure to report suspicions of money laundering

Those working in the regulated sector will recognise that the wording of s330 POCA mirrors that of s17 TACT:

330 Failure to disclose: regulated sector

(1) A person commits an offence if [the conditions in subsections (2) to (4) are satisfied][1].

(2) The first condition is that he—
(a) knows or suspects, or
(b) has reasonable grounds for knowing or suspecting that another person is engaged in money laundering.

With this in mind, *Lane & Letts* supports the argument that s330 is not an offence of negligence (i.e. one which can be committed in ignorance of information related to the substantive offending). In particular, it would be incorrect to contend that the prosecution need not prove any mental element on the part of the defendant. Rather, the prosecution must prove that the defendant was actually aware of the information that the prosecution says constitutes reasonable grounds for knowledge or suspicion. As such, both s17 TACT and s330 POCA have a *mens rea* closer to recklessness than negligence. Although the defendant might deny that he saw the 'risk' (i.e. had a suspicion), he is guilty if the prosecution can successfully prove he was nonetheless aware of the facts which, when objectively assessed, would have provided the reasonable grounds for knowledge or suspicion.

This approach is also supported by the recent Court of Appeal decision on an offence with a markedly different *actus reus* but a similar approach to *mens rea*. In quashing the gross negligence manslaughter conviction of Honey Rose in 2017, the Court of Appeal held that, when assessing whether there was a serious and obvious risk of death (a necessary element of the offence), the jury should refer to the knowledge actually held by the defendant at the time. The jury should not decide its verdict based on what the defendant ought to have known if he or she had acted competently. In the case of *Honey Rose*, this meant that the jury should have disregarded what she would have known had she acted competently and carried out the examination which would have revealed symptoms indicative of her patient's fatal condition.

The lesson to be drawn from *Honey Rose* and *Lane & Letts* is that, whilst some offences of unintended consequence may on first reading appear to criminalise conduct irrespective of *mens rea*, the courts have repeatedly decided that these are not strict liability offences, and that some proof of a culpable mental state is required. As such, both judgments are good news for regulated professionals, who can take comfort that a prosecution under s330 POCA is unlikely to succeed where the suspect information is merely available but not actually known to the defendant.

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Advising individuals in cross-border investigations: the limits of double jeopardy

Andrew Smith

If there is an overarching message in the new SFO director Lisa Osofsky's recent speeches, it is the significance of cross-border cooperation. Corporate crime lawyers will have listened carefully to this message; their clients will always be keen to achieve finality when they negotiate settlements with prosecutors in different jurisdictions. How should individuals faced with cross-border criminal exposure interpret this message?

Individuals are sometimes tempted (or advised) to enter into plea negotiations in one jurisdiction on the basis that a guilty plea in that jurisdiction will act as a barrier to prosecution elsewhere. Unfortunately, the doctrine of double jeopardy does not always protect individuals in this black and white fashion.

Double jeopardy is sometimes referred to as the plea in bar of *autrefois*. This confuses two distinct legal doctrines. The *autrefois* doctrine applies where a defendant is tried for the same offence – in law and in fact – for which he was previously convicted *(autrefois convict)* or acquitted *(autrefois acquit)*. Where the previous trial occurred overseas, the offence for which the defendant was convicted or acquitted will nearly always be different from the offence under investigation in the UK. Because they are likely to be different offences, the defendant cannot plead *autrefois*, but he can argue that the UK court should exercise its discretion to stay the proceedings as an abuse of process. This species of abuse was identified in Connelly v DPP [1964] AC 1254, in which Lord Devlin held that, whilst sequential trials for different charges would generally be unjust, *"a second trial on the same or similar facts is not always and necessarily oppressive and there may be in a particular case special circumstances which make it just and convenient in that case."*

The protection of double jeopardy is also enshrined in UK extradition law [1]. In Fofana

[1] Sections 12 and 80 of the Extradition Act 2003.

& Belize v Deputy Prosecutor Thubin [2006] EWHC 744, double jeopardy in extradition proceedings was held to embrace both the narrow *autrefois* doctrine and the wider abuse jurisdiction identified in Connelly.

The protection of double jeopardy is also enshrined in the civil law doctrine of *ne bis in idem*, which is an autonomous concept of EU law recognised in Article 54 of the Schengen Implementing Convention (SIC), which provides that:

"A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts [...]".

If a UK prosecution of an individual arises out of the *"same or similar facts"* (as per Connelly) or the *"same acts"* (as per Article 54 SIC) as his previous conviction or acquittal in foreign criminal proceedings, when would a UK court identify *"special circumstances"* (as per Connelly) that would make it *"just and convenient"* for the individual to be prosecuted again? It is possible to identify the following seven categories of *"special circumstances"*:

1. In Thomas [1985] QB 604, the accused was tried in the UK for the same conduct for which he had already been convicted *in absentia* in Italy. The court rejected his defence of double jeopardy, finding on the facts that he had fled to England, and so had never been in jeopardy of being punished in Italy. A finding of foreign guilt is not itself a sufficient condition for the application of double jeopardy; there must be a risk of double punishment. Special circumstances may therefore exist where there is no prospect of the individual being punished by the foreign court for the previous conviction.

2. In Young [2005] EWCA Crim 2963, the defendant had previously been convicted of wounding with intent and acquitted of attempted murder. She was subsequently prosecuted for murder following the death of the victim from her injuries. The Court ruled that this second prosecution did not offend double jeopardy since the victim's death post-dated the conclusion of the first trial. Special circumstances may therefore exist if new facts emerge after the previous conviction justifying a new prosecution for a more serious offence.

3. Similarly, the discovery of new evidence after the first conviction may amount to special circumstances. In AG for Gibraltar v Leoni (Criminal Appeal No 4 (1998)), the defendants were seen jettisoning cargo from the side of their boat. It was suspected that the cargo contained cannabis, but this could not be proved until the cargo was discovered, by which time the defendants had already pleaded guilty to an offence of jettisoning cargo. The Court sanctioned a prosecution for the drugs offence because the cannabis was new evidence, the discovery of which post-dated the conclusion of the first trial; the second prosecution did not therefore offend double jeopardy.

4. In Kulibaba v United States [2014] EWHC 176 (Admin), the defendants had pleaded guilty in the UK to the offence of conspiracy to defraud four UK-based banks and their customers. Subsequently the US authorities sought their extradition for what the UK court accepted was the same conspiracy committed over the same timeframe, supported by some of the same evidence. However, the fact that the US indictment identified different victims to those referred to in the UK prosecution meant that extradition did not offend double jeopardy. Special circumstances may therefore exist where the second prosecution identifies new victims not identified in the previous conviction.

5. A new prosecution mounted on a distinct factual basis cannot logically be based on the same or similar facts as a previous prosecution. However, assessing whether the evidence in a new prosecution discloses a distinct factual basis is not always straightforward. In Ali and others [2011] EWCA Crim 1260, some of the defendants were convicted of two counts of conspiracy: first, conspiring together and with others to *"murder persons unknown"*; and secondly, conspiring together to *"murder persons unknown by the detonation of improvised explosive devices on board transatlantic passenger aircraft."* Although the object of both conspiracies was to commit the offence of murder, the Court held that the second conspiracy was a distinct agreement to murder in a specific way, involving on the evidence a more serious and sophisticated agreement. Thus the defendants could not assert that their conviction on both counts offended double jeopardy. In an attempt to clarify when sequential prosecutions might overlap on their facts, the Court of Justice of the European Union (CJEU) has interpreted *"same acts"* in Article 54 SIC as being based on *"the identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected."*[2] In Case C-367/05 Kraajenbrink [2007] ECR I-619, the CJEU held that a defendant who had already been convicted in the Netherlands of the offence of handling the proceeds of drug trafficking could lawfully be prosecuted in Belgium for an offence of money laundering, even though the proceeds being laundered had the same origin as the proceeds handled in the first prosecution (i.e. drug trafficking) and even though the defendant committed both offences with the same criminal intent. Special circumstances may therefore exist – and double jeopardy will not apply – if the acts prosecuted in the second trial do not make up an *"inseparable whole"* with the acts prosecuted in the first.

[2] See, for example, case C-436/04 Van Esbroek [2006] ECR I-2333 and case C-288/0 Kretzinger [2007] ECR I06641.

6. Whilst the rationale of double jeopardy is, in part, to prevent prosecutors from having a second bite of the cherry, the courts have sometimes corrected a prosecutorial charging mistake by permitting a second prosecution of a more serious offence for the same or similar conduct. In Antoine [2014] EWCA Crim 1971, the defendant was convicted of two firearms offences, including possession of a firearm without a certificate contrary to section 1(1)(a) Firearms Act 1968, and received four months' imprisonment. The next day the prosecution unsuccessfully sought to reopen his sentence. The defendant was subsequently charged with the more serious offence of possession of a firearm contrary to section 5(1)(aba) Firearms Act 1968 based on the same facts as the first prosecution. The Court of Appeal found there was nothing abusive about this second prosecution, holding that *"no one with the responsibility for prosecuting the case correctly applied their minds to the appropriate charges and how they should be prosecuted. This was not an escalation from minor charges to more serious charges [...] but a move from misconceived charges to correct charges."* Furthermore, the Court justified the second prosecution on the basis that the initial sentence of four months' imprisonment was an *"unexpected, astonishing and undeserved windfall."* With respect, this reasoning is questionable. It is clear, contrary to the court's findings, that this was an escalation from minor charges to more serious charges, particularly as the more serious charges were a reaction by the prosecution to its unsuccessful attempt to reopen sentence on the minor charges. Nonetheless, the decision illustrates that special circumstances may exist where a previous conviction is founded on a prosecutorial charging mistake and/or led to a lenient sentence. By permitting a second trial, the court can correct what it regards as flaws in a previous prosecution to ensure that its sense of justice is not offended.

7. Contrast Antoine with Dwyer [2012] EWCA Crim 10. In Dwyer, the Court ruled that a charge of conspiracy to supply a Class A drug which relied in part on conduct for which the defendant had already pleaded guilty and been sentenced (a substantive offence of possession of the Class A drug with intent to supply) should be stayed as an abuse. The Court's reasoning was that, given the defendant had made admissions in pleading guilty to the substantive offence, the prosecution had had every opportunity to charge him in the first trial with more serious offences based on his admissions.

The prosecution was obliged, before the conclusion of the first trial, to lay charges which captured what was known about the defendant's criminality. The first trial having concluded, the prosecution should not be permitted to lay new charges arising out of

the same conduct. Whilst somewhat at odds with Antoine, Dwyer emphasises that, when assessing whether special circumstances justify a departure from double jeopardy, the knowledge of the prosecutor who seeks a new trial is relevant: the concept of *"same or similar facts"* refers to the relevant state of affairs as they existed to the prosecutor's knowledge at the date the first trial concluded. If, for example, a UK prosecutor seeking a new trial knew nothing about the overseas trial which led to the defendant's previous conviction, this will be a factor in favour of permitting a new trial to proceed, even where it concerns the same or similar facts as the previous trial.

The scope of some of these categories of special circumstances, particularly *5-7*, is ambiguous; their application will depend on the facts of the particular case. This reflects the refusal of the common law to interpret double jeopardy as an inflexible doctrine. Because the doctrine is flexible, considerable care must be taken in advising an individual client to plead guilty in an overseas jurisdiction. It is crucial not to be lured by the promise that an overseas jurisdiction may offer a more lenient sentencing regime than that applicable in the UK. Even if the guilty plea overseas encompasses all known criminality, this plea is not necessarily a barrier to a UK prosecutor taking a fresh look at the evidence and persuading the UK court that another prosecution is justified by reference to new facts, new evidence, new victims or an overly lenient sentence in the foreign state, particularly if the UK prosecutor was not consulted about the overseas prosecution.

If the individual facing a fresh prosecution in the UK is overseas, she might well be able to contest her extradition to the UK by reference to double jeopardy. If this argument fails and she is extradited, the English court, whilst not bound by the findings of the foreign court on double jeopardy, would no doubt take them into account in resolving whether the UK prosecution should be stayed as an abuse. In certain cases, therefore, the question addressed in this article will be academic: the overseas defendant charged in the UK with a different offence arising out of the same or similar facts as her previous overseas conviction will only be prosecuted in person in a UK court by virtue of having already lost an argument on double jeopardy in her overseas extradition proceedings.

Finally, in the era of increasing cross-border cooperation envisaged by Lisa Osofsky, it would be artificial to suggest that individuals have a free choice as to where they would prefer to be prosecuted. Doing a quick deal in one country in return for lenient punishment may be impossible if agencies across numerous jurisdictions are already working together to assess where the alleged conduct should be prosecuted. But where a quick deal in one country is possible (perhaps taking advantage of that country's enthusiasm for expediting its investigation or entering plea deals), the UK courts will never regard an overseas conviction alone as an insurmountable obstacle to a new prosecution in the UK on the same or similar facts. Double jeopardy has its limits.

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Getting tough on reporting money laundering and sanctions breaches

Anna Rothwell

At the recent launch of the multi-agency National Economic Crime Centre ("NECC") on 31 October 2018, Ben Wallace, the Minister of State for Security, declared a crackdown on "professional facilitators" of money laundering and sanctions offences. As well as estate agents, public schools, football clubs and luxury car dealers, legal professionals are now under increasing scrutiny for failing to report money laundering and sanctions breaches. In addition to providing funding of £48m for the NECC increased officers at the National Crime Agency ("NCA"), Mr Wallace spoke of the need to go after "the people who have not played their part in hardening the environment and reporting."

The perceived need for greater enforcement action is unsurprising. There have been relatively few prosecutions for failing to report money laundering since the offences contained in the Proceeds of Crime Act 2002 ("POCA") entered into force.[1] Nor have there been any reported prosecutions for failing to comply with financial sanctions reporting requirements since they were extended in August last year.

In light of this scarcity of prosecutions, how are the offences of failure to report money laundering and sanctions breaches interpreted in practice, and what are the proposals for reform?

Failure to report money laundering

In evidence to the Treasury Committee on Economic Crime on 30 October 2018, Mr Wallace spoke of his desire to increase prosecutions of those who fail to report money laundering. He stated that a prosecution of a "county solicitor" or regional estate agent would have a ripple effect, resulting in the collapse of firms or a change in their behaviour. In addition, at the launch of the NECC, Mr Wallace highlighted the fact that banks are responsible for 83% of suspicious

[1] Between 2013 and 2016, only 58 cases were prosecuted to trial under section 330 of POCA. A further 1,358 cases resulted in a criminal investigation but did not proceed to a trial.

activity reports ("SARs"), arguing that estate agents and lawyers in particular had more to do in the fight against economic crime. On its face, the statistics bear this out: legal professionals submitted less than 1% of the total number of SARs submitted to the NCA in 2017.

But it is questionable whether the Government is drawing the right conclusions from these statistics. The focus should be on the quality of SARs rather than the quantity. As the Law Commission highlighted in their consultation paper on the SAR regime earlier this year, while the legal profession does not produce the same volume of SARs as the banking sector, those submitted by legal professionals are likely to be more complex in nature, as well as of a higher quality. In other words, precisely the type of SAR which provides vital sources of intelligence. In contrast, enforcement agencies concede that they are struggling with a significant number of low quality SARs produced by banks and other financial institutions (on average, 2,000 SARs are received per working day). Many of these SARs are unnecessary, of little practical effect, or simply of poor quality, which means that essential resources are diverted.

But it would be wrong to lay the blame solely at the door of the banks and financial institutions. The way in which the failure to report money laundering offences in sections 330-332 of POCA are currently drafted encourages high volumes of defensive reports. Focusing on section 330 (as sections 331 and 332 apply only to nominated officers, a relatively narrow group of individuals), a person commits an offence if:

• he or she "knows or suspects", or has "reasonable grounds for knowing or suspecting", that another person is engaged in money laundering;

• the information on which his suspicion is based comes in the course of business in the regulated sector; and

• he or she fails to disclose that knowledge or suspicion, or reasonable grounds for suspicion, as soon as practicable to a nominated officer or the NCA.

The obligation to disclose information in relation to a customer or client under threat of criminal sanction is both onerous and unusual. Onerous because suspicion is such a low threshold, and unusual because English criminal law imposes very few positive obligations to report crime (terrorism is the only other example). In practical terms, the low threshold of suspicion means that those in the regulated sector must be vigilant at all times and report in high volume for fear of committing an offence. Moreover, the low threshold arguably requires only minimal effort – there is no need to enquire too closely once suspicion is established.
The high volume of reports is also a result of the ambiguity of the term "suspicion". This

firm regularly provides advice to solicitors through the Law Society's Anti-Money Laundering Directory. The most frequent question we are asked is "am I right to be suspicious?" There is rarely a straightforward answer. Partly this is because there remains no definitive judgment on the meaning of "reasonable grounds for suspecting". It is widely accepted that the threshold of "reasonable grounds to suspect" is not a subjective suspicion on objective grounds; it is a purely objective test. In other words, the offence is committed if a person should have suspected money laundering; they do not actually need to have held the suspicion themselves. It criminalises those who may not have noticed what a Court may regard with the benefit of hindsight as reasonable grounds to suspect money laundering was taking place.

In its analysis of these provisions, the Law Commission cite the Hansard reports of the debates on the Proceeds of Crime Bill as support for the view that the failure to disclose offences were intended to include a wholly objective test for criminality, precisely in order to encourage the reporting of money laundering. The unforeseen consequence is that the legislation has encouraged the over reporting of suspicions, rather than a realistic evaluation of risk.

In light of these difficulties, the Law Commission conclude that there is a strong argument that a solely objective test sets the threshold for liability too low. They recommend retaining the current wording of section 330, requiring an individual to have either knowledge or suspicion, or alternatively reasonable grounds for either knowledge or suspicion, but consider that the phrase "reasonable grounds for suspicion" should be interpreted in line with the House of Lords case of *R v Saik*[2]. This case considered the wording of section 93C(2) of the Criminal Justice Act 1993 (the forerunner of POCA), which was "knowing or having reasonable grounds to suspect that any property is the proceeds of criminal conduct". In *Saik*, their Lordships concluded that proof of suspicion is not enough: "it must be proved that there were reasonable grounds for the suspicion. In other words, the first requirement contains both a subjective part — that the person suspects — and an objective part— that there are reasonable grounds for the suspicion."[3] The *Saik* interpretation of "reasonable grounds to suspect" has been widely understood as a cumulative test, incorporating both subjective and objective elements. It requires a defendant to be proved to have actually suspected that the property was criminal in order to be convicted, and for that suspicion to be based on objective grounds.

If this interpretation of "reasonable grounds to suspect" were to be adopted, the Law Commission believe that it is likely that the number of low value and defensive SARs would be reduced, as it would promote a more evidence based approach to their submission. This is particularly important in light of the impact that a SAR can have on its subject, an impact exacerbated by the new power to extend moratorium periods in the Criminal Finances Act 2017.

While this interpretation, if adopted, would make the submission of SARs more onerous in the short term, as it places the onus on

[2] [2006] UKHL 18, [2007] 1 AC 18.
[3] [2006] UKHL 18; [2007] 1 AC 18, Lord Hope at para 53.

the person reporting their suspicion to have grounds that are objectively justifiable, in the long term it should lead to fewer and more focused reports of a higher quality. In order to reduce the burden on the regulated sector, the Law Commission also recommend that POCA is amended to include a statutory requirement that the Government produce guidance on the suspicion threshold, along the lines of that already published in relation to the Bribery Act 2010 and Criminal Finances Act 2017.

Failure to report sanctions breaches

Since 8 August 2017, if lawyers and other professionals, including accountants, auditors, tax advisors, estate agents, trust or company service providers, fail to report known or suspected sanctions breaches to HM Treasury's Office of Financial Sanctions Implementation ("OFSI"), they commit a criminal offence under the European Union Financial Sanctions (Amendment of Information Provisions) Regulations 2017 (see https://www.corkerbinning.com/new-regulations-tighten-financial-sanctions-grip/ for an outline of this offence).

The recent entry into force of the majority of the provisions in the Sanctions and Anti Money Laundering Act 2018 ("SAMLA") on 22 November 2018 gives the Government the ability to significantly broaden sanctions reporting obligations by way of ministerial "Henry VIII" powers post-Brexit. The wide-ranging use of such powers has been the cause of some controversy. The entry into force of SAMLA is also earlier than anticipated, as it was not expected to come into force until the date of the UK's exit from the European Union in March 2019.

SAMLA 2018 permits the introduction of far-reaching reporting obligations by way of secondary legislation, extending the existing reporting requirements to all natural and legal persons, and not just the lawyers and other professionals who currently bear this obligation. This dramatically extends the scope of the criminal offence to a far wider range of subjects. Ironically for an Act of Parliament which was originally intended to maintain the status quo after Brexit, it in fact extends UK law to bring it into line with existing reporting obligations provided for under EU law, breach of which has not to date been a criminal offence.

The explanatory notes for SAMLA 2018 confirm that these powers, if enacted, are intended to be used to require people to report cases where they become aware or have reasonable grounds to suspect they are dealing with a designated person or a designated person has committed an offence. This is the same test as has applied since August 2017 to lawyers and other professionals. The current OFSI guidance explicitly confirms that "reasonable grounds to suspect" refers to an objective test that asks whether there were factual circumstances from which an honest and reasonable person should have inferred knowledge or formed the suspicion. This again means an individual may be found guilty in circumstances where they did not actually suspect an offence may have occurred. However, in comparison to the tidal wave of SARs engulfing the NCA, relatively few sanctions breaches were reported to OFSI (in April 2017 to March 2018 OFSI received 122 reports of suspected breaches). The need to reduce the number of low quality reports is therefore less of a priority.

Conclusion

It remains to be seen if the declared crackdown on professionals will result in an increase in the number of investigations and successful prosecutions of those professionals (particularly lawyers) who allegedly facilitate transactions without reporting their suspicions. The Government is right to expect professionals to play a vital role in reporting their suspicions, but the current deluge of low quality reports simply overwhelms enforcement agencies and enables criminals to slip through the net. It is too easy to respond to this deluge by pouring greater resources into enforcement. The right response is to promulgate better guidance and interpretation from Government and the appellate courts, so that those burdened with the obligation to report have clarity and do not produce low quality reports generated from a fear of being exposed to criminal liability. The proposed change to the threshold of suspicion coupled with statutory guidance would help relieve that burden. In addition, the existing requirement to report sanctions breaches should not be extended to include all individuals and companies; rather, the Government should read across the conclusions of the Law Commission on the failure to report money laundering offence, and retain the reporting obligation on regulated professionals alone.

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INTERPOL under the spotlight

Edward Grange and Danielle Reece-Greenhalgh

The process of electing INTERPOL's new President last month attracted the attention of the world's press and forced INTERPOL's governance and political neutrality into the spotlight once more. The need for a change in leadership was brought about following the sudden disappearance and apparent detention of former President Meng Hongwei in China.

Emerging as the frontrunner for the unexpectedly vacant position was Alexander Prokopchuk, a Russian general with close ties to Vladimir Putin, who had formerly occupied a role within Russia's Ministry of the Interior. His candidacy reignited a longstanding and unresolved debate surrounding Russia's abuse of the INTERPOL system. Concerns raised by critics of the Kremlin (notably Bill Browder and Mikhail Khodorkovsky) centred on allegations that Prokopchuk had made routine use of red notices to target political opponents of Putin whilst in government. These allegations were afforded further weight by direct correspondence from Fair Trials to the Secretary General of INTERPOL, which stated that *"it would not be appropriate for a country with a record of violations of INTERPOL's rules (for example by frequently seeking to use its systems to disseminate politically motivated alerts) to be given a leadership role in a key oversight institution."*

INTERPOL's 194 members ultimately voted to award the presidency to South Korean Kim Jong-yang. Nevertheless, the widespread outcry about Prokopchuk and the question of Russia's abuse of the red notice system continues to call into question whether the existing safeguards of INTERPOL's political neutrality are effective. After all, Prokopchuk may not hold the title of President but he remains a Vice President of INTERPOL and sits on the Executive Committee. His compatriot, Petr Gorodov, sits in the Request Chamber of the Commission for the Control of INTERPOL's files (**"CCIF"**), which is responsible for the processing of requests relating to red notices, and importantly makes recommendations for the removal of such notices to the General Secretariat, which nearly always follows the recommendation given.

These concerns about the political neutrality of the INTERPOL bodies which are entrusted to take life-changing decisions about when red notices should be issued and deleted are particularly important when an individual affected by the red notice claims that it is tainted by political motives.

If an individual seeks removal of a red notice because it is so tainted, he or she can only apply to the CCIF by reference to an extremely limited and narrow set of legal rules, including INTERPOL's own Constitution.

The most important rule in this context is Article 3 of INTERPOL's Constitution which states that *"It is strictly forbidden for the Organization to undertake any intervention or activities of a political, military, religious or racial character."*

Article 3 reflects one of the founding resolutions of INTERPOL's General Assembly, Resolution AGN/20/RES/11, which provides that: *"...no request for information, notice of persons wanted and, above all, no request for provisional arrest for offences of a predominantly political, racial or religious character, is ever sent to the International Bureau or the NCBs, even if – in the requesting country – the facts amount to an offence against the ordinary law."*

To assist the practitioner in the application of Article 3, INTERPOL published a 'Repository of Practice' in February 2013. This drew a distinction between pure offences (i.e. acts criminalised solely due to their political nature, e.g. espionage) and relative offences (i.e. acts comprising elements of ordinary law crimes but which nonetheless have a political dimension). In relation to the latter, INTERPOL adopts a so-called "predominance test". In relation to both pure and relative offences, Article 34(3) of INTERPOL's Rules for the Processing of Data provides that the "main pertinent factors" to be considered in the context of an Article 3 claim include:

a) The nature of the offence, namely the charges and the underlying facts;

b) The status of the persons concerned;

c) The identity of the source of the data;

d) The position expressed by another National Central Bureau or another international entity;

e) The obligations under international law;

f) The implications for the neutrality of the Organization; and

g) The general context of the case.

When analysing the nature of the offence, the CCIF will consider information beyond that provided in the Red Notice application form, such as information concerning the background to the request or how it relates to other requests. For example, it may be relevant to assess a red notice request together with similar requests concerning other individuals wanted by the same country, or to consider the fact that such similar requests may have been denied in the past.

The Repository of Practice sets out various scenarios arising from the Article 3 case law. It is striking that all of these scenarios concern what could be labelled as overtly political offences such as treason, military crimes, election crimes, free speech violations by human rights activists or crimes committed by politicians during seizures of power. None of the scenarios describes a paradigm "relative offence", such as a non-politician who alleges he is being persecuted by a State on account of his economic success in a strategically important sector. Of course, this is precisely the type of conduct which Propopchuk's detractors allege he was instrumental in prosecuting at the Kremlin's behest. The failure of the Repository of Practice to provide meaningful guidance on relative offences – and how the predominance test should be applied to relative offences – demonstrates the challenge faced by those in challenging red notices on Article 3 grounds where the underlying conduct is not criminalised solely due to its political nature.

The Repository of Practice states that one of the primary objectives of Article 3 is to reflect international extradition law. However, when read with Repository of Practice, Article 3 adopts a definition of "political" which is arguably narrower than the test currently applied in many extradition laws or indeed the Refugee Convention. In the UK, the Extradition Act 2003 bars a person's extradition (whether to an EU Member State or to a State outside of the EU) if (and only if) it appears that:

a) The request for extradition (though purporting to be made on account of the extradition offence) is in fact made for the purpose of prosecuting or punishing the person on account of his [...] political opinions, or

b) If extradited the person might be prejudiced at his trial or punished, detained or restricted in his personal liberty by reason of his [...] political opinions.

Historically, UK extradition law adopted a definition of "political opinion" that was wider than that contemplated by INTERPOL. Taking their cue from immigration case law, the UK's extradition courts recognised that, in order to show persecution on account of political opinions, it was not necessary to show political action or activity; that political opinions could be imputed to the person whose extradition was sought; and that it was inappropriate to maintain a rigid distinction between political and economic opinions. None of these factors – which highlight the flexibility of the concept of "political" – are explicitly recognised in INTERPOL's Repository of Practice on Article 3.

In light of this divergence, an individual faced with a red notice may (at present) be in a better position contesting extradition and/or claiming asylum, and using success obtained in those proceedings as a basis to persuade INTERPOL to remove the red notice. This comes with two precautionary caveats. The first is that INTERPOL's own policy on asylum, published in 2014, recognises a limitation on the grant of asylum on political grounds (whereas no such limitation is recognised if asylum is granted on all other grounds under the Refugee Convention, e.g. religion, race, sexuality etc.). A person granted refugee status on the basis of political persecution does not therefore have a cast iron guarantee that his status will result in the red notice being removed. The second caveat is that if caught up in active extradition proceedings in the UK, practitioners will need to consider an asylum claim at the earliest possibility. This is because, in a shift away from the historic position, extradition courts have, over the past four years, increasingly embraced a restrictive interpretation of 'political opinions', which has detached itself from the principles derived from immigration case law summarised above.

This shift appears to have been motivated by the narrow interpretation adopted by the then Senior District Judge Riddle in the case of the *Russian Federation v Kononko*, as opposed to the wider interpretation adopted by his predecessor, Senior District Judge Workman, in the case of the *Russian Federation v Makhlay and Makarov*. With this narrowing of the interpretation of political opinion, it is clear, in an extradition context, that a mere political interest in a case will be insufficient to establish the bar of extraneous considerations.

In addition, unlike extradition cases, proceedings for asylum allow for the provision of anonymous witness and expert evidence, which cannot be shared or challenged by the requesting state. The client himself can also give evidence without being the subject of hostile cross-examination in open court. Therefore, in some cases, and depending always on the facts, asylum may be easier to claim than a discharge from an extradition request if the client asserts that he is the victim of a political persecution. A successful grant of asylum will result in the client's automatic discharge from the extradition proceedings.

Just as it is virtually impossible to claim asylum in the UK in respect of alleged persecution in another EU member state, so too there are no recorded cases where an individual has been discharged from an extradition request issued by another

Member State on the basis of his political opinions. It remains to be seen whether this may change post Brexit, when mutual trust and recognition could well be further eroded between the UK and the remaining EU27 States.

In summary, whilst it is preferable to have a successful extradition or asylum decision upon which to base representations to INTERPOL, the absence of such a decision is not fatal to an individual's chances of securing the removal of a red notice. We have had success in removing red notices on political grounds in the absence of an extradition or asylum decision, but it is an extremely difficult task, made no easier by the restrictive interpretation of "political" in INTERPOL's Repository of Practice on Article 3. Despite the sigh of relief exhaled at the election of Kim Jong-yang over Alexander Prokopchuk, INTERPOL still has much to do by way of further reform to ensure that the organisation becomes the model of political neutrality which it clearly seeks to be – both in terms of its perception by Member States and in the independence of the decision-making it applies to the issuing and removal of red notices which are tainted by political motives.

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R(AL) v SFO heard around the fraud world

David Corker

In R(AL) v SFO [2018] EWHC 856 the Admin Court was invited by a defendant charged with bribery by the SFO to intervene in the trial process. The applicant defendant was aggrieved at what he perceived was a failure of the prosecutor to pursue disclosure of unused material in the possession of a third party. Before seeking a public law remedy the Defendant had sought but failed to obtain from the Crown Court trial judge an order compelling the SFO to obtain this material.

The disclosure regime in criminal proceedings is a complex corpus of interwoven statutory and non-statutory powers and duties. It is clear that Parliament, via the Criminal Procedure and Investigations Act 1996, intended that disputes about disclosure should not be resolved by the High Court on a JR but by the Crown Court trial judge. In this case Holroyde L.J. and Green J therefore unsurprisingly dismissed the claim for a judicial review. However, freed from the responsibility of delivering a judgment on the merits, these judges then delivered an *obiter* judgment spanning 125 paragraphs. They wished to make various observations all critical of the SFO's conduct in not making greater efforts to obtain disclosure from the recalcitrant third party.

This article concerns the ramifications of this judicial criticism upon the conduct of internal investigations and related SFO conduct. On one level, the Admin Court's opinion, delivered in April 2018, is otiose because it is based on the law of LPP as determined in the ENRC litigation by Andrews J in May 2017. In September 2018, the Court of Appeal in ENRC wholly overruled Andrews J. In essence it reversed this Judge's finding that privilege does not attach to a solicitor's notes of their interview of a witness in the context of an internal investigation where there is *inter alia* suspected criminality. In AL, however, the Admin Court applied that finding in order to hold that the SFO should have made greater effort to obtain notes of interviews made in that context.

In order to understand why AL remains significant notwithstanding the Court of Appeal's judgment in ENRC, it is necessary to fathom why the two judges in AL devoted

so much effort to writing their judgment. Why it would be mistaken to regard their composition as analogous to that sermon written by Father McKenzie which, according to the Beatles, no one will hear.

At the root of the judgment is a distaste that a company which has secured for itself the commercially advantageous outcome of a DPA, principally on its assertion of its full co-operation with the SFO and its promise to maintain this if its erstwhile employees or others are prosecuted, should be entitled obdurately to deny the SFO access to its solicitors' notes of their witness interviews. In AL, the company had self-reported suspected bribery within its own organisation to the SFO. Its motive in so doing was to obtain a DPA. It promised its full co-operation with the consequent SFO inquiry. The SFO asked it to turn over its lawyers' detailed interview notes of individuals who appeared complicit. The company resisted and only agreed to disclose a short oral summary of them, arguing, somewhat incongruously bearing in mind its offer of a summary, that these notes were the subject of its LPP. The SFO did not press harder and agreed a DPA despite the company's stance. With the DPA obtained, the SFO moved onto an investigation and then prosecution for bribery of those individuals. In order to secure a fair trial, it sought full disclosure of the lawyers' notes but predictably the company remained obdurate. This stance as the judges apprehended could derail the criminal trial; the non-disclosure of such cogent material could found a successful abuse application by the accused. Hence the judicial impulse to intervene, facilitated by the then-law on privilege.

The kernel of the judgment is that where a company has sought a DPA the SFO ordinarily should not prosecute an individual who has been interviewed at length by the company's solicitors unless it has taken possession of the records of their interview. That, as the prospect of a DPA enables the SFO to insist on gaining such possession, it should do so.

Notwithstanding the subsequent change in the law which would on the facts of AL have justified the SFO in not obtaining those records, the SFO has since sought to apply this judgment. It now appears that its policy is that whenever a company approaches it with a self-report and seeks approval to continue its internal investigation, the SFO demands that any forthcoming significant witness interview to be conducted by its solicitors should be audio recorded and the recording thereafter promptly disclosed to it. This insistence neatly sidesteps potential objections concerned with the lawyer's notes disclosing their musings or, as US attorneys claim, their "mental impressions" of the witness which could now since the Court of Appeal's ENRC judgment found a valid assertion of privilege. If the company objects to this measure, the SFO can adduce the AL judgment as justification.

AL is therefore likely to introduce a level of formality and added significance into the conduct of internal investigations where a DPA is in contemplation. Formality because many witnesses are more likely to be careful in their replies having been warned where the recording of their words will end up. So also will the lawyers asking the questions who will also feel that their performance will be scrutinised. Added significance because if the interviewee were to be prosecuted then such an unassailable record of what they contended is likely, if relevant, to be relied upon as evidence either by the SFO or by a hostile co-accused. Furthermore, with the relaxation of the rules against the admission of hearsay evidence in criminal trials, the recording may be adduced in many situations where the interviewee is otherwise unavailable. Evidence adduced in a criminal trial has entered the public domain and so any attempt to control the usage of the recordings is generally futile.

These considerations may end up frustrating the internal investigation in that unsurprisingly people become less willing to talk or to be helpful to the company's lawyers. That includes those who consider that they have acted unlawfully. Whilst in my experience few interviewees understand the Upjohn warning, they are far more likely to appreciate the potential significance of an audio recording. This will militate against them believing that what they reveal will be treated confidentially; that somehow they can speak freely "off the record".

For those advising an individual client in peril of being prosecuted, the vista is unattractive. If their employer's instruction to them to co-operate with its investigation and therefore answer questions is not motivated by a desire to investigate suspected criminality then PACE with its array of protections does not apply. A caution for example would be inapposite. Moreover, assuming the threat of dismissal for refusal to co-operate does not amount to oppression or improper inducement pursuant to s76 of PACE, then probably if the interview constituted a confession by the interviewee it would be admissible in their subsequent trial. Finally, neither s78 of PACE nor an abuse submission would ordinarily result in the interview being excluded.

Audio recordings of this kind have the potential to destroy a suspect's right of silence. Exercise of this right in a SFO caution interview may be vitiated by the SFO being able anyway to adduce the recording of their internal or employer's interview. The client properly advised may well have to defy their employer's instruction and face the disciplinary consequences. On the other hand, the employer may not want to have a consequent unfair dismissal claim on its hands where it is alleged that it colluded with the SFO to destroy the erstwhile employee's basic protections or civil rights.

The effects of AL are likely to resound in the criminal fraud world, both for those conducting internal interviews and those representing their subjects.

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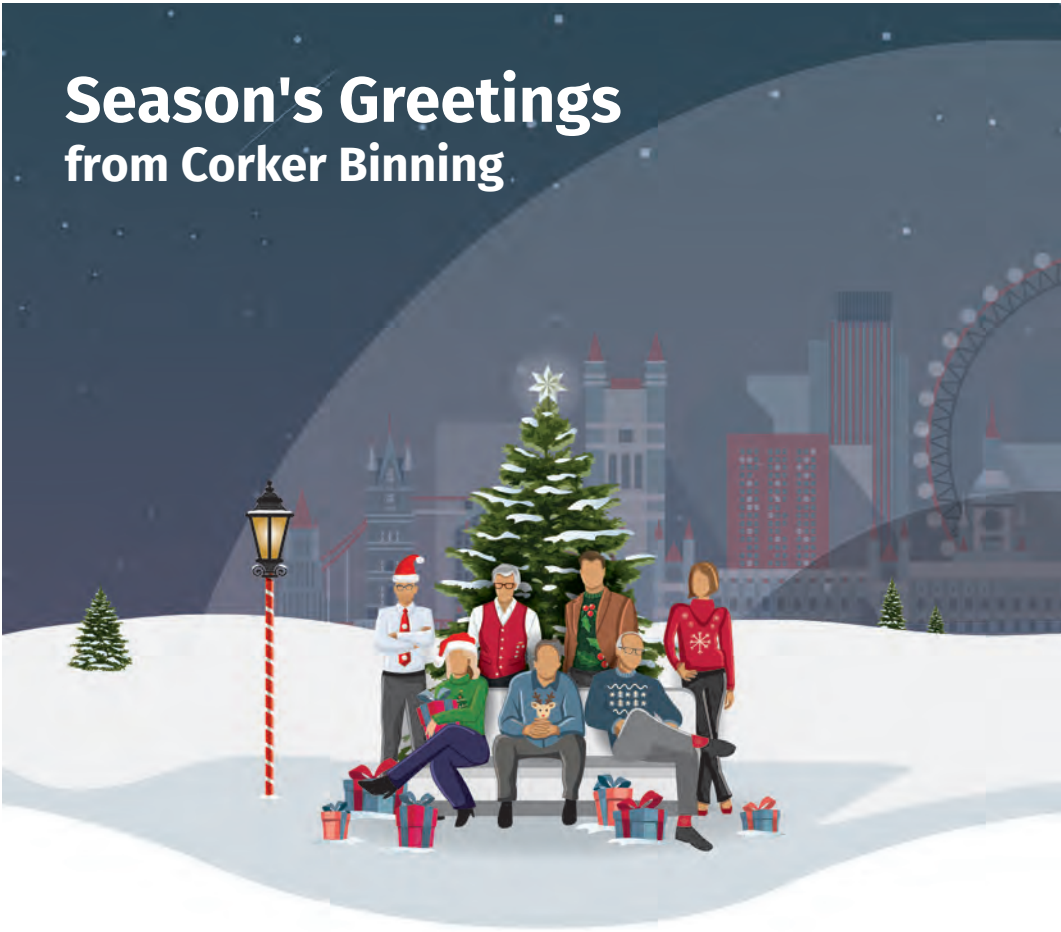
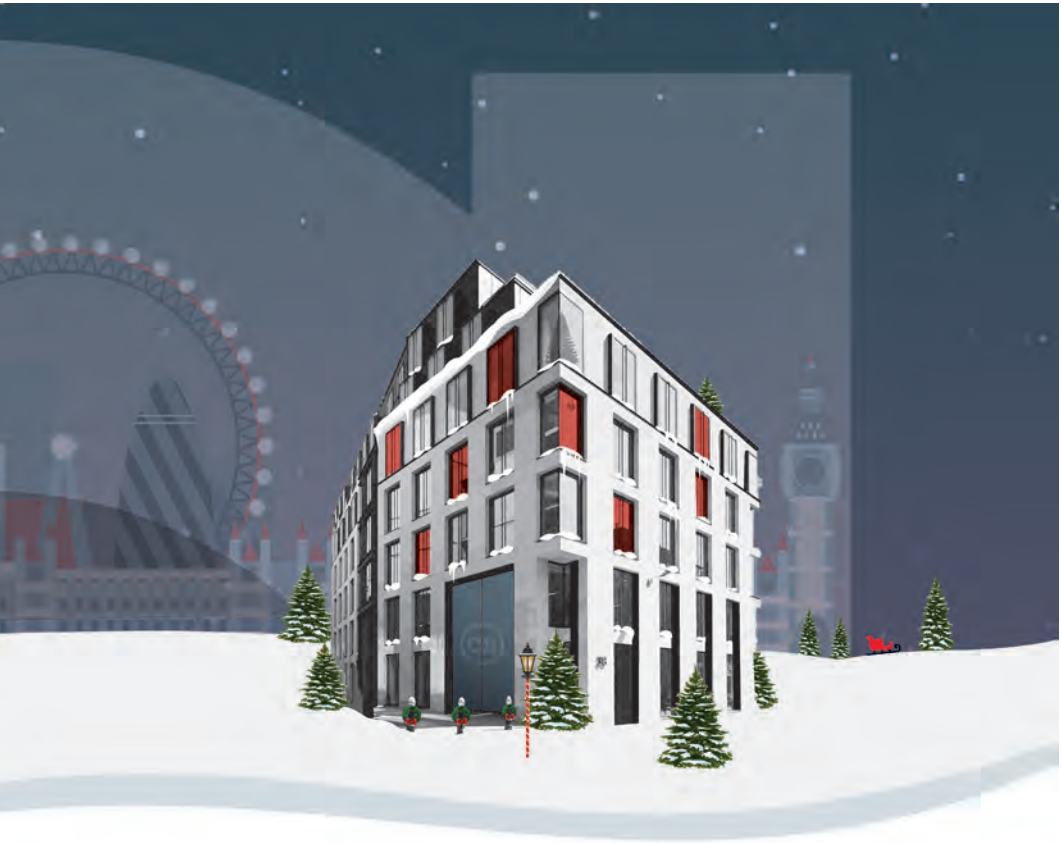
Season's Greetings
from Corker Binning





Shelter

Shelter is a charity that works to alleviate the distress caused by homelessness and bad housing.

This year, Corker Binning is making a donation to support Shelter to help even more people find and keep a home.

www.shelter.org.uk

The Big House

The Big House works with young people who have been through the care system and are finding life difficult. It provides a platform for them to participate in the making of theatre.

Corker Binning regularly volunteers and participates in their workshop programme.

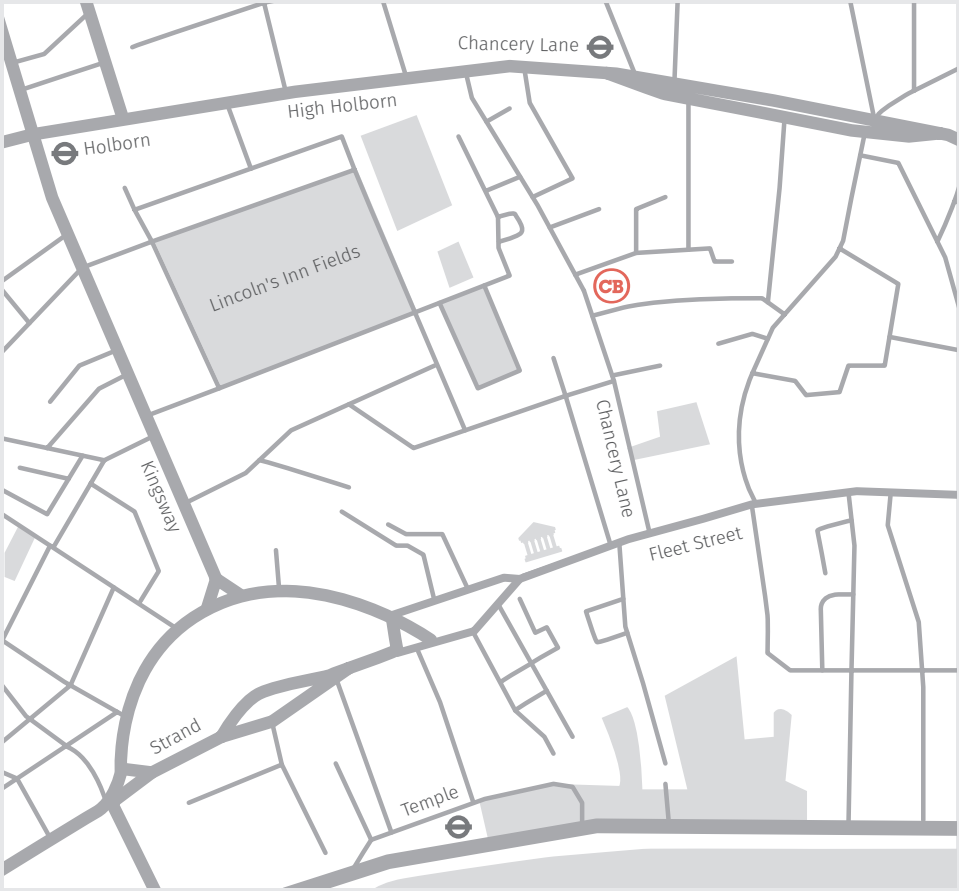
thebighouse.uk.com

CWI

Citizens' Watch International organises training, research and exchange of experience between UK and Russian lawyers and NGO workers. The charity aims to promote the sound administration of justice where human rights are at risk.

This year, Corker Binning has made a donation to support the charity's activities.

www.citwatchlondon.org



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