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Welcome to the Autumn edition of The Knowledge

AUTUMN 2021 marks 21 years since Corker Binning was founded. Unfortunately, health advice means we can’t throw a big party (at least not yet), but with life in legal London slowly returning to normal, we hope to see many of you in person very soon. In the meantime, please do check out our new website, available at www.corkerbinning.com. You will discover, among other things, carefully airbrushed photos of certain partners and a directory of all previous editions of The Knowledge.

In this edition, Nick Barnard outlines some of the regulatory challenges faced by the FCA in addressing Binance and other crypto exchanges. David Corker analyses the concept of “blind eye knowledge” in criminal law, and its relevance to the facilitation of tax evasion offence. Jessica Parker looks at a recent Court of Appeal case to explain why confiscation proceedings can extend into areas of law unfamiliar to most criminal lawyers. I look at the recent prosecution in France of Lafarge for complicity in crimes against humanity and explore the concept of corporate accessorial liability under English law. Finally, Joseph Hume considers a recent Supreme Court decision on the detention of children and asks whether the court should have been bolder in interpreting Convention rights in the absence of specific case law from Strasbourg.

Happy reading!

Andrew Smith
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Banning Binance and the challenges of regulating crypto

In June, various newspaper headlines (including the Financial Times) declared that the Financial Conduct Authority (‘FCA’) had banned the world’s biggest cryptocurrency exchange from the UK. This may come as a surprise to many UK investors who have been buying and selling cryptocurrency via Binance ever since.

This article examines the facts behind the sensational headlines, which are emblematic of the tussle between investors, financial institutions, cryptoasset service providers, and regulators that has existed ever since cryptocurrencies came to mainstream attention. At the heart of this tussle are questions about the cross-border regulation of cryptoasset companies, and the financial crime implications for investors and institutions who do business with Binance, and other cryptocurrency exchanges.

What is Binance?

Or perhaps more pertinently – where is Binance? Binance is a somewhat transient cryptocurrency exchange, which in its short life since 2017 has been ‘based’ firstly in China, then Japan, then ostensibly in Malta and is now registered in the Cayman Islands. Such a peripatetic existence seems to matter little to those in charge. When questioned as to where his company was headquartered, its founder Changpeng Zhao declared: “Wherever I sit, is going to be the Binance office. Wherever I need somebody, is going to be the Binance office."

Such a response is entirely in keeping with the blockchain philosophy, where cryptoassets are feted as Utopian anarchy, owned and controlled by their communities and beyond the oppressive reach of Governments and regulators. For businesses providing cryptoasset and blockchain services, the appeal goes beyond ideology and into practicality, as crypto’s intangible nature liberates them from the conventional restraints of nationality, geography and even physical infrastructure.

Unfortunately for Mr Zhao, those with an interest in keeping cryptocurrency under control have yet to see the appeal. Given the known risks of money-laundering and consumer harm posed by cryptocurrency, regulators are unlikely to conclude that it is beyond their physical or conceptual remit simply because those involved have no interest in playing by the usual rules, and indeed often set out to avoid doing so. By declaring that Binance is nowhere, Mr Zhao has by omission acknowledged that it could be anywhere, thus giving every regulator a reason to worry and offering little by way of reassurance. As a cryptocurrency exchange, Binance also shoulders the burden of being an identifiable hub in an otherwise decentralised network, and so the inevitable target of regulatory attention. Whilst those dealing in cryptocurrency may enjoy some degree of anonymity, Binance has nowhere to hide.

So, if Binance has not been ‘banned’ in the UK, what has the FCA done to generate such exciting headlines? Here Mr Zhao’s rhetoric begins to unravel, at least in part. Whilst the core Binance cryptocurrency exchange may claim to be stateless, there are registered Binance entities across the
world, some offering products and services such as derivatives in addition to currency trading. In the US, where the core Binance service is prohibited, there is an alternative regulated crypto-exchange on offer. A cynic might comment that, in fact, Mr Zhao will be happy to register a Binance office wherever is required in order to keep business moving.

In the UK, Binance established its subsidiary Binance Markets in 2020 following the acquisition of an existing FCA-approved firm (‘EddieUK’). Binance claims that Binance Markets had been intended to offer regulated cryptocurrency products (for example, derivatives and cryptocurrency-linked securities) to UK investors but has never actually operated in the UK. Despite this, the FCA was eager to clamp down, issuing a Consumer Warning on 26 June 2021 that no part of the Binance Group is authorised to carry on regulated activities in the UK, whilst also noting that buying and selling cryptocurrency itself is not regulated. As such, consumers using the Binance exchange enjoy none of the protections attached to regulated products and services. At the same time, Binance published a notice at the request of the FCA agreeing that it was not authorised, but also reminding customers that its exchange services were unaffected and remained open for business.

The story developed on 26 August 2021 when a related Supervisory Notice was made public. This revealed that Binance Markets had fallen foul of the FCA’s ‘use it or lose it’ strategy, recently adopted to prevent firms from continuing to be authorised under Part 4A Financial Services and Markets Act 2000 where in fact no regulated activities are being performed. The FCA fears that such authorisation may give false credibility to unregulated activities; Part 4A permission can be withdrawn in the absence of misconduct if a firm has not performed any regulated activities in the previous 12 months. This was the case for Binance Markets, which had not carried out any regulated activities in the UK since its acquisition of EddieUK. The Supervisory Notice reported that responses to FCA enquiries concerning the structure and activities of the firm and wider Binance Group had been incomplete and, in some cases, Binance Markets had refused to provide information at all. As a result, the FCA concluded that the firm was ‘not capable of being effectively supervised’, and so withdrew its permission to carry on regulated activities and directed it to display the consumer warning described above.

So, in practice, the FCA’s Supervisory Notice means little in the short term. A business which never traded has been banned from trading, whilst Binance’s main business continues unhindered. However, the FCA’s stance represents a stumbling block for any of Mr Zhao’s expansion plans, whilst the subsequent reporting reflects the lack of understanding and general suspicion attached to Binance and cryptoassets generally.

Whilst its core exchange service might battle on in the majority of jurisdictions, the frosty reception given to Binance and its subsidiaries by regulators globally may ironically scupper their efforts to remain independent. In particular, in the absence of its own entity approved under the UK Money Laundering Regulations, Binance remains reliant upon regulated institutions to act as the intermediary between the mainstream fiat economy and the brave new world of crypto.

In some cases, this bridge is already ablaze, with many UK banks implementing payment restrictions in the wake of the Supervisory Notice, whilst Barclays, HSBC and Santander have prohibited customers from transferring funds to Binance altogether. In a similar vein, from September 2021, Google will only permit advertising of financial products and services that are FCA-approved, thus debarring Binance (and
Where banks and other regulated institutions remain willing to act as gatekeepers between the UK and Binance (wherever it may be), investors should tread carefully.

The majority of other crypto-service providers are not promoting to UK customers, irrespective of whether the services concerned are regulated. Where banks and other regulated institutions remain willing to act as gatekeepers between the UK and Binance (wherever it may be), investors should tread carefully. Until it resolves its difficulties with the FCA, the risk profile of Binance is unlikely to improve. At the milder end, traders may find their business is no longer welcome as institutions de-risk away from crypto. At best, accounts will be closed, incurring the administrative inconvenience of establishing a new banking relationship elsewhere, of which options are increasingly limited for crypto-related transactions. Things may get worse if the institution, spooked by the FCA’s Supervisory Notice, chooses to play it safe and make a Suspicious Activity Report to the National Crime Agency (‘NCA’) before releasing the balance of funds. Again, at best this will result in a delay whilst the NCA considers whether to consent to the transfer. If the NCA decides to investigate further and requests an extension to the moratorium period, there may be a delay of a month or more. In the worst-case scenario, the funds could become subject to an Account Freezing Order, and thereafter be at risk of forfeiture.

Whilst this may seem an extreme or excessive outcome, it is in fact entirely realistic. Crypto was an AML red flag long before the FCA’s recent action. As demonstrated by those institutions which have already blacklisted Binance, and the borderline inaccurate reporting on the effect of the Supervisory Notice, both the regulated sector and the media are suspicious, confused or both. It is difficult to explain the novel and fast-moving processes involved to compliance officers and investigators who are only just catching up with crypto. This is made harder by the offshore nature of the trading and related data, and the absence of any ‘real world’ commercial activity to back up the transactions. As such, it may be a challenge to dispel the low threshold of suspicion required to prolong a money-laundering investigation, whether that be in the form of a Suspicious Activity Report moratorium extension or an Account Freezing Order. The consequence is that those using Binance for entirely lawful (if perhaps unusual and often misunderstood) purposes may find that the immediate problem is not the availability or legality of its services but negotiating the fiat gatekeepers. Whilst Binance and cryptocurrency generally have thrived on their perceived freedom from conventional regulation, such virtues will become curses if traders simply encounter a different set of risks and barriers through AML regimes and processes.

Plainly there is a huge market for cryptocurrency trading, which Binance has succeeded in dominating. However, the increasing regulatory pressure from all sides indicates that the room and time available to grow is limited, at least in its current form. As demonstrated by its attempts to secure FCA authorisation, and its announcement in August that all users will be required to undergo identity verification irrespective of trading value, Binance finally appears to be embracing rather than shunning regulation, at least in part. Such approval may prove vital for Binance to continue expanding, by providing it with the kind of credibility needed to appeal to mainstream investors, who are unlikely to take an interest if they fear becoming embroiled in a money-laundering investigation, alongside the risks of fraud and market volatility for which crypto is already notorious, as well as authorisation to promote its services to those audiences. The trick for Binance will be doing so in a way that preserves at least some of the freewheeling magic that has made cryptocurrency a success so far.

Crypto was an AML red flag long before the FCA’s recent action.
When ignorance is not bliss – wilful blindness and the failure to prevent model of corporate criminal liability

David Corker
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The judgment in Metcalf v SRA\(^1\) is an opportunity to consider the meaning of the legal concept of deliberate ignorance (aka wilful or Nelsonian blindness) and its application to criminal law. It is a source or method of criminal attribution that has been greatly overlooked by prosecutors advising in relation to investigations of suspected fraud and tax evasion. I believe that some of them mistakenly believe that deliberate ignorance is a prophylactic against incrimination whereas in fact it is probative of it.

An example of this flawed thinking concerns the corporate offence of “failure to prevent” facilitation of tax evasion. The government’s premise as to why this model of corporate criminal liability should supplant the DMW common law one was that: “the common law method of criminal attribution may have acted as an incentive for the most senior members of an organisation to turn a blind eye to the criminal acts of its representatives in order to shield the relevant body from criminal liability.” The supposed vice which this new offence would therefore cure is impunity enjoyed by senior management who deliberately ignore suspected tax evasion facilitated by their organisation.

Is it correct to contend that, but for this new offence, companies run by such individuals were beyond the reach of the criminal law? I submit that the common law did not need to be abolished and replaced in order to make a company liable. It was adept.

In the Metcalf case, the SRA submitted that the solicitor, M, had acted dishonestly because he had chosen to ignore the dubious nature of the transactions that he had facilitated. The SDT agreed with the SRA. M appealed to the High Court. Amongst his several grounds of appeal he submitted that:

(a) in principle blindness was akin to ignorance and ignorance ought not to be deemed a sufficient ground for a finding of dishonesty, and
(b) as a matter of evidence the drawing of adverse inferences from an omission, M’s failure to enquire about those transactions, could never in itself satisfy the criminal standard of proof in relation to dishonesty.

These submissions might seem persuasive when applied to the criminal law. To a criminal lawyer thinking in the abstract it probably seems wrong or surprising that a person can be guilty of a non-strict liability offence if it is either accepted or cannot be gainsaid that (i) they were ignorant of material facts whilst they acted or omitted to act, and (ii) their ignorance is the root of their culpability. However, this is precisely what the common law’s concept of wilful blindness holds.

The majority of criminal offences and all serious ones require proof to the criminal standard that a person acted with a reprehensible state of mind. There are various such states; for example dishonesty per the offences of theft or fraud or knowledge or suspicion per the several offences of money laundering. Proving the requisite state of mind is the route to the person being culpable. Offences of strict liability where the individual’s state of mind is irrelevant to establishing culpability are rare and entirely the creatures of

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\(^{1}\) [2021] EWHC 2271 (Admin)
statute. Moreover, it is a canon of our criminal law that one person’s state of mind cannot be vicariously ascribed to another, since a person is responsible only for their own crimes. See Highbury Poultry Farms v CPS2 for a recent and excellent exposition of these tenets.

The axiom about the need to prove a particular state of mind is not confined or especially pertinent to our criminal law. In fact, in relation to mens rea, civil law has frequently been transposed to criminal law. Consider the most fundamental mens rea concept in criminal law: dishonesty. From where did it emerge? The watershed civil law judgment in Ivey v Genting Casinos3. It was then imported into criminal law by the Court of Appeal in R v Barton4, upturning 40 years of jurisprudence about what dishonesty means in the process. Dishonesty is not unique in its provenance. Legal concepts such as knowledge and connivance have a similar civil law heritage.

The common law has dominated because Parliament has eschewed attempting to define the meaning of mens rea in its multifarious guises and applications. An example is the Fraud Act 2006. The ambitious aim of this statute was to consolidate a then disparate set of economic crime offences. The Act stipulates three ways in which fraud can be committed; sections 2-4. Dishonesty is crucial to each, see section 1. It however omits any definition or prescription as to what this state of mind is or how it is to be proven. The same situation prevails as regards knowledge or suspicion where they apply in crime. Such is the heavy reliance placed by Parliament on the common law concerning mens rea.

There is unsurprisingly therefore a substantial corpus of jurisprudence where mens rea concepts have been explored and sometimes elucidated. Rarely have the significant judgments been delivered in the context of criminal law. Judges have predominantly construed these concepts in the context of civil disputes concerning insurance and breach of trust. In the course of their labours, the judges have considered whether deliberate ignorance is a form of mens rea. Essentially, should the law hold that an individual who is in ignorance of a fact in these circumstances be deemed to be knowledgeable of it?

The answer the law has divined is a resounding yes, with all the adverse consequences that may follow for the party who feigned ignorance. Here are some recent judgments that establish that ignorance can be knowledge when the former is a consequence of deliberation.

The House of Lords case Royal Brunei Airlines v Tan5. A case where the ratio of the House’s decision turned on what the law regarded as dishonesty. As Lord Nicholls said at paragraph 389:

“[In most situations there is little difficulty in identifying how an honest person would behave. Honest people do not intentionally deceive others to their detriment. Honest people do not knowingly take others’ property. Unless there is a very good and compelling reason, an honest person does not participate in a transaction if he knows it involves a misapplication of trust assets to the detriment of the beneficiaries. Nor does an honest person in such a case deliberately close his eyes and ears, or deliberately not ask questions, lest he learn something he would rather not know, and then proceed regardless.”

In an insurance case, Manifest Shipping v Uni-Polaris6, Lord Clyde held this: “Blind-eye knowledge in my judgment requires a conscious reason for blinding the eye. There must be at least a suspicion of a truth about which you do not want to know and which you refuse to investigate.”

In the same case Lord Hobhouse wanted to distinguish blind eye knowledge from, for example, suspicion or gross negligence. He held that the best means by which to discern them was to ascertain the reason for why the

2 [2018] EWHC 3122 (Admin
3 [2017] UKSC 67
4 [2020] EWCA Crim 575
5 [1995] 2 AC 378
6 [2001] UKHL 1
person refrained from obtaining actual knowledge of the material fact (NB: “privity” here means knowledge): “The illuminating question therefore becomes "why did he not inquire?" If the judge is satisfied that it was because he did not want to know for certain, then a finding of privity should be made. If, on the other hand, he did not inquire because he was too lazy or he was grossly negligent or believed that there was nothing wrong, then privity has not been made out.”

These two cases, which have been quoted affirmatively in numerous subsequent appellate judgments, justify this legal proposition; a conscious decision not to enquire into the existence of a fact is treated as equivalent to knowledge of that fact.

The law has occasionally used different expressions to describe deliberate ignorance, usually in order to distinguish it from negligence. Nothing turns on this. Nelsonian blind eye and wilful blindness are synonymous with deliberate ignorance. See for example the 2020 judgment of the High Court in Uavend Properties v Adsaax:

“In my judgment, therefore, it makes no difference whether the requisite mental element is described as blind-eye knowledge, Nelsonian blindness or reckless indifference. They are all labels for the same thing, which is a conscious decision not to enquire for fear of discovering an inconvenient truth.”

Finally, it is important to quote from a relevant criminal law judgment delivered by the Court of Appeal, Criminal Division. Surprisingly there is only one recent such case, R v Holt. The Court held:

“Whilst it was accepted that he should have asked more questions about his wife's affairs, this was not an innocent oversight but was as a result of what the judge described as “Nelsonian blindness” - in other words turning away from an obvious truth.”

This brief commentary is sufficient to ponder this question. If it was proven that a UK financial institution during 2008-12: (a) enabled cum ex transactions in Germany (by, for example, acting as a custodian lending German equities), (b) cum ex amounts to cheating the German HMRC equivalent, and (c) that institution’s senior management deliberately ignored information which would have revealed (a) and (b) (i.e. “don’t ask, don’t tell” etc.), would a prosecution of the institution have been bound to fail? No. The institution’s ignorance would have been deemed to be knowledge and would have been an adequate basis for a finding that the institution had committed a variety of crimes such as aiding and abetting and money laundering as well as several discrete tax offences.

There was no gap the corporate offence needed to fill. So why was the law concerning tax evasion and corporate criminal liability misrepresented in 2017? I suspect that the answer here is the same as the answer to the question asked by one of my partners in the last edition of The Knowledge, which was why in June 2021 the CPS changed its guidance concerning the failure to report money laundering offence. Pour encourager les autres. In other words to make it appear that the criminal law is being toughened as a precursor to enforcement in order that people will behave differently. Especially that category of people whose job is to facilitate financial transactions undertaken by others that they do not understand and which appear to lack a commercial rationale. That they will be encouraged by their management, who have been briefed about criminal law risks, to ask questions and demand answers in order to avoid something dodgy. The fact that neither of these offences has ever been prosecuted suggests that neither was created with the principal aim of them being so.

Using the criminal law to achieve this result is a legitimate public policy. I hope that this consideration of this aspect of corporate criminal liability will inform the extant debate as to whether the “failure to prevent” model should be extrapolated to economic crime.

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7 [2020] EWHC 2073 (Comm)
8 [2017] EWCA Crim 720
9 See page 32 in the July 2021 edition of The Knowledge: https://corkerbinning.com/newsletters/the-knowledge-july-2021/
The troubling case of Mr Parker

Jessica Parker
Partner

Part 2 of the Proceeds of Crime Act 2002 (‘POCA’) does not tend to pique the general public’s interest, except to the extent that it represents the wisdom of the proverb that crime does not pay. However, the confiscation regime it creates is wrought with issues in which the general public would be very interested if they ever found themselves at the wrong end of it. Prisoners describe the meeting at which the confiscation scheme is described to them as ‘being POCA-ed’, a verb that means: the discovery that if they have not kept careful records of their income and outgoings (remarkably few have), they risk being unable to explain to the Court why they no longer have access to the funds from which they benefited. If they cannot pay the confiscation order, interest racks up at a rate of 8% (if they were hiding their assets, they better have invested them well) and the debt can then be enforced through default sentences that can be far longer than those they received for their crimes. The trial process may have taken months, but the enforcement hearing for the confiscation order only takes hours; the district judge can be satisfied that it is correct to activate the default sentence because the defendant has usually been convicted of an offence of dishonesty and the sentencing remarks from the trial judge invariably describe them unflatteringly. So far, so remote from the general public. The confiscation regime only seems to affect those convicted of acquisitive crime.

Parker v FCA and another is a case which demonstrates how the confiscation regime can spread its tentacles into the lives of innocent victims. At first instance, the matter was decided by an experienced trial judge, assisted by experienced Counsel, but by the time their error was acknowledged by the Court of Appeal, it was too late to remedy. Lady Justice Andrews, delivering the Court of Appeal’s judgment, considered that this “unhappy state of affairs arose… through a combination of unusual circumstances”, but those familiar with the confiscation regime will understand that a similar error could easily be repeated. The underlying cause of the error in Parker was recently diagnosed by the Law Commission, which is currently examining the confiscation regime. Their consultation report commented that “the legal complexities may extend beyond the confiscation legislation itself. For example, the court may be required to consider legal and beneficial interests; lifting the corporate veil; trusts; contract law; insolvency and matrimonial property. … They may be of insolvency and cross-border recognition … In some cases they may relate to tax law or the law of matrimonial property and ancillary relief.” Many lawyers practising in the criminal courts may consider themselves POCA’ed when confronted with the prospect of grappling with these areas of law.

Mr Parker was an elderly widow who was also vulnerable because of chronic illness. His relationship with Mr Moore started in 2009 when Mr Moore encouraged him to invest in a land banking scheme and then in wine. In each case Mr Parker lost his investment. Sadly, Mr Parker continued to trust Mr Moore. He was persuaded to make a further investment into one of Mr Moore’s companies and then to switch this investment into a property that Mr Moore intended to develop. Shortly after the investment was made and the property purchased, Mr Moore was convicted of a separate fraud following his prosecution by the FCA. In respect of that fraud, another investment scam, there were a number of

1 [2021] EWCA Crim 956
A proprietary interest is not affected by the confiscation regime. The issue in this case was whether Mr Parker had such a proprietary interest and therefore a right to a share in the property in question, or whether Mr Parker was simply an unsecured debtor, and the value of his investment lost.

Separate victims (the FCA Victims). Confiscation proceedings commenced and the FCA applied for an order that the sums recovered through confiscation be applied to the FCA Victims by compensation order. The FCA argued that Mr Moore’s assets included a share in the property in which Mr Parker had invested. The FCA’s case was that Mr Parker was simply owed a debt by Mr Moore and that Mr Parker did not own any part of the property. An unsecured debtor does not have priority over the confiscation regime; if the defendant’s assets are exhausted by a confiscation order, the debtor will not be repaid (SFO v Lexi Holdings plc2). In contrast, a third party who has a proprietary interest in an asset will recover their interest, which is excluded from the amount available to be recovered from the defendant through the confiscation order. A proprietary interest is not affected by the confiscation regime. The issue in this case was whether Mr Parker had such a proprietary interest and therefore a right to a share in the property in question, or whether Mr Parker was simply an unsecured debtor, and the value of his investment lost.

Mr Parker took advantage of a provision introduced into the confiscation regime by the Serious Crime Act 2015, section 10A of POCA, which gave him the opportunity to apply to the Crown Court at the confiscation hearing to argue that he held an equitable stake in the property, or rather, that the property was not Mr Moore’s recoverable property. Such a finding would put the property out of reach of the confiscation regime and see its value returned to Mr Parker.

Having considered the legal arguments about the nature of Mr Parker’s interest, in a short judgment, the trial judge concluded that Mr Parker did not have a proprietary interest in the property. Firstly, his interest was poorly recorded (in fact only recorded after Mr Moore’s conviction). Secondly, his money had been mixed with the FCA Victims’ money when it was first advanced to Mr Moore. Thirdly, Mr Parker had consented to the proposal that his money be spent on the property. Having rejected Mr Parker’s application for these reasons, the trial judge determined that the property belonged only to Mr and Mrs Moore (because in this case Mrs Moore also had an interest in the property) and therefore Mr Moore’s 50% was recoverable and could be included in the amount to be confiscated from Mr Moore and then applied as compensation to the FCA Victims.

Mr Parker appealed but his application to appeal was rejected by the single judge. News of the rejection did not reach his solicitors until his appeal was out of time (through no fault of his own). He renewed his application. Meanwhile, there was no mechanism to pause the distribution of confiscated sums while an order is being appealed. The property in question was sold and the proceeds were passed to the Magistrates Court who paid the sums to the FCA Victims.

The Court of Appeal gave permission for the appeal out of time and following an examination of the history of the proceedings they allowed the appeal. They found that the trial judge had erred in interpreting the evidence concerning Mr Parker’s equitable interest in the property. The Court of Appeal held that having accepted the oral evidence that Mr Parker and Mr Moore had intended that Mr Parker acquire an interest in the property, the correct interpretation of the facts was that the property was held by Mr Moore (and his wife) in a common interest constructive trust for Mr Parker. In a statement that will no doubt have left the trial judge and the lawyers in the Crown Court wincing, Lady Justice Andrews observed that this was a “classic example of a constructive trust.” Nonetheless, there was nothing to be done to remedy the error, since Mr Moore’s assets had been exhausted and the Court had decided that

2 [2008] EWCA Crim 1443
it would be wrong for him to recover the monies from the FCA Victims.

**What went wrong in Mr Parker’s case?**

The answer to this question is rooted in some of the same problems that led the Home Office to invite the Law Commission to consider the confiscation regime. The problems the Home Office identified included “the irregular compensation of victims in confiscation proceedings; the frequent imposition of unrealistic confiscation orders; … the complexity of the relevant legislative provisions and related case law …” Taking first, the complexity of the law, it is true that there have often been divergent and surprising decisions on very similar facts. For example, some spouses or partners who have been held to know that the property in question was acquired through crime have been found to have a proprietary interest (Gibson v Revenue and Customs Prosecution Office3). In contrast, some spouses or partners who had no idea about their partner’s offending, such as Mrs Hayes, wife of the LIBOR rigger, Tom Hayes, do not. A careful analysis of the legal and equitable interests is required in each case, an analysis which does not necessarily form part of the day to day experience of criminal lawyers.

In the case of Parker, Lady Justice Andrews expressed concern about “the fairness of the requirement that issues concerning the beneficial entitlement to property in the context of confiscation proceedings under POCA should always be determined in the Crown Court, instead of there being at least an option to transfer the more complex cases into the business and property courts. Were this to happen, there would be a greater chance of the judge having relevant expertise, and of the judge having the benefit of the assistance of experienced specialist counsel. An alternative would be for a specialist judge to sit in the Crown Court to hear such cases.” Indeed, these are exactly the options that the Law Commission is considering. One of Lady Justice Andrews’ colleagues on the Court of Appeal panel was a former property litigator turned circuit judge and so was ideally placed to identify the ‘classic example of a constructive trust’.

The second problem that confronted Mr Parker is that the objective of Part 2 of the POCA regime is to deprive criminals of the benefit of their crime. Where the implementation of this objective is inconsistent with a third party’s rights, including in this case the rights of a victim, there are no overarching principles to which the court can defer to achieve justice. Mr Parker’s predicament is not rare. When confronted by a prolific fraudster, invariably a prosecutor has to be selective and will choose the strongest case to prosecute. A victim is only eligible for compensation where the offender has been convicted of (or otherwise admits) the offence causing loss to that victim. Other victims whose cases fall outside the indictment, perhaps because they would have been harder to prove, are not eligible for compensation. Whatever reform the Law Commission proposes will come too late to undo the financial disaster that befell Mr Parker. Until the law or procedure is reformed, both criminal lawyers and judges in the Crown Court will have to tread carefully and seek specialist advice when confronted with confiscation cases which throw up these unfamiliar issues.

3 [2008] EWCA Civ 645
Recent years have seen successive attempts to hold companies criminally liable for their alleged complicity in international crimes. In 2010, the Swedish authorities commenced a criminal investigation into the alleged facilitation of war crimes in South Sudan by Lundin, an oil and gas exploration company. The same year, the Dutch authorities launched a criminal investigation into allegations that Riwal, a construction company, was complicit in war crimes and crimes against humanity connected to its role in building the “Annexation Wall” between Israel and Palestine that the International Court of Justice (‘ICJ’) subsequently judged illegal. In 2011 and 2017, the French authorities opened separate investigations into Amesys, a surveillance company, accused of abetting torture and enforced disappearances because its technology had been used by autocratic regimes in Libya and Egypt to target political opponents.

Despite these investigations, corporate prosecutions remain elusive. Of the aforementioned cases, one was discontinued without any charges and the other two have resulted in charges against individuals but not the company. This absence of corporate prosecutions is perhaps unsurprising. International law – including treaties such as the Genocide Convention and Geneva Conventions, the tribunals established at Nuremberg and Tokyo after World War II, or the more recent tribunals such as the ICTY and ICTR – does not provide for corporate liability. A French proposal to include corporate liability in the Rome Statute of the International Criminal Court was rejected in 1998. As a result, complainants seeking to hold a company accountable for its alleged complicity in international crimes must rely on domestic law. In doing so, victims and campaigning organisations have tended to favour civil, tort-based claims rather than the criminal law.

This reluctance to deploy domestic criminal law against companies has many causes. Some are practical in nature: for example, the difficulty in gathering admissible evidence that establishes, to the criminal standard, a sufficiently strong connection between a company’s actions and the underlying offending, especially where, as is commonly the case, the offending took place overseas at a time of armed conflict or other social upheaval. Other causes are legal in nature: for example, determining the relevant mens rea for complicity (or, to use the English law term, accessorial liability). What must the prosecutor prove in relation to a company’s state of mind for it to be guilty of encouraging or assisting the commission of international crimes?

Last month the highest court in France addressed precisely this question. Lafarge, a French cement company, faces criminal prosecution before the French courts for alleged crimes committed in Syria by its subsidiary, Lafarge Cement Syria (‘LCS’). In the early stages of the Syrian civil war in 2013-2014, LCS allegedly bought raw materials from jihadi groups, including ISIS, in order to keep its Syrian cement factory in operation. LCS allegedly paid Euro 13m to jihadi groups for negotiating safe passage for its workers and products at a time when these groups

1 This article uses “international crimes” to refer to genocide, war crimes and crimes against humanity (including murder, forced displacement, torture and enforced disappearances, amongst others).

2 The Riwal case was closed without charges in 2013. The Lundin case remains ongoing: the Swedish Ministry of Justice authorised charges against two individuals in autumn 2018 but no charging decision has been made in respect of the company. The Amesys case is also ongoing: in June 2021 four individuals were indicted but no charging decision has been made in respect of the company.

3 See, for example, claims in the torts of negligence and breach of statutory duty under English law (e.g. Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents) [2019] UKSC 20) and claims pursuant to the Alien Tort Statute under US law (e.g. Chiquita Brands International, Inc., Alien Tort Statute and Shareholder Derivative Litigation, case no. 08-01916-MD-Marra)
were violently seizing control of swathes of Syria, such as the city of Raqqa in March 2013. In 2014, the UN Independent International Commission of Inquiry laid bare the extent of their atrocities, concluding that these groups had perpetrated war crimes and crimes against humanity, including widespread and systematic murder, torture, enslavement and rape. Against that background, in November 2016 a group of former LCS employees and two NGOs filed a criminal complaint in the French courts against Lafarge, LCS and their current and former CEOs for offences including complicity in crimes against humanity. This allegation of complicity was founded on Article 121-7 of the French Criminal Code, which provides that: “[…] a person who knowingly, by aid or assistance, has facilitated its preparation or commission, is an accomplice to a crime or an offence.” In June 2018, investigating judges took the unprecedented step of charging Lafarge with, among other offences, complicity in crimes against humanity, on the basis that Lafarge had financed the perpetrators of these crimes.

In November 2019, the French Court of Appeals revoked the charge, concluding that merely financing the crimes of armed groups was insufficient to establish an intention to be associated with the crimes, and therefore a crucial element of the offence of complicity was absent. Last month, however, the French Supreme Court quashed this decision, ruling that:

“Lafarge financed, via its subsidiaries, the activities of the Islamic State to the tune of several million dollars […] it had precise knowledge (“une connaissance précise”) of the actions of this organization, which were likely to constitute crimes against humanity […] one can be complicit in crimes against humanity even if one doesn’t have the intention of being associated (“l’intention d’associer”) with the crimes committed […]”

In other words, it was sufficient that Lafarge knew that the armed groups it was funding were committing the offences; it was unnecessary to prove that Lafarge intended those groups to commit the offences. Would an English court recognise this distinction and accede to a prosecution of a company in the same circumstances?

The starting point is that there is jurisdiction to prosecute international crimes under English law pursuant to sections 51-52 of the International Criminal Court Act 2001. Accessorial liability for such crimes arises if a defendant aids or abets their commission under section 8 of the Aiders and Abettors Act 1861 (probably the closest analogue to Article 121-7 of the French Criminal Code). The English prosecutor must prove that the accessory:

(a) intends to do the acts that constitute the aiding or abetting, (b) believes that these acts have the capacity to assist or encourage the principal offender, and (c) knows or believes that the principal offender is committing (or will commit) the offence, in the circumstances required for conviction of the offence. Consistent with the French Supreme Court’s ruling on the scope of its law of complicity, there is no requirement in English law to prove that the accessory intended the principal offender to commit the offence.

Applying these convoluted provisions to the complicated fact patterns of international crimes is not straightforward. However, where there is incontrovertible evidence that a company has funded payment with full knowledge of the facts of a sum of several million dollars to an organization whose only purpose is criminal is sufficient to constitute complicity through aid and assistance […] it is irrelevant that the accomplice acts with a view to pursuing a commercial activity, a circumstance that is part of the motive and not the intentional element […]”

4 See paragraphs 80-82 of the Supreme Court’s decision, available here: Décision – Pourvoi n°19-87.367 | Cour de cassation
5 This article does not explore the offences of inchoate liability created by sections 44-46 of the Serious Crime Act 2007, which are also potentially relevant.
an “organisation whose only purpose was criminal” and “had precise knowledge of the actions of the organisation, which were likely to constitute crimes against humanity”, it is highly arguable that this would be sufficient to satisfy the mens rea of aiding and abetting under English law.

But since the allegation is one of accessory liability for international crimes, should international law influence the interpretation of this mens rea? The French Supreme Court asked itself the same question about Article 121-7 of the French Criminal Code, although it did not appear to reach a clear answer.6 If an English court grappling with this issue reached out to international law for assistance, it would discover that a very similar debate concerning the scope of complicity has been raging for the past 75 years, i.e. is it necessary to prove that the accessory intended that the principal commit the crime, or is knowledge sufficient? To this day, the debate remains unresolved.

The “intention” side of the debate can draw on certain Nuremberg authorities such as United States v Weizsaecker, in which the prosecutor charged a bank executive with providing loans to businesses, knowing that the businesses were using slave labour. The tribunal refused to convict the defendant, finding that: “loans or sales of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint [...] but the transaction can hardly be said to be a crime.” The ICTY drew on these authorities in Prosecutor v Tadić, finding: “a clear pattern [...] first, there is a requirement of intent, which involves awareness of the act of participation coupled with a conscious decision to participate.”7 Similarly, the drafters of the Rome Statute stated that, when considering whether a person facilitates a crime under Article 25(3)(c), they were creating a “specific subjective requirement stricter than mere knowledge.”8

Other Nuremberg authorities point in the opposite direction. For example, in United States v Ohlendorf, the tribunal convicted two defendants under a knowledge standard: one because he was “aware that the people [whose names he gave to the Nazis] would be executed when found,” the other because he “knew that executions were taking place” and failed to intervene.9 The same analysis can be found in various decisions of the ICTY and ICTR, for example Prosecutor v Krstić, where the Appeals Chamber held that the defendant’s knowledge of the Bosnian Serb Army’s intention to commit genocide was sufficient on a charge of aiding and abetting genocide, without an additional finding that he himself shared that intent.10 The ICJ has gone even further, arguing that corporate complicity in gross human rights abuses arises where the company “knew or should have known” (i.e. actual and constructive knowledge) that its conduct would be likely to contribute to the crimes.11

Superimposing this contradictory morass of international law onto an already complex area of English law underlines some of the difficulties in defining the contours of accessory liability for international crimes. There are many shades of grey on the spectrum between knowledge and intention; much will always depend on the precise factual matrix. But to take two practical examples: a company is more likely to satisfy the threshold for accessionary liability if it actively cooperates with a military regime, knowingly providing the necessary means for the regime to commit international crimes which are contemporaneous with the company’s cooperation. In contrast, the position is more ambiguous where a company simply operates for commercial advantage in a conflict area where international crimes are being (or will be) committed. The risk in this second example is that the scope of accessorial liability remains so uncertain that it can be deployed (particularly by campaigning

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6 See paragraph 62: “La question se pose de savoir si la complicité doit être définie différemment du droit commun lorsqu’est en cause le crime contre l’humanité”
7 See page 622, The Ministries Case, Case XI, US Military Tribunal, Nuremberg, 11-13 April 1949
8 See paragraph 634, Case No. IT-94-1-T, 7 May 1997
9 See Ambos, in Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, article 25, paragraph 19 inchoate offences.
10 See pages 569 and 572-573 of The Einsatzgruppen Case, 4 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 1949
11 See paragraphs 135-144, Case No. IT-98-33A
Brexit has had the effect that the Government is positively encouraging English companies to find new trading relationships outside the EU, sometimes in countries where human rights abuses are rife and where the rule of law is weak.

organisations) to target a company which, on one view, is doing no more than “business as usual”, such as providing goods or – as in the case of Lafarge – finance.

The risk of English companies finding themselves exposed to this enforcement risk is slowly increasing. Brexit has had the effect that the Government is positively encouraging English companies to find new trading relationships outside the EU, sometimes in countries where human rights abuses are rife and where the rule of law is weak. Despite this, however, the English courts have yet to accede to a prosecution of a company for its alleged complicity in international crimes. Proving accessorial liability under English law is difficult enough, and that is before the complications of proving it in the context of international crime and identifying a directing mind and will of the corporate accessory who has the requisite mens rea.

To cut through this legal quagmire, and to close the perceived accountability gap, in 2017 the Joint Committee on Human Rights, in response to guidance from the UN and the Council of Europe, recommended the imposition of a duty on companies to prevent human rights abuses and the creation of a criminal offence of failing to discharge that duty. Proving accessorial liability under English law is difficult enough, and that is before the complications of proving it in the context of international crime and identifying a directing mind and will of the corporate accessory who has the requisite mens rea.

For the time being, therefore, it is in continental Europe that the risk is most acute. European companies exposed to this risk that have operations in England, or board directors resident in England, will need advice about how to engage pre-emptively and tactically with requests for extradition and mutual legal assistance. The novelty and legal complexity of alleging accessorial liability for international crimes means there will be scope for challenging such requests in the English courts (for example, on the basis of dual criminality). The Lafarge prosecution, regardless of whether it leads to a corporate conviction, may well become the catalyst for a flurry of similar cases in continental Europe that will have cross-border ramifications for both companies and individuals, as well as influencing how countries legislate for corporate criminal liability in this rapidly evolving area in years to come.

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R (on the application of AB) v Secretary of State for Justice – an unwavering allegiance to Strasbourg case law?

On 9 July 2021, the Supreme Court (‘UKSC’) handed down judgment in R (on the application of AB) v Secretary of State for Justice. It concerned the controversial issue of solitary confinement, made more controversial here by the fact that the recipient of such treatment was a minor.

The UKSC’s mandate was to consider two questions. Firstly, whether solitary confinement of individuals under 18 years of age is inherently inhuman and degrading, and thus contrary to Article 3 of the European Convention on Human Rights (‘ECHR’). Secondly, if the first question were to be answered in the negative, is there a single test of compatibility with Article 3 for solitary confinement involving persons under 18 so that it is a measure only used in ‘exceptional circumstances in which such treatment is strictly necessary.’

In answering both questions in the negative, the UKSC ultimately reached a conclusion that was unequivocally consistent with the jurisprudence of the European Court of Human Rights (‘ECtHR’), or more accurately the absence of any such jurisprudence that had addressed these questions. In adopting this conservative approach and refusing to interpret and develop the Strasbourg jurisprudence, did the UKSC miss a valuable opportunity for clarifying the application of Article 3 and thereby potentially safeguarding the rights of children who endure solitary confinement?

The appellant had suffered a turbulent childhood. From a young age, he witnessed domestic violence between his parents and was twice placed on the child protection register due to a likelihood of emotional abuse. The result was that he grew up in a multitude of residential placements, none of which was successful, and by his early teenage years, he was subject to a full care order. Shortly after, between 2015 and 2016, the appellant’s offending began and, in December 2016, he pleaded guilty to indecent exposure and sexual assault. The appellant was remanded in custody to Feltham Young Offenders Institution to await sentence the following year.

Upon his arrival, the appellant was 15 years old. He was detained in a cell, alone, with restrictions for him not to integrate or have meaningful interaction with other detainees, save for fleeting instances when three prison officers were present. The reasons cited for his isolation were for the protection of prison staff and his own safety (due to aggressive behavior displayed towards other detainees). This treatment lasted until 2 February 2017.

Two weeks after his release from solitary confinement, the appellant issued a claim for judicial review against the respondent. The High Court decided that the respondent’s detention between December 2016 and February 2017 had breached Article 8 of the ECHR, but not Article 3 of the ECHR. The Court of Appeal agreed.

To examine the two questions before it, the UKSC embarked on the familiar path, mandated by the

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1 [2021] 3 WLR 494
2 [2021] 3 WLR 494 paragraph 1; the lower appellate courts had already dealt with failures by the respondent under domestic law and Article 8 of the ECHR. The UKSC was therefore not required to rule on these issues.
To examine the two questions before it, the UKSC embarked on the familiar path, mandated by the Human Rights Act 1998, of analysing the relevant Strasbourg case law. The two most important cases it identified concerning allegations of inhuman and degrading treatment contrary to Article 3 were:

1. Ireland v United Kingdom: this described the base level of severity for treatment to constitute a violation of Article 3. The ECtHR stated that an assessment of this base level must take into consideration ‘all of the circumstances of the case’.

2. Ahmad v United Kingdom: this expanded the list of relevant factors to be considered in determining whether the treatment reaches the base level required.

Having identified these two cases, the UKSC referred to further Strasbourg jurisprudence that had reached materially identical conclusions, concluding that removal from association is not a violation of Article 3 per se. Rather, an assessment of such a violation had to turn on a case-by-case fact specific assessment based on the set criteria and not any automatic rule.

Yet, there was a chink in the UKSC’s reliance on the case law to this point, which was that it all concerned the treatment of imprisoned adults. The UKSC openly acknowledged this problem:

“There do not appear to have been any cases in Strasbourg concerned with the application of Article 3 to the removal from association of detainees aged under 18.”

To remedy this defect, the UKSC discussed another group of ECtHR cases, this time involving the detention of children and young people generally, albeit not in the specific context of solitary confinement. It opined that these cases involving children took a similar approach to those involving solitary confinement of adults insofar as each case repeated the ‘all of the circumstances of the case’ mantra for assessing a violation of Article 3.

To this point, then, the UKSC had teased out the most relevant decisions of the ECtHR and highlighted the limitations of those decisions, i.e. there was no decision concerning the solitary confinement of a child. This is where the UKSC’s decision took a curious turn.

As none of the decisions was a perfect fit for the facts, one might assume that their value should be to provide a source of informed guidance to assist the court in their assessment of the two questions posed to them. Unfortunately, the UKSC decided that the absence of any decision dealing specifically with identical facts meant that its hands were tied:

“It is of course possible that the European court may choose to develop its jurisprudence in this way, if a suitable case comes before it. But it is not the function of this court to undertake a development of the Convention law of such a substantial nature.”

[...]

Accordingly, domestic courts were required “to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

Whilst this approach is rooted in established authority, its consequences are troubling. It goes without saying that the UKSC should not seek to undermine decisions and principles adumbrated by the ECtHR. But the UKSC’s approach in this case suggests a positive reluctance to apply those decisions and principles to any factual question that has yet to be decided by the ECtHR. The logical consequence of this approach is that our domestic courts will have to take decisions based on a ‘rulebook’ of European decisions. Keeping pace with Strasbourg is fine when Strasbourg has set the pace, but when it has not, there is a risk that domestic courts and authorities apply ‘square-peg’ decisions to ‘round-hole’ facts.

The UKSC seemed untroubled by this prospect and...
In the absence of a factually identical decision from Strasbourg, the court could have considered the effect of solitary confinement on a child based on expert evidence and international instruments available to it, as Counsel for the appellant argued, and then integrated this analysis into the existing Strasbourg jurisprudence.

This is of course true, but the fundamental raison d’etre of the ECHR is to protect the rights of the individual against an omnipotent state. Domestic judicial verdicts that give the state undue authority to infringe on the rights of individuals may ultimately be overturned in Strasbourg, but such cases take many months, or usually years, to reach that point. In the meantime, the consequences are borne by those most vulnerable.

In the absence of a factually identical decision from Strasbourg, the court could have considered the effect of solitary confinement on a child based on expert evidence and international instruments available to it, as Counsel for the appellant argued, and then integrated this analysis into the existing Strasbourg jurisprudence. Had it done so, it may have come to a different conclusion. Equally, it may not have. Either way, it is troubling that the UKSC was unwilling to engage with this issue on the basis that the ECtHR had not yet engaged with it, and to suggest that the appellant’s only remedy would be to ask the ECtHR to engage with it.

If domestic courts take a conservative approach, it is always open to the person concerned to make an application to the European court. If it is persuaded to modify its existing approach, then the individual will obtain a remedy, and the domestic courts are likely to follow the new approach when the issue next comes before them.

But if domestic courts go further than they can be fully confident that the European court would go, and the European court would not in fact go so far, then the public authority involved has no right to apply to Strasbourg, and the error made by the domestic courts will remain uncorrected.

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A rigid adherence to this approach risks creating a domestic judicial environment where potentially dangerous and perverse outcomes are possible.