

English Court of Appeal upends “adequate consideration” exemption under the Proceeds of Crime Act 2002

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In June 2024, in *R (on the application of) World Uyghur Congress v National Crime Agency* [2024] EWHC Civ 715 (the “**Decision**”), the Court of Appeal reversed the decision of the High Court, concluding that the National Crime Agency (“**NCA**”) acted unlawfully by choosing not to investigate allegations of money laundering resulting from the importation of cotton into the UK from the Xinjiang Uyghur Autonomous Region (“**XUAR**”) in China.

The Decision has not been further appealed by the NCA. It is now the leading case on the adequate consideration exemption under the Proceeds of Crime Act 2002 (“**POCA**”). As a result, the ability previously to rely on the adequate consideration exemption in a wide range of transactional circumstances has been significantly narrowed. This will likely result in a significant increase in the number of Defences against Money Laundering (“**DAML**”) required.

The key consequences of the Decision are that:

1. The “adequate consideration” exemption available for the “possession offence” under s.329(1) of POCA is significantly narrower than had previously been widely understood. The exemption now only applies to the initial receipt or use of any proceeds of crime, but not to any further transfer or use of the property, which

would constitute offences under POCA. In effect, the Court confirmed that the exemption does not “cleanse” criminal property for all subsequent recipients or activity by the recipient itself. Therefore, every transaction involving proceeds of crime will now result in the parties on both sides of the transaction being in receipt of the proceeds of crime. As such, businesses will therefore need to consider whether it is necessary to seek a DAML from the NCA in order to mitigate the risk of committing a money laundering offence with respect to the future use of the property.

2. The money laundering offences under POCA are wide and overlapping. Previously it had been thought that if there was an adequate consideration exemption to one of the POCA offences, then no DAML was required if the very same circumstances also gave rise to one of the other substantive POCA offences.¹ However, the Decision suggests that “read-across” interpretation is not permissible and that each offence has to be interpreted separately, thereby largely undermining the benefit of the adequate consideration exemption, and riding a cart and horses through the explanatory notes to POCA.
3. Where a business does seek a DAML from the NCA, there is now a risk that the property may still be subject to civil recovery, as the suspicion required for seeking a DAML would disqualify the purchaser from being a *bona fide* purchaser under the civil recovery regime pursuant to s.308 of POCA. That said, where a DAML has been issued, we consider the likelihood that the NCA (or another enforcement authority) would then seek to recover the funds to be low. However, in addition to statutory liability, if suspicion is now equivalent to not being a *bona fide* purchaser for value, it opens up the risk of potential civil liability to third parties as a constructive trustee.

Background

The World Uyghur Congress (“**WUC**”) is a non-governmental organisation that aims to promote the collective interests of the Uyghurs, an ethnically and culturally Turkic people living in the XUAR. The NCA is the UK’s primary money laundering law enforcement agency.

In response to the importation into the UK of cotton products from the XUAR, WUC provided evidence concerning the issues of forced labour and human rights abuses in the XUAR to three law enforcement agencies, including the NCA, to persuade them to take action. The NCA opted not to investigate, and the WUC challenged the decision in the High Court under judicial review grounds. The High Court ruled in the NCA’s favour, and WUC appealed the decision to the Court of Appeal, arguing that the NCA’s decision not to investigate was based on a misunderstanding of POCA, including in particular that the NCA considered (wrongly) that the presence within a supply chain of a person who can rely on the exemption under section 329(2)(c) of POCA has the effect of “cleansing” criminal property for any future purchasers.

¹ I.e. the offences under s.327 and s.328 of POCA.

Overview of POCA

Pursuant to s.329 of POCA, a person commits a primary money laundering offence if they (a) acquire criminal property; (b) use criminal property; or (c) have possession of criminal property.

Under s.329, there is an exemption to this offence of “adequate consideration”, which applies if the alleged offender acquired, used or had possession of the criminal property for adequate consideration. Prior to the Decision, it was widely understood (including by the Government) that if the adequate consideration exemption applied, it would break the chain of criminality and “cleanse” the property for all subsequent activity or recipients. To interpret otherwise would lead to an exponential growth of what constitutes criminal property. For example, in a corporate transaction involving suspected criminal property, both the seller and purchaser would end up in receipt of criminal property.

In addition, whilst on a plain reading of POCA, the exemption only applied to s.329 and not the other substantive money laundering offences despite their overlap, it was widely considered prior to the Decision that, where the same factual circumstances gave rise to both an offence under s.329 as well as s.327 or s.328, it was permissible to “read-across” the exemption, such that no substantive money laundering offence would be committed. This would apply, for example, in situations where a business entered into a corporate transaction which required a transfer of tainted assets from the seller to the purchaser. Although this would give rise to both a “possession” offence under s.329, as well as a “transfer offence” under s.327, the purchaser could have turned to the adequate consideration exemption to mitigate the risk of committing either offence.

Court of Appeal Decision

Substantive money laundering offences

The Court of Appeal found that it was incorrect to say that if criminal property was acquired for adequate consideration then no offence is committed under POCA. The correct position was that no offence would be committed under s.329. However, if the purchaser transferred the property to someone else or took it out of the country, the purchaser would commit a separate primary money laundering offence under s.327 of concealing, disguising, converting, transferring, or removing from the UK criminal property, because the adequate consideration exemption did not apply to that offence.

For example, if Company A is acquiring the assets of Company B, then, provided adequate consideration was given, the initial acquisition of assets containing criminal property would not result in the commission of a money laundering offence by Company A. However, if and when the assets were subsequently made use of, to generate profits for Company A, such use would give rise to a s.327 offence for the company. If those tainted profits were then paid out by way of enhanced dividends, then the payments of those dividends could constitute an offence for Company A under s.327, and additional POCA risk for the shareholders, depending on whether they had the requisite knowledge or suspicion of criminal property.

Civil recovery regime

Under Part 5 of POCA, there is also a civil recovery regime which enables enforcement authorities to recover “recoverable property”, which is any property obtained through unlawful conduct. Pursuant to s.308, property ceases to be recoverable if it is obtained by a *bona fide* purchaser for value and without notice.

The Court of Appeal held that for the purposes of the civil recovery regime, the fact that a purchaser paid the market value for property is insufficient in and of itself to prevent the property from being recoverable. The purchaser “*must show they acted in good faith and were not on notice that the property was obtained by unlawful conduct. A person who suspected that it was would not be able to rely on section 308*” because they would no longer be acting in good faith and without notice.

Conclusions

The Decision has significant and wide-ranging implications for all businesses which may come into contact with criminal property and commit a money laundering offence, including but not limited to the following situations:

1. *International supply chains*: Downstream purchasers cannot rely on upstream purchasers having paid market value for goods, funds or other property which they know or suspect to be derived from criminal conduct, to “cleanse” the goods for the purposes of POCA.
2. *M&A transactions*: Whilst purchasers can rely on the “adequate consideration” exemption when acquiring entities holding criminal property or assets that include criminal property, this will not cleanse the criminal property if and when the purchaser chooses to transfer, convert, or make any other use of the property thereafter.
3. *Overlapping substantive money laundering offences*: Where a transaction would result in the simultaneous commission of more than one substantive money laundering offence, such as both the “possession offence” under s.329 as well as an offence under s.327 or s.328, a DAML will be required even if the person can rely on the “adequate consideration” exemption for s.329.
4. *Civil recovery and civil liability*: Businesses that choose to seek a DAML will now also risk the relevant property being subject to civil recovery by an enforcement authority, because the knowledge or suspicion of criminal property necessary to seek a DAML, would disqualify the business as a *bona fide* purchaser under s.308 of POCA. We consider the risk that they (or another enforcement agency) would then seek to recover the tainted funds to be low, simply because it is one matter to be suspicious that assets which have been mixed are directly or indirectly the proceeds of crime, and for the NCA to prove, even on the balance of probabilities, that the assets are the traceable proceeds of a crime, since the civil recovery order should be an order “*in rem*” against the identified/specific assets which derive from the crime. In addition,

purchasers may also be subject to the risk of civil liability to third parties as constructive trustees of said property.

5. *Reliance on DAMLs*: Businesses involved in the above scenarios, or other situations involving acquisition or use of criminal property, should carefully assess the facts and consider whether they should seek a DAML in order to mitigate against the risk of committing a primary money laundering offence. We anticipate that the Decision will lead to an increase in the number of DAML applications made to the NCA.
6. *Comprehensive or partial DAMLs*: When seeking a DAML, depending on the clarity at that point surrounding proposed future uses of the tainted property, businesses will need to consider whether to (1) seek a comprehensive DAML upfront addressing all proposed future uses of the proceeds, or (2) seek an initial DAML based on the immediate next steps and then apply for successive DAMLs thereafter for each subsequent transaction or action involving the tainted proceeds. The primary risk with the first option is that an application for a comprehensive DAML in respect of all future uses of the property may be deemed too vague and rejected by the NCA, which could have a material impact on any time-sensitive transactions that are unable to proceed until a DAML is received. In contrast, the second option may result in a higher success rate in obtaining DAMLs given the more targeted approach, but will increase the operational burden on a business’s compliance function.
7. *Additional mitigation measures*: Businesses should also review contractual terms, due diligence processes and compliance frameworks relating to their supply chains (particularly where these involve jurisdictions that are higher-risk for modern slavery) and M&A activities, to identify and mitigate potential money laundering risks and ensure that any concerns are appropriately considered and acted upon. This is likely to create a number of challenges for businesses seeking to balance POCA and “tipping off” risks against increasing expectations for global organisations to actively diligence and monitor more deeply their supply chains for both human rights and modern slavery issues as well as environmental risks (e.g., the EU Supply Chain Due Diligence Directive).

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