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A Reverse for NCA With Implications for Supply Chain Investigations

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Why is this case important?

The case challenged a decision by the *National Crime Agency* (“NCA”) not to carry out investigations into whether consignments of cotton goods were the product of alleged forced labour and/or other human rights abuses.

The claim was brought as a judicial review, claiming that the NCA misdirected itself on two fundamental legal questions:

- *Does the NCA need to be able to identify specific criminal property and criminal conduct before there can be the proper basis for an investigation under the Proceeds of Crime Act 2002 (“POCA”)?*
- *Does provision of adequate consideration anywhere in the supply chain prevent any goods imported into the UK from being identified as criminal property or recoverable property?*

The Court of Appeal’s answer to both those questions was “no”; meaning that the NCA had indeed misdirected itself on the legal tests it should apply. The case has wide implications, not just for activists, whose hand has been strengthened, but also for businesses who face an increasing range of legal and public mechanisms by which their supply chains can be scrutinised and the profits they make from them are challenged.

Background

The *World Uyghur Congress* (“WUC”) is a non-governmental organisation raising awareness of human rights abuses affecting the Uyghurs, a Turkic people living in the *Xinjiang Uyghur Autonomous Region* (“XUAR”) of China. The WUC brought a judicial review claim in the English High Court, challenging the decision of the NCA not to carry out investigations into consignments of cotton goods originating from XUAR. The WUC alleged that these were the product of forced labour (or other human rights abuses) carried out by the People’s Republic of China. In addition to WUC, the campaign group *Spotlight on Corruption* was permitted to intervene in the appeal.

The NCA is responsible for the investigation of serious and organised crime in the UK. Among its responsibilities is the investigation of possible criminal offences and/or civil recovery proceedings under POCA. In this case, it was common ground between the parties that (a) there is a diverse, substantial, and growing body of evidence that serious human rights abuses are occurring, on a large scale, in the XUAR cotton industry, and that forced labour produces a significant portion of the cotton originating from China; and (b) the funds generated by the sale of those products can amount

to “criminal property,” for the purposes of money-laundering offences, or “recoverable property,” for the purposes of civil recovery proceedings.

The NCA set out two propositions as part of its basis for deciding not to investigate:

- that it was necessary to be able to identify a specific product as *criminal property*, arising out of criminal conduct, before commencing an investigation into whether a money-laundering offence has been committed; and
- that the presence within a supply chain of a party who can rely on the exemption under section 329(2)(c) of POCA, [also known as the “adequate consideration” exemption (i.e. that they had paid market value for the property)], has the effect of “cleansing” criminal property, so as to preclude its recovery from anyone who subsequently acquires it, or the recovery of the proceeds of its onward sale.

The Court found that “*both those propositions are, and are now accepted to be, wrong as a matter of law.*” This rejected both the high evidentiary threshold suggested by the NCA in order to start an investigation, and their broad interpretation of the “adequate consideration exemption.”

The case is an important reminder that the products or profits of UK businesses, derived from wrongdoing and abuses occurring anywhere in the world, can be scrutinised by the UK law enforcement authorities.

Implications

The immediate consequence for this particular matter is to send it back to the NCA, for reconsideration of whether to carry out a POCA investigation. But the wider consequences go much further, as the NCA may need to revisit previous decisions on POCA investigations, as well as change their approach to investigations in the future.

The decision does not mean the NCA can be compelled to commence investigations in all cases where there are allegations of forced labour or other human rights abuses. The judgment made it clear that the courts will be slow to interfere with decisions as to when and whether to investigate; encompassing, as they do, a mix of legal, policy, and public interest considerations.

However, the decision will give pressure groups and others a much stronger basis to press the NCA to carry out POCA investigations into alleged human rights abuses, not just in the retail industry but wherever there is revenue arising from those types of allegations.

The Court observed that: “[a] *purchaser or importer who suspects the goods to be the product of forced labour or other human rights abuses would not be able to rely on* [the limited protections provided by POCA],” and explained that it was not a correct interpretation of the law to believe that taint was removed if “*at any point in a market supply chain stretching many thousands of miles, the chain could be broken merely by the use of adequate consideration in any of the transactions involved...*” The case also adds to the growing scrutiny of the environmental, social and governance credentials of companies and their boards, coming from activists, investigative journalism, and shareholders. Highlighting flows of “tainted” money has a strong resonance in social and mainstream media. By way of example, Boohoo faced a series of allegations in July 2020 by a Sunday Times investigation into allegations of modern slavery within its supply chain. That has now been followed up in May 2024 by a shareholders’ claim in the English High Court, alleging misleading statements in the company’s ESG-related disclosures as regulated by Financial Services & Markets Act 2000.

Key Take-Aways

For businesses with exposure to high risk jurisdictions or supply chains, this is a warning about the creative ways in which the UK's money-laundering legislation can be used to focus on underlying wrong-doing.

This approach adds another line of attack for groups looking to use many and varied tactics to put pressure on companies and their boards to enhance the ESG credentials.

A POCA investigation or shareholder claim, even if ultimately unsuccessful, is disruptive, costly, and distracting.

Companies should consider working with advisors to assess their risks and exposure to challenges and investigations of this type.

Notes

1. *Our multidisciplinary, global team of leading ESG lawyers combines legal prowess with business acumen, enabling our clients to proactively anticipate ESG impacts, risks, and opportunities, and understand their key implications to leverage the strategic ESG opportunities for their business. As a team, we have unparalleled dexterity and expertise in assisting companies with their most challenging and complex human rights dilemmas, and are frequently called upon to identify and develop business and human rights solutions. For further information on our ESG practice, please contact Global Co-Chair of the ESG & Sustainable Finance practice, [Ruth Knox](#).*
2. *Our Litigation, Investigations, and Economic Crime teams are class leaders in high-profile government and corporate investigations. What sets us apart is our combined expertise across investigations, corporate representations, criminal and regulatory defence, and risk management. As a team, we have the added bonus of senior law enforcement expertise and extensive experience in judicial review, giving us an invaluable perspective on the interplay between criminal and civil risks. For more information on our criminal, regulatory, litigation, and judicial review expertise, please contact [Stuart Alford KC](#) or [Jumana Rahman](#).*

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