



Business Crime & Fraud Group

— 16 November 2021 —

Fraud Round Up: Selected Cases from 2021



Disclosure

— 16 November 2021 —

Naomi Parsons

FRAUD DISCLOSURE UPDATE 2021

Attorney General's Guidelines 2020 (effective from 30 December 2020)

1. AG's "Review of the efficiency and effectiveness of disclosure in the criminal justice system", Nov 2018
2. AG's Guidelines are "high-level principles" to be understood alongside statute, Crim PR and case law:
 - R v R (Practice Note) [2015] EWCA Crim 1941 (**paras 44-63**) ("Operation Amazon")
 - R v CB; R v Mohammed (Sultan) [2020] EWCA Crim 790 (**paras 66-100**)
3. Updates to AG's Guidelines: Annex A – Digital Material
 - Sifting and examination (**Annex A paras 36-45**)
 - Schedules (**Annex A paras 50-53**)
4. Prosecution non-disclosure failings in 2021:
 - Hamilton & others v Post Office Ltd [2021] EWCA Crim 577 (**paras 60-80; 120-138**)
 - R v Woods and Marshall (the "Serco" trial), Southwark Crown Court, April 2021
 - R v Bloor and others, Southwark Crown Court, October 2021



AMEC Foster Wheeler DPA

— 16 November 2021 —

Max Baines

DPAs to DATE

	Company	Date	Term	Penalty
1	Standard Bank	2015		\$32.2m
2	Sarclad	2016		£6.5m
3	Rolls-Royce	2017		£497.2m (£671m globally)
4	Tesco	2017		£129m
5	Serco	2019		£19.2m
6	Guralp Systems	2019		£2m
7	Airbus	2020		€984m (€3.6b globally)
8	G4S	2020		£38.5m
9	Airline Services	2020		£3m
10	AMEC Foster Wheeler	2021		£103m (\$177m globally)
11	Two companies (Bribery Act offences)	2021		£2.5m

AMEC Foster Wheeler

DPA – 1 July 2021 (Edis LJ)

- Bribery & corruption in oil & gas sector 1996-2014
- Senior level employees
- Financial Penalty (& costs) UK - **£103m**
- Global settlement (UK, US & Brazil) - **\$177m**
- Compensation to people of Nigeria - **£210,610**

AMEC Foster Wheeler

Key Takeaways

- ❖ Importance of self-reporting
- ❖ Change of Ownership
- ❖ No findings against individuals
- ❖ Calculation of Penalty

AMEC Foster Wheeler

Self-Reporting

- AMEC Foster Wheeler did not self-report
- 2007-2009: corrupt activity in Malaysia, Nigeria & Saudi Arabia brought to attention of Board
- AFW “cleansing process”
- No legal duty but Board failure to report “deplorable”
- ABC policies worthless as not reflected in company actions
- Widespread & high-level culture of criminality
- Why was DPA approved?

AMEC Foster Wheeler

New Ownership

- Self-reporting during course of investigation “essential”
- New ownership co-operated fully with SFO
- Put in place corporate governance systems
- John Wood Group “twice-removed”
- AMEC purchased Foster Wheeler 2014, post criminality
- Wood purchased AFW 2017
- No DPA without change of ownership & management

AMEC Foster Wheeler

Timing of Acquisition

- Wood purchased AFW after SFO investigation announced
- But Wood offer predated announcement - no discount
- Wood therefore not tainted by AFW criminality
- Can be treated as “entirely innocent” party
- Required to “carry the can” for AFW liabilities
- Significant in terms of decision to approve DPA & level of penalty

AMEC Foster Wheeler

Prosecution of Individuals

- Decision on individual charges “within 3 months”
- Clear emphasis on protecting position
- SFO website (within DPA announcement):

The DPA only relates to criminal liability of AFWEL and does not address whether liability of any sort attaches to any other person, including any employee, agent, former employee or former agent of AFWEL

AMEC Foster Wheeler

Prosecution of Individuals

➤ Preamble to DPA:

Upon determining the issue of approval of the DPA, the Court did not make findings of fact. No process took place by which the culpability of individual people was determined or assessed. The Court observed that companies act through individuals, and it was necessary to consider some individual conduct for that reason, but the Court did not hear from any individuals or call upon them for their side of the story. The judgment in the DPA solely dealt with the culpability of the company Amec Foster Wheeler Energy Limited and not that of any individual person. No findings of any kind were made against any individual

AMEC Foster Wheeler

Calculation of Penalty

- Edis LJ critical of SFO's mechanistic approach to penalty
- "Broadly comparable" to fine on a guilty plea
- Penalty must have real economic impact but not undermine commercial position of entirely reformed company
- 50% reduction for being "twice-removed"
- Compensation of £210,610 "to the people of Nigeria"
- Only included in one previous DPA
- Difference between tax claimed & tax paid



Criminal Evidence

— 16 November 2021 —

Faras Baloch

Criminal Evidence Update

R v Sally Ann Jones [2021] EWCA Crim 1195

R v Byrne [2021] EWCA Crim 107

R v A & Others [2021] EWCA Crim 128

R v Sally Ann Jones [2021] EWCA Crim 1195

- Company suspected it was the victim of a fraud by its senior officers, including SJ.
- Company applied for a Norwich Pharmacal order to obtain documents from SJ's company.
- SJ did not claim privilege against self incrimination. High Court ordered disclosure.
- Documents implicated SJ who was the subject of a private prosecution by the company.
- Trial Judge rejected s.78 in respect of documents obtained.

R v Sally Ann Jones [2021] EWCA Crim 1195

- *“...we accept the submission that Jones’ solicitors must have considered the question of self incrimination...the application was made inter partes with experienced criminal solicitors acting and the possibility (at least) of criminal proceedings against the party producing the documents was clearly raised, the fact that these things were not done does not in our judgment mean that the use of those documents in the criminal proceedings rendered those proceedings unfair.”*
- *“The fact is that no claim to privilege against self incrimination was made. In the absence of any evidence to the contrary, the judge was entitled to infer that this was a considered and deliberate decision.”*

R v Sally Ann Jones [2021] EWCA Crim 1195

- Court did not address whether SJ had a valid claim to privilege against self incrimination.
- **Claiming the privilege against self incrimination in respect of pre-existing documents:** *Volaw Trust & Corporate Services Ltd v Office of the Comptroller of Taxes (Jersey) and Another* [2019] UKPC 29 – 4 factors to consider: nature/ degree of compulsion; public interest in investigation; safeguards in procedure & use of material.
- **Claiming the privilege against self incrimination in respect of admissions or statements:** s.13 Fraud Act 2006 – must answer/ comply with order BUT answers are inadmissible in proceedings under FA 2006 or related offences.

R v Byrne [2021] EWCA Crim 107

- The fact an expert witness had been discredited for unprofessional conduct did not render unsafe earlier convictions imposed at trials where the expert had given evidence which remained **unchallenged**.
- A lack of formal qualifications was not in itself determinative of whether an individual was entitled to give expert opinion evidence.

R v A & Others [2021] EWCA Crim 128

- EncroChat - secure mobile phone system used by criminals.
- French police breached it and transferred material to UK authorities.
- **Issue:** Whether communications obtained were admissible or excluded by s.56 Investigatory Powers Act 2016.
- **Question:** Were the communications intercepted during transmission (inadmissible) OR intercepted from storage (admissible)?
- **Conclusion:** Communications were being stored NOT transmitted when intercepted.



Confiscation

— 16 November 2021 —

Gillian Jones Q.C.

CONFISCATION

Case 1: CPS v Aquila Advisory Ltd [2021] UKSC 49

- The facts
- The decision at first instance
- The appeal to the Court of Appeal, Civil Division.
- The appeal to the Supreme Court the issues:
 - Where a proprietary claim is brought by a company against its directors to recover proceeds of crime received in breach of fiduciary duty:
 - (1) Can that proprietary claim be asserted in priority to a confiscation order obtained by the Crown Prosecution Service?
 - (2) Can the illegality of the directors be attributed to the company in circumstances where the company suffered no loss and stood to profit from the crime?

Case 2: R v Asplin, Kearns and Jones [2021] EWCA Crim 1313

- The facts
- The issue - was the judge wrong to include salaries in the calculation of benefit and in doing so was the confiscation order disproportionate?
- The ruling
- The practical implications





Case 3: Collins v DPP [2021] EWHC 634 (Admin)



- Appeal by way of case stated
- The facts



- The issue - where a hidden assets order has been made in confiscation proceedings with the amount owed to be reduced in the case of each defendant by the sums paid by any in respect of it, should any term of imprisonment in default of payment be reduced in the same way?





Case 4: R v Parczewska [2021] EWCA Crim 750

- The facts
- The confiscation order
- The issue – for asset recovery purposes does the fact that the Court of Appeal had found that the appellant played a lesser role for the purposes of sentence length govern the position regarding the confiscation order?

Other Cases of Note

NatWest accepts that it failed to comply with regulation 8(1) and regulations 8(3) and 14(1) MLR 2007 in relation to the accounts of a UK incorporated customer. These regulations require certain firms to ensure they have adequate anti-money laundering systems and controls to prevent money laundering. Sentence 13 December 2021

Qatar v Banque Haviland SA [2021] EWHC 2172 (Comm).LPP: Application of dominant purpose test: PWC investigation report commissioned followed by press report alleging plot to drive down value of Qatar's bonds not protected by litigation privilege: useful summary of authorities [89]-[129]

Seed [2021] EWCA Crim 1198: S9 POCA Calculation - value of stolen property where rightful owner unidentified is "available" to the thief under s9 POCA for purposes of calculation as thief has possessory title:.

R (Javadov) v Westminster JJs [2021] EWHC (QB). S303Z1(4) POCA applications for AFOs (Account Freezing Orders) can be heard in private on an *inter partes* or *ex parte* application at court's discretion if the justification is sufficiently strong.

Waring [2021] EWCA Crim 1369: Available amount to include as a tainted gift the value of an asset stolen to order for a fee.

Arnjang v NF Global Limited [2021] NZHC 395 : practical assistance when reporting entity had to terminate business relationship under AML legislation.

Gates [2021] EWCA Crim 66: Conspiracy “together and/or with persons unknown” permits finding one D guilty even if no co-Ds are convicted: .

Contact Us

Naomi.Parsons@18rlc.co.uk

Max.Baines@18rlc.co.uk

Faras.Baloch@18rlc.co.uk

Gillian.Jones@18rlc.co.uk

For information about our Business Crime & Fraud Group:

Allison.Clare@18rlc.co.uk