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FCA FAIL TO SECURE CONVICTION IN FIRST CRIMINAL PROSECUTION FOR DESTRUCTION OF DOCUMENTS

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SUMMARY

In the first prosecution of its kind brought by the Financial Conduct Authority (**FCA**), Konstantin Vishnyak has been acquitted by a jury at Southwark Crown Court of one count of destruction of documents under the Financial Services and Markets Act 2000 (**FSMA**). Mr Vishnyak had previously been under investigation by the FCA for suspected insider dealing offences.
In this article, we consider the unusual nature of the defence that was put forward by Mr Vishnyak, why this case was such a loss for the regulator and what, if anything, it may reveal about the FCA's mind-set in relation to similar cases in the future.

Relevant Background

Mr Vishnyak worked as a banker at a Russian Bank between 2008 and 2016. He was arrested at his home in September 2018 for suspected insider dealing offences but, before handing over an iPhone to the investigators, he managed to delete the WhatsApp application from it.

Prosecutors for the FCA alleged that the banker deleted the application knowing that it might be relevant to an insider-dealing investigation concerning his trading in six companies that received takeover bids. Mr Vishnyak had apparently made approximately £3.78 million trading in these stocks.

Although the insider-trading investigation against Mr Vishnyak and two other suspects was later discontinued by the FCA, Mr Vishnyak was charged with the offence of destroying documents in September 2019.

The offence

Destroying documents relevant to an investigation is an offence under part XI FSMA, contrary to section 177(3)(a). This provides that:

> "*A person who knows or suspects that an investigation is being or is likely to be conducted under [part XI] is guilty of an offence if—*
>
> *(a) he falsifies, conceals, destroys or otherwise disposes of a document which he knows or suspects is or would be relevant to such an investigation, or*
>
> *(b) he causes or permits the falsification, concealment, destruction or disposal of such a document,*
>
> *unless he shows that he had no intention of concealing facts disclosed by the documents from the investigator.*"

This is a criminal offence punishable, on conviction, by a fine and/or up to 2 years' imprisonment.

The WhatsApp application is considered to be a 'document' for the purposes of this offence. 'Documents' is defined widely in section 417 FSMA, and includes "*information recorded in any form*" and, "*in relation to information recorded otherwise than in legible form, references to its production include references to producing a copy of the information in legible form, or in a form from which it can readily be produced in visible and legible form*". Undoubtedly, this broad definition is intended to capture all material that could potentially be relevant to a regulator and to ensure access to evidence that might be stored within social media, messaging and trading platform applications.

The offence is little more than a statutory species of the common law offence of doing acts tending and intended to pervert the course of public justice.

The defence

Mr Vishnyak admitted deleting the app from his phone but maintained that he had done so to conceal and keep private his chats with prominent Russian politicians and business people during the summer of 2018. In particular, he deleted conversations with Andrei Lugovoi a politician who is wanted by British police in connection with the poisoning of Alexander Litvinenko in a London restaurant in 2006. During his evidence at trial, Mr Vishnyak said he feared he would become a "bargaining chip" in the context of deteriorating relations between Russia and the UK.

Mr Vishnyak further argued that there would have been no data on the WhatsApp application relevant to the investigation when he deleted it because of changes made to his account in July 2018 over fears that individuals in Russia were trying to hack his phone. The FCA was unable, through the expert evidence that it called, to disprove this assertion.

It should be emphasised that this was a very specific defence that was put forward, the detail of which is unlikely to have been clear to the FCA at the time that the decision to charge was taken, That detail may well have emerged during the pre-trial stage through the provision of a defence statement. Had the FCA been aware of all of that detail, it may well be that the decision to charge may not have been made.

Outcome/significance

The FCA have stated that they are "*disappointed by the outcome*" but that "*we will take action whenever evidence we need is tampered with or destroyed*".

The circumstances of this case were extraordinary in terms of the defence that was put forward. It is likely that in many other cases any such destruction of documents or deletion of messaging applications is going to be the result of a panicked reaction rather than anything more rational, which would clearly never amount to a defence to this charge.

As the first prosecution brought by the FCA in relation to a destruction of documents offence, the result of this case represents a significant blow to it. While the FCA operates the standard 'realistic prospect of conviction' test that applies to all prosecutors, many have observed over the years that the FCA appears to commence criminal prosecutions not simply when there is a realistic prospect of conviction but only when it has very substantial confidence that the prosecution will result in conviction.

Bearing in mind the very fact-specific defence that was put forward in this case, it is not sensible to predict how this may affect the FCA in the future. We will now simply have to wait and see whether its public pronouncement of taking action whenever evidence is tampered with or destroyed is a true reflection of the approach that the FCA takes in the future or whether this result dampens their enthusiasm to pursue similar charges. There can be no doubt, however, that its confidence in pursuing such cases has been dented.

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