

CLAMPING DOWN

FRAUD CONCERNS IN GOVERNMENT-BACKED LENDING SCHEMES

Earlier than predicted, cases are already beginning to emerge of fraudulent applications for loans under emergency lending schemes for businesses introduced by the government to help companies manage the economic effects of COVID-19: the Business Bounceback Loan Scheme (BBLs) and Coronavirus Business Interruption Loan Scheme (CBILs).

The Financial Times reports that £31.3 billion has been lent to businesses under CBILs and BBLs as at the beginning of June, equating to approximately 745,000 businesses taking out loans, with more than £3.8bn going to 94,000 companies in the first week of June.

A number of cases are already emerging of fraudulent applications, an outcome financial institutions warned of when the schemes were implemented. Lynne Owens, the director general of the National Crime Agency (NCA), said in early June that fraudulent accessing of lending schemes is a key focus of the agency: "We have been working hand in glove with the DWP and HMRC. Everybody recognises the risk that can be created by a new financial stimulus package."

Government-backed stimulus packages have also been put in place in the United States, and US Assistant Attorney General Brian Benczkowski may have said it simplest: "Whenever there's a trillion dollars out on the street that quickly, the fraudsters are going to come out of the woodwork in an attempt to get access to that money." As the FCA has acknowledged, "the need to manage [financial crime] risks should be balanced against the need for the fast and efficient release of funds to businesses under the Government's Schemes."

CRIMINAL ACTIONS TO FOLLOW?



The greater concern is that public law enforcement agencies, which even before the pandemic were the subject of significant criticism in that they were failing to adequately investigate and prosecute fraud, will not have sufficient resources to manage the flow of new cases.

The centralised command centre for collating reports of fraud, ActionFraud, was the subject of an undercover investigation by journalists last year, which exposed woeful practices, leading Police Scotland to withdraw from the system altogether.

The Home Office commissioned a review of the service which was published in January 2020. The review found that:

- fraud accounts for one in three of all crimes committed;
- 2000 fraud offences are committed every day in England & Wales, but just one in 50 is prosecuted;
- less than 1% of police officers directly investigate fraud.

Insolvency Practitioners (IPs) are one group that have already reported an emerging awareness of a fraud typology relating to the BBLs scheme, but have been unable to access support from law enforcement. IPs report repeated examples of company directors taking out a BBLs loan, paying the money into a personal account, then placing the company into liquidation. IPs have attempted to make reports to the criminal enforcement division of the Insolvency Service, only to be told that it is overwhelmed, and has no resources to assist. The IPs could take action themselves in the civil courts, but the adverse costs risk combined with the litigation costs given the value of these loans between £2,000 and £50,000, make this impractical.

PRIVATE PROSECUTIONS AS AN OPTION



IPs and financial institutions are now looking for a realistic option to address the criminality they uncover, and some are considering pursuing private prosecutions in an effort to mount a credible deterrent to the offending. Some of the benefits cited are:

- **private prosecutions offer some cost protection:** costs may be recovered from Central Funds, provided certain conditions are met, and there are no fees to issue proceedings, unlike civil claims;
- **protection against adverse costs:** unlike civil proceedings, private prosecutions do not ordinarily involve applications for costs against the prosecutor, unless misconduct on their part is identified;
- **mitigating the risk of future litigation over the government guarantee:** if a fraud can be swiftly pursued, and funds recovered using mechanisms in the Proceeds of Crime Act 2002 that are available to private prosecutors, this could protect against future disputes with the government over the enforceability of the guarantee. It will be difficult for the government to claim that lenders had not followed every available counter-fraud control if a full criminal prosecution for a fraudulent loan application is brought;
- **act as a deterrent:** it's clear from the anecdotal reports from IPs that these company directors, and other borrowers under the BBLS are not engaging in a sophisticated fraud; rather they are counting on the government guarantee and the large numbers of borrowers, coupled with lack of resources by law enforcement as protection against pursuit. A criminal action by lenders or IPs through a private prosecution that can be widely publicised is seen as a deterrent to more fraudulent applications, or misappropriation of borrowed funds. This is the financial institution equivalent to posting a sign saying "thieves will be prosecuted."

BASIS OF A PRIVATE PROSECUTION



In England and Wales any person, organisation or company is entitled to bring a private prosecution against another party: an entity does not have to be the victim of a crime in order to pursue a private criminal case. The right to bring a private prosecution is governed by section 6(1) Prosecution of Offences Act 1985. All sanctions that would be available in a public prosecution are available to a private prosecutor, including custodial sentences, financial penalties and confiscation of the proceeds of crime.



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