DEFERRED PROSECUTION AGREEMENTS; THE CHALLENGES FOR INDIVIDUALS

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Authors: Simon Morgan and Mark Jones practice within the Fraud and Economic Crime department of Morgan Rose Solicitors defending in cases of complex fraud, corruption and other serious crime.

Email: **simonmorgan@morgan-rose.com or markjones@morgan-rose.com**
Telephone: **00 (44) 207 242 2520**

The sentencing of four of its executives on 1 August 2014 closes the chapter on the Innospec prosecution but leaves open questions about how corporates may respond to renewed calls from the Serious Fraud Office (SFO) to self-report, in view of the now evident consequences for the individuals.

Three of the four Innospec executives who were prosecuted in conjunction with the company received prison sentences ranging from 18 months to 4 years with another "very narrowly indeed escaping prison". Two of those concerned were convicted and sentenced after a trial.

In March 2010 Innospec Ltd pleaded guilty in the U.K. to bribing state officials in Indonesia and was fined $12.7m. In the U.S. it pleaded guilty to contravening the Foreign Corrupt Practices Act for conduct in Iraq which included violating the UN Oil-for-Food program. The (U.K.) settlement reached in *R. v Innospec Ltd* by the SFO attracted adverse opinions at the time from the Crown Court judge and latterly, the Organisation for Economic Cooperation and Development (OECD) more generally for the lack of transparency inherent in agreements of this nature if reached behind closed doors.

Thomas LJ heavily criticised the SFO in the way in which it reached agreement with the company, suggesting it did not have the authority to do so and described the penalty which had been agreed as 'wholly inadequate'. The negotiated settlement in *R. v Innospec Ltd* pre-dated the legislative framework now in force to enable similar agreements, but the roots of what are now Deferred Prosecution Agreements (DPAs) can be traced back to it.

In the wake of the case, the Crime & Courts Act 2013 introduced DPAs into UK law; they came into force on 24 February 2014. DPA's permit corporates to deal with admitted criminal activity, without prosecution, in return for agreeing to a number of terms and conditions; the corporate is in effect entering into a contractual agreement. Like any contractual agreement, the negotiation process is key to its success or failure.

It is essential to understand from the very start that DPAs are not available to individuals, only bodies corporate, partnerships and unincorporated organisations. It may be that a DPA is considered appropriate for the corporate. However it must be borne in mind that it is likely that the operating and directing minds of the organisation, and/or its employees, may be separately prosecuted if there is sufficient evidence to do so.

Corporate liability under the Bribery Act 2010 ("the Act") or the pre-existing laws[1] may be established in one of two ways. Firstly through non-vicarious liability resulting from an individual or individuals being concerned in acts of bribery as set out in sections 1, 2 and 6 of the Act where the offender was a directing mind and will of the company; know as the 'identification principle'.

[1] Prevention of Corruption Act 1906 as amended by the Prevention of Corruption Act 1916 and the Anti-Terrorism, Crime and Security Act 2001

A separate but linked offence may be committed by the corporate in any event under section 7 of the Act. This is an offence capable of being committed only by the commercial organisation which is guilty of the offence if it fails to prevent bribery by persons associated with it, through failing to have in place adequate procedures to prevent it. There is inevitably desire by those particularly at the top, to shield themselves individually and collectively from the wrongdoing. It is in the interests of the commercial organisation to do so with a view to avoiding corporate liability, but also for the individuals who are at risk of prosecution, whether or not a DPA is ultimately agreed. A corporate making a self-report to the SFO with a view to availing itself of a DPA may very well look to make a sacrificial offering of an individual or individuals in order to safeguard its interests.

The Serious Fraud Office position

In a speech to the Annual Employed Bar Association in March 2014, General Counsel to the SFO Alun Milford said, 'generally, we sometimes find that companies supply us with the product of a corporate investigation, badged as a self report, in which the company accepts that there may have been wrong-doing by people associated with it but denies corporate liability. It will be obvious to you that such a report cannot, as a matter of simple logic, be regarded as a self-report. It is instead a report by a person, the company, into wrongdoing by others, namely some of its employees and agents. It means that we are being offered assistance into an investigation into others' criminality, for the company has none'.

He also reiterated the warning that following the making of a report, 'we will investigate both the company and individuals associated with it or its business. At the conclusion of the investigation, we will apply the test in the Code for Crown Prosecutors against each individual suspect'.

A clear conflict can arise between the corporate and its officers and employees. There is a tendency for a corporate to seek to exonerate itself when reporting to the SFO and place blame for the wrongdoing with non-executive level employees, third parties or agents. Milford appeared to criticise self-reports that amounted to a denial of corporate responsibility with the company 'blaming others - typically junior staff, when the conduct was sanctioned at the very top'.

The message communicated by Milford was that it will always be necessary for the SFO to fulfil its investigative role as it would in any criminal investigation it was involved in. The results of corporate internal investigations would not be accepted at face value, particularly if the material collated was disclosed to the SFO on a limited waiver of privilege basis; the effect of which is to raise barriers to unfettered access to key material. He suggested that where internal investigations had been conducted in a fashion that departed substantially from accepted (SFO/Police) investigation methods and techniques, with the risk that evidence trails were disturbed, the issue telegraphed to individuals who might be involved, or have an interest in covering it up and data potentially destroyed, then this would have a detrimental impact of the value of the self-report. To those familiar with SFO operations it may seem peculiar that something so obvious even needed saying.

External lawyers called in to act for the corporate are professionally duty bound to act in its best interests. An internal investigation conducted against that background with a view to disclosing wrongdoing to a potential prosecutor necessarily carries a perceived bias, at least as far as the SFO is concerned. Allowing a suspect to conduct the investigation into his wrongdoing and potentially, later prosecution is anathema.

The SFOs underlying message seemed to be that if a corporate wanted to achieve the intended benefit of self-reporting i.e. even if there is sufficient evidence to prosecute the corporate, the public interest test outweighed it in favour of a DPA; then the self-report ought to be more or less an immediate invitation for the SFO to undertake that investigation itself from the very outset, with some provision for delegation of function to the corporate, co-ordinated by it, with methodology and scope agreed in advance by the SFO.

The reality

If the likelihood of this seems remote, then that is probably correct. A person (natural or otherwise) surrendering to the police station with the statement, 'I believe I might have committed a serious criminal

offence' is indeed a rare event. The human element of a corporate; its directing minds, will be advised by external lawyers in the initial meetings of the potential criminal liability facing them and the corporate if the wrongdoing is not capable of being quarantined at a lower, or removed level. The full extent of the problem is probably unknown when the issue comes to light following a whistle-blower event, or information received from a third party. Directors and officers might not even know whether one or more of their number are involved, or may be suspected of involvement. There may be concern that each of them might by some possibility, be implicated directly or indirectly.

Allowing the SFO to co-ordinate if not conduct much of the investigation from the outset, particularly with regards to the initial interviewing of witnesses, electronic data preservation and the forensic examination of it, requires a leap of faith on behalf of the corporate and the people within it, that seems unlikely in the extreme.

For individuals, weighing up whether they are more concerned about protecting themselves from prosecution personally or, that of the corporate they govern, is unlikely to be a challenging decision even for the most assiduous. Opening the doors to external criminal investigators without first knowing what their potential exposure is and whether there is any possibility of legally providing the minimum disclosure necessary to still call it a self-report, may be perceived as an enormous personal risk to take.

At the outset of any internal corporate investigation it may be extremely difficult to identify who has relevant information, contravened internal processes or be at the heart of the illicit activity. External lawyers for the corporate will initially look to form a corpus of individuals within it to identify as their Client and with a view to establishing the protection of Legal Professional Privilege. Such protection is essential for the corporate to have confidential communications with its lawyers and manage the disclosure of material to the SFO which was gathered during the internal investigation. This may translate into a reluctance or refusal to provide first account statements taken from those interviewed by the corporate, with the assistance of the external lawyers.

During internal investigations, employees are often given little or no choice about being subject to internal investigative interviews. Milford's speech dwelt on the issue of information withheld from the SFO by lawyers acting for self-reporting corporates on grounds of legal professional privilege and in particular, records of the first accounts given by those interviewed.

Employees need to be aware that the SFO and/or CPS will be able to use the information that employees have given during the internal investigation, if the corporate has disclosed it to them, in any subsequent criminal proceedings against either the corporate or the individual. If an individual is interviewed in circumstances designed by the external lawyers with a view to not disclosing the first account taken, either to the SFO or anyone else on grounds of legal professional privilege then there may be a risk of an incomplete picture being presented. Individuals subject to internal investigations may feel under pressure not to give an entirely frank account for fear of incriminating themselves in circumstances where the factual and legal issues are not fully explained or understood. The risk of falsely accusing a colleague or superior may also hinder an entirely frank account being provided with the risk of detriment.

An individual employed by the corporate may wish to refuse to answer questions during any internal investigation, or at least consider whether such a course of action is in their best interests. The DPA Code makes it clear, subject to a few exceptions, that there is no limitation on the use to which information obtained during the DPA negotiation process may be subsequently used against either to corporate, or anybody else.

The Lesson

Individuals within corporates are in a vulnerable position if an event has triggered consideration of a self-report and an internal investigation underway. They are unlikely to be able to seek help internally and in any event, with the protection of confidentiality provided by a lawyer/client relationship. The need of the individual to seek early, independent advice which is separate from lawyers acting for the corporate is paramount.