The identification principle and corrupt practices

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Corporate Crime analysis: Neil Swift, partner at Peter & Peters, explains how the Serious Fraud Office (SFO) has secured the first convictions against a corporate for foreign bribery, but warns of ongoing challenges in identifying a directing mind and will.

Original news

Printing firm fined £2.2m for corruption of foreign officials, LNB News 11/01/2016 92

Printing company Smith and Ouzman Ltd, based in Eastbourne, has been ordered to pay a total of £2.2m after being convicted of making corrupt payments to public officials for business contracts in Kenya and Mauritania. The company's chairman and sales and marketing director have also been given jail sentences. The conviction and sentences follow a four-year investigation by the SFO.

What is the background to the enforcement action?

Smith and Ouzman Ltd is a UK printing company specialising in the production of security documents such as ballot papers and certificates.

The SFO commenced an investigation in October 2010 following allegations that the company had won contracts in four African countries (Kenya, Mauritania, Ghana and Somaliland) as a result of paying bribes to public officials. The SFO were concerned with conduct that took place between 1 November 2006 and 31 December 2010.

The company, as well as its former chairman, sales and marketing director, international sales manager and one of its agents were charged in August 2013 with corruptly agreeing to make payments to influence the award of business contracts to the company, contrary to section 1 of the Prevention of Corruption Act 1906 (PCA 1906).

The trial took place in late 2014. Evidence adduced at trial included emails between the sales and marketing director and the company's agents. The SFO contended that 'chicken' was used as a euphemism for bribes in emails with the Kenyan agent:

> '…they are desperate for the chicken…'
>
> '…the chickens will fly straight away…'
>
> '…we will keep our chickens for now…'

It is inferred that a literal interpretation of the emails was rejected, as on 22 December 2014 the former chairman, the sales and marketing director and the company were convicted of making corrupt payments totalling £395,074 to officials in Kenya and Mauritania.

Sentencing of the individuals took place in February 2015—the former chairman received 18 months' imprisonment (suspended for two years) and its sales and marketing director received three years' imprisonment.

The company was sentenced almost a year later. It was ordered to pay a fine of £1,316,799, a confiscation order of £881,158 and costs of £25,000.

What did the SFO say about the breach?

The SFO made a number of public statements following conviction and sentencing. In particular, it noted the fact that such offending 'whether involving companies large or small severely damages the UK's commercial reputation and feeds corrupt governance in the developing world'. The SFO added:

> 'The convictions recognise the corrosive impact of such conduct on growth and the integrity of business contracts in the Developing World.'

This was a prosecution under PCA 1906 and not the Bribery Act 2010 (BA 2010)—so why is this enforcement particularly noteworthy?

As the director of the SFO, David Green CB QC, also said:

> '[T]his case marks the first convictions secured against a corporate for foreign bribery, following a contested trial.'

The case was noteworthy because it involved the successful application of the identification principle of corporate criminal liability, most comprehensively set out in the House of Lords' judgment in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, [1971] 2 All ER 127. In order to convict a company, a court has to be satisfied that an individual of sufficient seniority within the organisation to be regarded as 'a directing mind and will' is guilty of the offence.

There have, of course, been other prosecutions of companies for corruption offences, but those have followed guilty pleas—the recent concurrent prosecution of Innospec by the SFO and the US Department of Justice is perhaps the most notable example.

Should firms be concerned about the outcome in this case?

It is perhaps unsurprising that the presence in the dock, and subsequent conviction, of the company's chairman and one of its directors led to the successful application of the identification principle. This was a relatively small company whose senior officers were directly engaged in criminal activity. Clearly, there was sufficient evidence to prove that knowledge of and involvement in the criminal conduct went right to the heart and (directing) mind of the company.

The identification principle remains a blunt instrument for use in the investigation and prosecution of corporate criminality. The very real challenge for investigators and prosecutors is finding an evidential trail to one or more individuals within a large multinational corporate, who has both a guilty mind and sufficient seniority to affix the company with criminal liability.

What should lawyers advise their clients?

BA 2010, s 7 was introduced for the purpose of making prosecution of companies for bribery offences more straightforward. We are starting to see that provision being used to deal with corporate offending, either through prosecution or through deferred prosecution agreements.

However, for corrupt conduct which took place prior to the coming into force of BA 2010, and for other economic crimes, prosecutors will continue to find the identification principle difficult to apply in all but the most straightforward cases.

Without a more effective means of prosecuting companies for criminal offences other than bribery, the effectiveness of criminal enforcement against companies generally—and deferred prosecution agreements in particular—is severely curtailed.

Interviewed by Duncan Wood.

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