Welcome to Pinsent Masons’ Financial Crime and Asset Recovery team bulletin.

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Companies Act offences – a technical challenge

The Serious Fraud Office (“SFO”) offered no further evidence against Olympus Corporation (“Olympus”) and Gyrus Group Limited (“Gyrus”) at Southwark Crown Court in November for charges of making misleading statements to its auditor, contrary to section 501 of the Companies Act 2006.

This was the first case involving the SFO prosecuting a company under the Companies Act 2006. Although the SFO dropped the case it was because of a “technicality” that was specific to the case. Company directors need to remain vigilant about the accuracy of financial statements and representations given to auditors.

The prosecution began in 2011 following a tip off from its then chief executive Michael Woodford, who reported Olympus to the SFO over its acquisition of the British medical equipment manufacturer, Gyrus. Charges ensued in several jurisdictions with UK prosecutors pursuing the companies under section 501 of the Companies Act 2006. In essence, it was alleged that Gyrus has made misleading statements to its auditors.

Under section 501, a “person” commits an offence if he knowingly or recklessly gives materially misleading, false or deceptive information about a company to its auditors. The reason the prosecution failed was that the courts considered that the group of “persons” that could commit an offence under section 501 was limited by section 499 of the Companies Act and did not extend to the company itself. Under section 499, directors, officers and subsidiaries are duty bound to provide auditors with information requested by the auditors and it is an offence to make a misleading statement. In a statement, the SFO said that it “could not have prosecuted individuals in this case because Japan does not extradite its nationals”.

Whilst the attempt may have failed in this instance, the SFO are to be commended for seeking new ways to bring offending corporates to account. The collapse here seems to have been caused by deficiencies in UK legislation, leading some commentators to state that it demonstrates the “urgent need for a complete overhaul of corporate liability law in the UK”. David Green, Director of the SFO, has repeatedly called for a review of legislation (particularly, for him, of the Bribery Act) to make it easier for corporates to be brought to task, but, as we have reported, the government has decided against this. Mr Green has also stated that the first Deferred Prosecution Agreements (“DPAs”) are imminent (in fact the first has just been announced – more later). One thing is clear, however, organisations will not be minded to come clean in the hope of a DPA if there is little hope of the SFO succeeding in court. The whole concept of a DPA depends on the SFO having in its armour the appropriate legislative tools to make charges stick. Corruption and dishonesty are bad for UK plc.
First DPA announced

On 30 November, the SFO announced that its first application for a Deferred Prosecution Agreement (“DPA”) had been approved by Lord Justice Leveson at Southwark Crown Court, sitting at the Royal Courts of Justice. The DPA, between the SFO and Standard Bank plc (now known as ICBC Standard Bank plc) (“Standard Bank”), follows Standard Bank’s indictment for failing to prevent bribery, in terms of section 7 of the Bribery Act 2010 – the same section at issue in the Brand-Rex civil settlement announced by the Scottish authorities earlier this year. Pursuant to the DPA proceedings the indictment is immediately suspended.

The suspended charge related to a US$6 million payment by a former sister company of Standard Bank, Stanbic Bank Tanzania (“Stanbic Tanzania”), in March 2013 to a local partner in Tanzania, Enterprise Growth Market Advisors. The SFO alleges that the payment was intended to induce members of the Government of Tanzania, to show favour to Stanbic Tanzania and Standard Bank’s proposal for a US$600 million private placement to be carried out on behalf of the Government of Tanzania. The placement generated transaction fees of US$8.4 million, shared by Stanbic Tanzania and Standard Bank.

As a result of the DPA, Standard Bank will pay a financial penalty of some US$25 million, together with compensation of approximately US$7 million and a contribution to costs of £330,000. Standard Bank has also agreed to cooperate fully with the SFO and to be subject to an independent review of its existing anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws. It is also required to implement recommendations of the independent reviewer.

In approving the DPA Mr Justice Leveson confirmed the matters to be considered by the court in determining, as it must, whether it is in the interests of justice to proceed by way of a DPA rather than prosecution. These include:

- the seriousness of the conduct – the more serious, the more likely prosecution will be in the public interest
- the promptness of the self report and the extent to which the prosecutor has been involved
- credit will be given for self reporting matters which might otherwise have remained unknown to the prosecutor
- the weight given to a self report will depend on the totality of information disclosed and on the level of cooperation shown, including identifying witnesses, disclosing their accounts and the documents shown to them
- any history of similar conduct
- the fact that the organisation in its current form is effectively a different entity from that which committed the offence weighs in favour of a proposed DPA.

This is a significant landmark for the SFO and “will serve as a template for future agreements”. Commentators had been concerned that DPAs would simply be used as a tool by wealthy corporates to buy themselves out of trouble and ultimately of being held to account for their misdemeanors. David Green, Director of the SFO has long disputed this and Mr Justice Leveson confirmed his stance:

“Although these proceedings have been required to validate a proposal and, then, a concluded agreement in relation to the investigation by the SFO into the role played by Standard Bank in respect of the raising in 2012-13 of US $600 million by the Government of Tanzania, it is important to emphasise that the court has assumed a pivotal role in the assessment of its terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest; furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement. Suffice to say that I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime.”

Section 7 in action – again

Having waited some years for section 7 of the Bribery Act 2010 to be utilised, in the last quarter it has been in action three times; in the Scottish Brand-Rex case (reported in our last bulletin), the Standard Bank case (above) and now, in relation to the Sweett Group plc (“Sweett Group”).

On 2 December, the SFO confirmed that Sweett Group had admitted an offence of failing to prevent bribery in terms of section 7, regarding conduct in the Middle East. The admission follows an investigation into the company which began in July 2014. No details of the penalty to be imposed on the company are available yet but Douglas McCormick CEO of Sweett Group commented:

“We have…announced this morning the admission by the Group of an offence under Section 7(1) of the UK Bribery Act 2010 in relation to two related contracts entered into in 2013 in the Middle East, identified by the Group and reported to the SFO. Today’s announcement brings closure on the Middle East legacy issues a step closer, allowing the Group to progress unencumbered in the future. This is an important next step in the strategic turnaround of the business…”

A good week for the SFO. Watch this space – this is unlikely to be the last we see of section 7 in action.
Money Laundering Reporting

In the Standard Bank case, the bank not only reported matters to the SFO but also to SOCA (Serious Organised Crime Agency, now the National Crime Agency). Why did it report to two organisations? It had to make a notification to the SFO to obtain the opportunity to obtain a DPA. To avoid committing a money laundering offence it also had to make a separate formal money laundering report.

Under the Proceeds of Crime Act 2002, a person (which includes a company) risks committing an offence of money laundering if they acquire, use, possess, or transfer “criminal property” or enter into an arrangement that they know or suspect to facilitate another person to acquire or use criminal property.

Criminal property is widely defined as constituting a person’s benefit from criminal conduct in whole or in part and whether directly or indirectly. It therefore captures a benefit derived from fraud, bribery and also regulatory crimes such as not having a required licence to operate.

An offence is not, however, committed if the person or company in questions makes an “authorised disclosure” to the National Crime Agency and obtains “consent” to proceed.

The dangers of internships

BNY Mellon have agreed to pay over $14 million to settle charges that it had breached the US equivalent of the Bribery Act by giving student internships to the children of foreign officials. Although it can be perfectly proper to hire a family member or friend of a foreign official, where that is intended to induce or reward that official for awarding work, it can be an offence.

Care must be taken in giving out what are, at the end of the day, often extremely sought after internships. Make sure your hiring policy is fully compliant, transparent and applied to all. It is wise, too, to keep compliance personnel fully informed at all stages of the hiring process.

SFO engagement – why and when

Much has been said recently, including by us, about cooperation with the SFO. In a recent speech at the annual Anti Bribery and Corruption Forum, Ben Morgan, joint head of bribery and corruption at the SFO, considered the question, why engage with the SFO at all? Three principal reasons for engaging were outlined:

- the SFO has extremely good intelligence leads, which they are actively cultivating to ensure constant improvement. If there is corruption, the SFO will find out about it sooner or later;
- whistleblowing is becoming more prevalent. “Whether to sit on a corruption issue or to come and talk to us about it has always been a question of playing the odds. And ... those odds are changing. People are less and less willing to tolerate wrongdoing where they know about it, so we are more and more likely to find out.”
- “If you want a DPA coming to us before we come to you is a very good start”. As indicated above, Mr Justice Leveson cites this as one of the reasons a DPA may be considered as an alternative to prosecution.

Mr Morgan also looked at the question of when to engage. Again much has been said of this, with some believing from previous SFO speeches that their stance is that they should be told immediately there is suspicion of wrongdoing. We have not held this view and, again, Mr Morgan was at pains to confirm that this is not the SFO’s position on the matter. Whilst their view is that they should be told of suspicions “sooner rather than later”, the SFO “accept you need enough time and space to have an initial look at an allegation that comes to your attention. But nor do we want the first time we hear from you to be at the end of a major internal investigation, months if not years after the conduct in question has surfaced, and in particular after multiple witnesses have been interviewed and re-interviewed extensively. There is a balance between those two extremes that you will have to judge for yourselves, but the nearer the beginning of your own investigative work you speak to us, the happier we will be.”

The SFO expect cooperation with, for example:

- identifying relevant witnesses
- agreeing the sequencing of interviewing them
- the disclosure of the factual elements of interviews already conducted, and in particular claims to privilege over such interviews
- the provision of relevant contemporary documentation
- alerting the SFO to potentially relevant sources of documentation. Internal investigations should be carried out in a properly inquisitional way
- ensuring the proper handling of data – integrity of images, location of data, continuity of evidence, format in which it is supplied etc.

Should any suspicious activity be uncovered, it is essential that expert advice is sought immediately.
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UK’s AML system is failing

The UK takes pride in what it perceives as its robust approach to the detection and prosecution of economic crime, with the government at pains to lead the way on many transparency issues (see more later). This has suffered a setback recently, however, with the publication (on 23rd November) of a report by Transparency International UK (the UK branch of the world-leading non-governmental anti-corruption organisation) which highlights significant weaknesses in the supervision of the UK’s anti money laundering rules which allow corrupt money to flood into the UK undetected and uninvestigated. The report concludes that:

“No sector supervisor in the UK is providing a proportionate and credible deterrent to those who engage in complicit and wilful money laundering… The system that should prevent dirty money entering the UK is failing”

Transparency International UK looked at the financial services, accountancy, legal services, luxury goods, property and trust and company service providers sectors. They found that the “mish-mash” of different (mainly private sector) supervisors involved left the system lacking transparency and was “structurally unsound”, which in turn:

• undermines effective implementation of legislation
• results in an inconsistent, unclear and unhelpful environment for businesses seeking to abide by the rules
• leaves businesses in the dark about what risk-based preventative action they should take to protect themselves from corrupt money in their sector.

Over 20 recommendations for improvement are made in the report including:

• overhauling the way anti-money laundering standards are overseen to achieve consistency;
• ensuring integrity and accountability in the supervisory system;
• ensuring adequate levels of enforcement against money laundering and
• providing better information about money laundering risks to the private sector.

The UK government’s own assessments have confirmed that only a small percentage of the dirty money entering the UK is detected and investigated, with David Cameron pledging to persuade foreign fraudsters that there “is no place for dirty money in Britain”. Businesses should expect some significant change in this area as the government attempts to make good on its promises. In the meantime, all should ensure that their anti-money laundering policy is updated, fully compliant, understood and enforced.

More transparency on the cards

We reported in our last bulletin on the UK government’s plans to stop foreign fraudsters and corrupt officials using anonymous shell companies to hide dirty money by buying up luxury properties in the capital, and to encourage greater corporate transparency throughout the world. On 16 November, they published their plan for UK implementation of the G20 High Level Principles on Beneficial Ownership Transparency (“the Plan”). Amongst other things it confirms that a planned public register of who really owns and controls UK companies is likely to become operational in June 2016.

Companies will obliged to know who owns and controls them and able to identify a “natural person” as their beneficial owner. They will require to obtain and hold adequate, accurate and current information on their beneficial ownership and make this information accessible to domestic competent authorities and report it to a central public register. Details of beneficial owners’ full names, dates of birth, nationalities, country or state of usual residence, residential addresses, service addresses and details of the beneficial interest held must be kept and, with the exception of residential addresses and full dates of birth, made available for public inspection and accessible at Companies House. Protected information will be accessible by certain UK and overseas enforcement authorities.

Companies should start looking ahead now, and make sure they are in a position to meet their obligations in this respect.

The Plan also refers to other measures designed to improve corporate transparency, including to put in place effective mechanisms to share beneficial ownership information with certain foreign authorities and to extending beneficial ownership transparency to foreign companies investing in high-value property or bidding on UK public contracts. These will be implemented in 2017 through new UK money laundering regulations which will implement the 4th EU Money Laundering Directive.

The Plan follows hot on the heels of a joint statement (on 10th November) from Transparency International UK and the National Association of Estate Agents urging the government to “begin the process to make foreign and offshore ownership of UK property fully transparent”. According to them, anonymous offshore companies own some 35,000 properties in the UK, pushing up property prices to the detriment of other honest purchasers. The statement urges the government to take a strong position to ensure they commit to public registers of foreign beneficial ownership.

“The rhetoric from the Prime Minister about stopping the flow of corrupt capital coming into the UK has been very strong, but now is the time for real action. The veil of secrecy over UK property ownership needs to be lifted to ensure the UK is no longer a safe haven for dirty cash…”

Watch this space.
Scottish Courts provide a salutary lesson for those involved in bribery

A recent case before the Court of Session in Scotland, illustrates the potential consequences of being implicated in bribery for director shareholders. The case centred round an allegation of unfair prejudice under the Companies Act, with the applicant, a director, seeking to have his case upheld and his shares in the company purchased at fair or market value.

In essence, one of the directors of a company became suspicious that the company might have been involved in bribery. Due to the animosity between the applicant, a Mr Gray, and at least one of his fellow directors, Mr Gray was not immediately advised of this and an initial internal investigation was carried out without his knowledge. That revealed that bribery was indeed likely to have occurred and that Mr Gray knew of it and may have authorised it. Advice was taken and a self-report made.

Disciplinary proceedings in respect of Mr Gray and others then took place, as a result of which Mr Gray was dismissed as a director, the involvement in bribery being said to amount to gross misconduct allowing immediate dismissal. Mr Gray appealed the decision (proceedings challenging the dismissal were continuing) but resigned as director and commenced the current court proceedings alleging that the affairs of the company had been carried out in an unfairly prejudicial manner to himself and associated shareholders.

The court agreed with a number of his complaints of unfairly prejudicial conduct and had then to consider what relief to grant. In so doing the court had to consider what was just and equitable in all the circumstances. Mr Gray sought the purchase of his shares at fair or market value, amounting to some £20 million. The court decided, however, that Mr Gray’s involvement and knowledge of the bribery required to be considered in determining what was just and equitable. That involvement made him a “Bad Leaver” in terms of the company’s articles of association. Those articles provided that a leaving shareholder whose contract of employment is terminated where, in the reasonable opinion of the Board, he has committed an act of gross misconduct will be deemed a “Bad Leaver”. As such, Mr Gray was only entitled to 75% of the fair value or the par value of his shares whichever was lower, a difference of some £18 million.

A salutary lesson for Mr Gray – the consequences of involvement in bribery can be far-reaching.