FIRST CONTESTED PROSECUTION FOR FAILURE TO PREVENT BRIBERY: JURY REJECTS "ADEQUATE PROCEDURES" DEFENCE

The first company to plead not guilty to the corporate offence of failing to prevent bribery (under section 7 of the Bribery Act 2010 ("BA 2010")) since it came into force in July 2011 has failed to persuade a jury that it had "adequate procedures" in place. The case is an indicator of the continuing will of prosecutors to pursue corporates (even where they cooperate), but leaves most questions about when the offence will be prosecuted and when companies may be able to successfully defend prosecutions unanswered.

Key issues

- Deferred prosecution agreements are not inevitable in cases where corporates self-report failures to prevent bribery.
- UK prosecuting authorities have considerable latitude when deciding whether to prosecute in such cases, and are willing to use cases to send a deterrent message.
- The case does not provide any further judicial guidance on what amounts to "adequate procedures" although prosecutors emphasised the importance of implementing, maintaining and training staff on appropriate specific anti-bribery and corruption policies and giving a suitable senior individual responsibility for compliance in this area.

THE FACTS

Skansen Interior Limited ("SIL"), an interior refurbishment company that has been dormant since May 2014, was prosecuted for failing to prevent its former managing director from bribing a project manager within a property company in connection with office refurbishment contracts worth £6 million. £10,000 is reported to have been paid in bribes and a further £29,000 offered but not paid.

Although full details have not been publicised, it is reported that SIL conducted its own internal investigation, proactively brought matters to the attention of the City of London Police and cooperated with the investigation, including by providing confidential and privileged documents.

Both of the individuals involved pleaded guilty to other offences under BA 2010 and are yet to be sentenced. Because it is dormant and has no assets, although SIL was convicted, no penalty could be imposed upon it.

WHY WAS THERE NO DEFERRED PROSECUTION AGREEMENT?

At first glance, the case looks to have been eminently suitable for resolution by way of a deferred prosecution agreement ("DPA"). SIL appears to have provided early and significant cooperation and the facts appear to have been more straightforward than almost all the cases in which DPAs have been concluded to date. Indeed, it is in some respects surprising that the matter was prosecuted at all given some of the indications included in guidance published by the Crown Prosecution Service ("CPS") and the Serious Fraud Office ("SFO").

Press reports indicate that a DPA may have been contemplated at one stage but that the CPS decided that the public interest would be better served by

prosecuting in order to send a deterrent message to other companies (notwithstanding the fact that no penalty could be imposed). In reality, the decision is also likely to have been heavily influenced by the likely practical difficulties associated with SIL, as a dormant company with no assets, complying with the financial and other terms of a DPA (although the DPA agreed with the company known as XYZ in July 2016, in which an overseas parent company agreed to provide substantial financial support, shows that such difficulties are not insurmountable).

The case underlines the breadth of prosecutors' discretion as to whether to entertain a DPA, and that settlements are not inevitable in cases where corporates come forward with details of failures to prevent bribery. The CPS in this case has adopted the same line as taken by the SFO when it decided to prosecute Sweett Group plc for the section 7 offence, which led to the imposition of a fine of £1.4 million and a confiscation order requiring it to pay over £850,000 following a guilty plea. In that case, the SFO decided that it was not appropriate to enter into a DPA with Sweett as it concluded that the company was not providing sufficient levels of co-operation.

WHAT ARE "ADEQUATE PROCEDURES"?

SIL sought to rely on the defence that it had "adequate procedures" in place to prevent bribery. The onus was on it to prove this to the civil standard of the balance of probabilities. The jury rejected arguments put forward on SIL's behalf that sophisticated and specific arrangements were not required in a small company of around 30 people operating in a single open plan office. It did not accept that SIL's general policies or procedures on ethics which required everybody to act honestly and ethically or its financial controls in place relating to payments of invoices or the standard terms in relevant construction contracts (or indeed the fact that one of the payments was detected before it was paid) amounted to "adequate procedures" for the purposes of the section 7 offence. There was no dedicated stand-alone ABC policy at the time of the relevant conduct, no proper training and no individual had been given specific responsibility for ABC compliance. The jury therefore returned a guilty verdict.

Neither this case nor any of the four to date where much larger companies have entered into DPAs or have been prosecuted in relation to failing to prevent bribery provide any detailed indications as to how the Ministry of Justice guidance on "adequate procedures" should translate into practice and what companies must do in order to benefit from the defence to the section 7 offence. This relatively factually complex question is a matter for the jury to determine in cases where corporates plead not guilty to the section 7 offence. No judicial guidance on the factors juries should consider has emerged from this case. However, it seems that in this case the CPS placed particular emphasis on an absence of records showing that staff had been trained or required formally to sign up to the policies and procedures SIL maintained and pointed to the belated introduction of a more detailed ABC policy as an acceptance that previous arrangements were deficient.

Other key themes arising include the importance of designating an appropriate senior individual as responsible for anti-bribery compliance (apparently even where there is no specific regulatory obligation to do so), responding effectively to changes in the law and the types of business in which a company is involved, and maintaining appropriate channels for concerns to be escalated (particularly where senior employees are suspected of being

involved in bribery). These are all prominent features of the six principles in relation to "adequate procedures" set out in the Ministry of Justice guidance.

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