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Briefing note 18 November 2011

# The Bribery Act 2010 – From small acorns...

Former Magistrates' Court clerk Munir Patel has today become the first person to be sentenced under Bribery Act 2010 ("the Act"). Mr Patel has been jailed for 6 years, having pleaded guilty last month to requesting or receiving a bribe (an offence under section 2 of the Act (and to the separate common law offence of Misconduct in Public Office). He received 3 years for bribery. Mr Patel was prosecuted in connection with a payment of £500, which he received in return for offering to seek to influence the course of criminal (road traffic) proceedings (although he is stated by prosecutors to have been involved in 53 similar arrangements in total) .

Almost five months on from the long awaited and much heralded entry into force of the Act, Mr Patel is the only person or organisation to have been prosecuted with any offence under its provisions.

Given that it does not apply retrospectively to acts (or omissions) prior to July 2011, this is perhaps unsurprising. On the face of it, people may have been surprised at the selection of this case for the first prosecution under such a high profile piece of legislation. Nevertheless a closer reading of the circumstances of the case does suggest that the actions of Mr Patel struck at the very heart of the integrity of the criminal justice system and clearly fall within the mischief described at section 2 of the Act.

However, the focus of attention of most of those who lobbied for the Act, those who drafted it and the accompanying guidance, and those who have planned for its effect on their business was the Act's potential application to the international operations, transactions and payments of multinational organisations than on the actions of a clerk at Redbridge Magistrates' Court in a road traffic case.

It would be wrong to view the apparent absence of any action under the Act at this stage against large corporates (or individuals associated with them) as an indicator of a lack of current anti-bribery enforcement activity, or of any lack of appetite for

## Contacts


**Roger Best**
Partner, London

T: +44 20 7006 1640
E: roger.best
@cliffordchance.com

**Steven Gatti**
Partner, New York

T: +1 202912 5095
E: steven.gatti
@cliffordchance.com

**Edward O'Callaghan**
Partner, New York

T: +1 212878 3439
E: edward.ocallaghan
@CliffordChance.com

**David Raskin**
Partner, New York

T: +1 212878 3438
E: david.raskin
@cliffordchance.com

**Luke Tolaini**
Partner, London

T: +44 20 7006 4666
E: luke.tolaini
@cliffordchance.com

**Judith Seddon**
Director, Business Crime & Regulatory Enforcement, London

T: +44 20 7006 4820
E: judith.seddon
@cliffordchance.com

**Chris Stott**
Professional Support Lawyer, London

T: +44 20 7006 4231
E: chris.stott
@cliffordchance.com

action on the part of the SFO. Last month three more individuals were charged with offences (under the previous legislation) in connection with their actions whilst they were directors of Innospec Limited (and its predecessor company). Those proceedings are ongoing. Equally, and notwithstanding that it continues to prosecute individuals through the criminal courts where appropriate, the SFO has made no secret of its wish to explore alternatives to contested criminal proceedings to deal with offences including bribery and overseas corruption. In addition to seeking to maximise the deterrent effect of the Act by raising the profile of the legislation publicly, by pushing for robust penalties, and by encouraging proactive corporate compliance (through, for example, the inclusion of the "adequate procedures" defence to the offence under section 7 of the Act), they have also publicly advocated the use, in certain circumstances, of disposals where the Court plays a significantly reduced role.

In particular, Richard Alderman has clearly expressed his wish for the SFO to be given the power, in addition to the existing tools at its disposal (under, for example Serious Organised Crime and Police Act 2005 ("**SOCPA**") and the civil recovery provisions under Part V of Proceeds of Crime Act 2002 ("**POCA**")), to conclude investigations into historical corruption by way of deferred prosecution agreements ("**DPA**s") of the type widely used by US regulators, rather than by way of long and costly criminal trials.

This suggested approach appears to enjoy political support. The current indications from government are that the first DPAs may be entered into in 2014 and that an estimated ten per year will follow thereafter.

There is not necessarily corresponding support from the judiciary. For example, in the context of the SFO presenting the Court with an agreed sentencing package (and in circumstances where it had been agreed that the US would take the lion's share of what funds Innospec had to satisfy any penalties imposed), Lord Justice Thomas in *R v Innospec*[i] and subsequently the Lord Chief Justice, Lord Judge, in *R v Dougall*[ii], made it abundantly clear that the Courts were unhappy about having their discretion to impose significant sentences in bribery cases fettered; and that it would "*rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order.*"[iii] Nevertheless, the SFO has continued in its determination to seek and obtain civil recovery orders under POCA to deal with unlawful conduct despite the criticism in *Innospec*. There have already been three such cases in 2011 alone.[iv]

While DPAs may, to some degree, alleviate concerns that civil recovery orders should not be used when serious criminal conduct is at issue (since DPAs are, at least, the province of the criminal rather than civil courts) there still remain issues of transparency and judicial oversight to grapple with. But the SFO is determined to press ahead in its quest for the powers to deliver what it sees as swifter and cheaper justice. As it said earlier this year,

> "*There is no doubt the SFO could do even more given greater powers and we are pressing for them. The Government is committed to combating economic crime and with the powers to deal fraudsters a body blow that white collar criminals have previously been able to avoid. These powers are still a matter for discussion. In the meantime the SFO's skills will continue to bring fraudsters to book; deliver justice to victims and provide value for money.*"[v]

The SFO is not the only prosecuting agency to be using enhanced powers. Last year, the Financial Services Authority successfully used its powers under SOCPA in *R v Anjam Ahmad*[vi], an insider dealing prosecution, to give a co-operating defendant a significantly reduced sentence. It is hard to see that this trend will not continue.

In making its argument about the benefits of DPAs the SFO is looking to the perceived success of DPAs (and indeed Non Prosecution Agreements ("**NPAs**")) in the US where their number has steadily increased over recent years, enabling the prosecution to reach speedy commercial resolutions of complex cases and enabling the defence to have some certainty of outcome. These have been used by the US Department of Justice ("**DoJ**") for some time and with considerable success, but have only recently (in May 2011) been used for the first time by the US Securities and Exchange Commission ("**SEC**").

However, if the SFO is looking to US judges to persuade their UK counterparts of the benefits of such agreements, the extent to which such support is likely to be forthcoming may be diminishing. Most recently, it has been dealt a blow by comments made by a US Judge asked to approve a settlement by the US Securities and Exchange Commission ("**SEC**") with a bank accused of mis-selling. The SEC, in proposing the settlement of an investigation by way of a $95 million financial penalty, has been strongly criticised in judgments which have resonated with that of Lord Justice Thomas in *Innospec*[vii]. This is the latest in an increasing number of cases where judges have

voiced their dissatisfaction at the (in their view inadequate) level of penalties proposed by the SEC and the DoJ under DPAs and other settlements entered into with large institutions. To date, negotiated deals have continued to be (reluctantly) approved, but the tide appears to be turning.

Nevertheless, it is likely that the SFO (or any successor organisation) will continue to show enthusiasm for alternatives to prosecution, in appropriate circumstances (and in particular where offenders self-report) especially bearing in mind the current fiscal constraints. In doing so, they will also need to ensure the principles under the *Code for Crown Prosecutors* are borne in mind, which includes ensuring that prosecutions are brought if it is in the public interest to do so. However, the public interest will, in some circumstances, be served in obtaining the swift resolution of cases, which does not involve prosecution, thereby avoiding lengthy and costly trials and allowing the company to move on.

Whilst the circumstances of Mr Patel's case clearly did not lend themselves to an alternative resolution mechanism such as a DPA, it is only a matter of time before a larger and/or more high profile case concerning post-July 2011 conduct presents itself. When it does, regardless of any judicial resistance to alternative methods of resolution, it is likely that those deciding how to proceed will wish, so far as possible, to resolve matters pragmatically, whilst preserving the potency of the deterrent effect of the Act.

Most would argue that, until now, the DoJ has managed well the balance between pragmatism and deterrence. Whether the comments by the Judge in the recent SEC hearing herald a change of attitude is hard to say. They are, though, likely to fuel concern that the so-called enhanced toolkit which the SFO is seeking - based on that of its US colleagues - will enable corporate offenders to buy their way out of trouble, at a fraction of what their offending merits. From whichever side of the debate, it is surely essential if non-prosecution avenues are to be successfully explored, that there is transparency, clarity and judicial buy-in.

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[i] 26 March 2010 (unreported)
[ii] [2010] EWCA Crim 1048
[iii] Per Thomas LJ in *Innospec*
[iv] Action has been taken by the SFO under Part V of POCA against Macmillan Publishers Limited (SFO Press Release, 22 July 2011 - http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/action-on-macmillan-publishers-limited.aspx), Depuy International Limited (SFO Press Release, 8 April 2011, http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/depuy-international-limited-ordered-to-pay-4829-million-pounds-in-civil-recovery-order.aspx) and MW Kellogg Limited (SFO Press Release, 16 February 2011 - http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mw-kellogg-ltd-to-pay-7-million-pounds-in-sfo-high-court-action.aspx), resulting in orders for these companies to pay sums of over £11 million, £4.829 million and over £7 million respectively.
[v] SFO Press Release, 7 April 2011(http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/serious-fraud-office---more-effective-and-costing-less.aspx)
[vi] 22 June 2010 (unreported) – FSA Press Release, 22 June 2010 (http://www.fsa.gov.uk/pages/Library/Communication/PR/2010/104.shtml)
[vii] *SEC v. CitiGroup Global Market, Inc.,* 1:11-cv-073897-JSR, DI 9 (S.D.N.Y. 2011)