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SFO secures first Bribery Act convictions… and promises more to come

The Serious Fraud Office secured its first convictions for offences under the Bribery Act 2010 on 5 December two and a half years after the Act came into force. Three individuals, former directors of companies involved in the sale and promotion of investment products based on "green biofuel" plantations in Cambodia, were convicted of a range of criminal offences and sentenced to a total of 28 years' imprisonment.

In the teeth of mounting criticism from NGOs, and the OECD, the Serious Fraud Office will feel as much relief as pleasure in having notched up its first convictions under the Bribery Act, even if those convictions might not exactly rank in the "top strata of economic crime" which David Green CB QC, Director of the SFO, has publicly tasked the agency with tackling.

The ex-CEO and Chairman of Sustainable Growth Group, and the ex-Chief Commercial Officer of its subsidiary, Sustainable AgroEnergy PLC. were both convicted of conspiracy to commit fraud, and fraudulent trading. The CCO was also convicted of accepting bribes, (though acquitted of paying bribes) while the director of a sales agent, SJ Stone Ltd, was convicted of conspiracy to furnish false information and two counts of active bribery. The CCO received bribes for his role in relation to false sales invoices submitted by the agent, which allowed exorbitant commission rates to be charged on investors' funds.

The bribery charges against two of the three were clearly ancillary to the fraud-based charges. Indeed, sentencing the three individuals, the judge focused mainly on the impact of the individuals' dishonesty on individual investors and described the bribery as an aggravating rather than a central feature of the fraud.

The case is by no means the largest being pursued by the SFO at present. Nonetheless, it illustrates the SFO's readiness to prosecute offences under the Bribery Act where it can. The Bribery Act applies to conduct that took place on or after 1 July 2011 (i.e. during the period in which the conduct leading to the convictions in this case occurred). The SFO has indicated that this is the first of a number of cases concerned with the mis-selling of investment products through Self Invested Personal Pension schemes to come to trial. Depending on their fact patterns, these subsequent cases may act as a further proving ground for the prosecution by the SFO of Bribery Act offences.

This case is undoubtedly more factually complex than those in which individuals have hitherto been convicted following prosecutions pursued by the Crown Prosecution Service (see, for example, Clifford Chance briefing in respect of the first prosecution under the Bribery Act in November 2011). The SFO may point to it as an early indicator of the greater ease with which it can now prosecute bribery involving multiple jurisdictions and relatively intricate factual scenarios.

However, it is unlikely to go down as a seminal case. Indeed, the case bears many of the hallmarks of the type of prosecutions from which Mr Green has been seeking to distance the SFO in some of his more recent speeches. The elements of the individuals' conduct covered by the bribery charges could equally have been prosecuted by other agencies (including some of those with which the SFO partnered in this case). Had it occurred prior to 1 July 2011, there is no reason to suppose that successful prosecutions could not have been brought.

It appears to have been open to the SFO to have prosecuted one of the companies involved in this case for the offence of failing to prevent bribery using section 7 of BA 2010 ("the corporate offence") (to the extent that conduct occurred after 1 July 2011). When a suitable case involving a corporate organisation is identified and successfully prosecuted (or, if appropriate, used as the

basis for a deferred prosecution agreement ("DPA")), it is likely to be held out as evidence of the desirability of extending the corporate offence to cover conduct other than bribery. In the meantime, Mr Green continues to extol the virtues of such an extension from conference platforms.

The SFO's recent public statements suggest that some of the higher profile cases with which it now wishes to be associated, referred to by Mr Green as the "top tier" cases, are progressing towards the stage where decisions as to disposal will be taken. These decisions will include whether to charge individuals and/or organisations with offences or, in appropriate cases, to seek to enter into the first DPAs. Adjustments to the SFO's focus under Mr Green's tenure and the nature and timing of the conduct with which those cases are concerned will mean that a greater proportion will be based on allegations that offences under the Bribery Act may have been committed (rather than under predecessor or alternative legislation).

The SFO's first successful prosecution of offences under the Bribery Act in this case is a statement of intent, but provides no real practical guidance, or clarity, for corporate organisations which are or may become the subject of bribery investigations. Those organisations and their advisers will continue to scan the horizon for more instructive cases as more prosecutions emerge from the pipeline, and in particular for indications of the first use of the corporate offence. They will be especially astute to indications from prosecutors (and, if the corporate offence forms part of the basis for a DPA settlement, the Court) as to what "adequate procedures" look like in practice and how they interpret published guidance in that area.

The SFO has indicated that it intends to pursue further proceedings against those convicted in respect of the estimated £23 million invested in the products between April 2011 and February 2012 with a view to obtaining confiscation and compensation orders

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