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Shareholders carry financial risk for bribery in companies in which they invest

The UK Serious Fraud Office ("SFO") has, for the first time, obtained a civil recovery order against a shareholder of a company involved in historic bribery. The order, made under Part V of the Proceeds of Crime Act 2002 ("POCA"), which enables the SFO and others to trace and recover "*property obtained through unlawful conduct*"[i], requires the shareholder concerned to repay £131,204 received by way of dividends from Mabey & Johnson Limited ("M&J"), which was convicted of corruption offences and breaches of sanctions in September 2009.

This civil recovery order is the final chapter in the action arising from the discovery by M&J of historic corrupt payments made to numerous overseas countries, including Ghana, Jamaica and Iraq (where payments were found to have been made in breach of the UN Oil for Food Programme). Following a report made to the SFO by M&J and several lengthy investigations by the SFO, M&J, two of its former directors and one former employee have been convicted of (pre-Bribery Act 2010) corruption offences and breaches of UK sanctions legislation[ii].

The civil recovery order was made by consent following co-operation with the SFO. Beyond that, however, relatively few facts relating to the detail of the civil recovery order made have been made public. Nevertheless, the case has been held up by the SFO as an example of the benefits of early self-reporting by companies, and as a reminder to shareholders and investors of their responsibility to "*satisfy themselves with the business practices of the companies they invest in* [sic.]"[iii].

Commensurate with the size of M&J and its parent (which are relatively small family-owned companies), the amount of the order of the sums to be recovered is relatively small. The SFO has secured much greater sums, through the frequent use of the civil recovery regime over recent years, often against much larger entities, starting with the civil recovery order made against Balfour Beatty in October 2008[iv]. The powers used by the SFO are not new[v], and have not been extended to enable it to secure this order[vi]. Instead, the significance of the order lies in the use of these powers against the owners of a company rather than the company itself or those responsible for its management.

It is clear that the use of civil recovery powers in this way is not intended to be a one-off. Richard Alderman, Director of the SFO, commenting on the order, has made it plain that "*The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity*" and signalled an intention to tackle in particular "*institutional investors whose due diligence has clearly been lax*" and who "*have the knowledge and expertise*"[vii] to conduct appropriate levels of due diligence to satisfy themselves that the company in which they are investing is not involved in corruption.

In some respects, this stated intention to hold shareholders responsible for their investment decisions represents an extension of the concepts contained within section 7 of the Bribery Act 2010 ("**the Act**"), which requires organisations to take steps to prevent bribery, to the owners of companies.

This may be desirable from the point of view of encouraging a culture of active compliance with anti-bribery and corruption legislation. However, it is far from clear where the boundaries of investors' due diligence obligations lie, and which steps they are required to take in order to discharge them. Unlike the guidance produced by the Ministry of Justice for organisations to assist them with meeting their obligations under section 7 of the Act[viii], there is no corresponding statutory guidance for investors.

Prudent and experienced investors conduct due diligence prior to making acquisitions, and are of course well able to make judgments as to companies' performance and prospects. They can, to the extent that information is in the public domain, assess companies' policies and procedures, including those relating to ethics and anti-bribery measures. However, this is very different to analysing fully the adequacy of such policies and assessing how effectively those policies and procedures are implemented in the business practices of those companies.

The SFO has previously encouraged those involved in mergers and acquisitions who may be concerned about issues raised in the course of due diligence to approach it for "clearance". Corporates were initially wary of the SFO's apparent willingness to comment on proposed acquisitions, although Richard Alderman has noted an upturn in approaches recently, commenting, for example, in a speech in 2011:

"I have been struck over the last few months by the number of corporations that have been coming to see me about some pretty sensitive negotiations in which they are involved and the problems that due diligence is throwing up. I need hardly say as well that the timescales in all of this are very tight."[ix]

In contrast, this approach (nor indeed any other) has not been advocated by the SFO as a means by which investors could mitigate the risk of civil recovery action being taken against them, leaving some significant question marks as to how investors are expected to satisfy themselves to the standard expected by the SFO (and indeed what that standard is).

Similar uncertainty remains in relation to the circumstances in which the SFO will take action to recover property from shareholders. This is the first case where the SFO has taken sequential criminal and civil action against a company, its directors and its shareholders in respect of the same corrupt payments. It is not yet clear whether the SFO intends to replicate this multi-layered approach in future. Civil recovery proceedings are different in character and purpose to criminal proceedings and are focussed on recouping property rather than establishing liability on the part of the subject of the order. This has been recognised in this instance, where the order made (by consent) requiring the shareholder to return dividends has followed admitted wrongdoing by the subsidiary of the company from which those dividends were received.

However, a conviction is not required in order for civil recovery proceedings to succeed. This has recently been affirmed in several cases successfully pursued by the Serious Organised Crime Agency[x] and is largely due to the difference in the criminal and civil standards of proof and the wide definition of "unlawful conduct" for the purposes of Part V of POCA).

Similarly, the scope of the civil recovery provisions in Part V of POCA is wider than even the broadened scope of the criminal law on bribery in the UK. In order to be prosecuted under the Bribery Act 2010, a company only need be incorporated in or carrying on business in the UK. There is no requirement in Part V of POCA for any such link to the UK other than the dividend (or other property alleged to be derived from "unlawful conduct") reaching UK shores.

Richard Alderman has described the order made in this case against the shareholder of M&J as "*the final piece in an exemplary model of corporate self-reporting and cooperative resolution*"[xi]. Another of the SFO's flagship policies has been to seek to "*deliver more for less*"[xii] and to innovate in the way it tackles bribery and corruption, including by increasing the emphasis on asset recovery[xiii].

The SFO has been criticised for this approach, and in particular for pursuing civil proceedings instead of prosecuting companies and/or individuals. In the face of such criticism, it has continued to try to flex its muscle and has brought high profile prosecutions of corporate entities, such as the action taken against Innospec[xiv], leading to the imposition of a fine of $12.7 million in March 2010 and M&J, and against directors of both companies. It has nonetheless continued to attract criticism, not least from sentencing judges, for seeking to dispose of cases through negotiated settlements[xv].

The SFO's attempts to encourage self-reporting whilst exploring alternatives to prosecution are not necessarily contradictory. However, as the political and budgetary pressures on the SFO continue to grow, it is perhaps open to question whether businesses, looking at the experience of M&J, its directors, and now its shareholders, will agree that self-reporting is in their interests.

The SFO is not a regulator with which institutional investors will be, or will wish to become, familiar. However, given the breadth and flexibility of application of the civil recovery regime, investors may be concerned that factors such as the prevailing resistance to the SFO's attempts to use alternatives to prosecution and continuing pressure on its resources may lead it to pursue civil recovery proceedings against investors as a substitute for prosecution of the companies whose shares they own and/or the directors who run them.

This order is clearly designed to set a precedent for further civil recovery action by the SFO where property is in the hands of shareholders of larger companies, including where there have been no prior criminal proceedings. It is clear from the action taken in this case that the SFO does not regard the corporate veil as an obstacle to enforcement action in bribery cases.

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[i] Sections 241 and 242 POCA

[ii] Following M&J's conviction (under UK anti-corruption legislation in force prior to the passage of the Bribery Act 2010) (which led to M&J being fined £6.6 million and a confiscation order of £1.1 million being imposed), former directors David Mabey and Charles Forsyth and former employee Richard Gledhill have also been convicted of offences relating to payments to Iraq breaching sanctions legislation (Iraq (United Nations Sanctions) Order 2000, made under United Nations Act 1946 – see *R v Forsyth; R v Mabey* [2011] UKSC 9 for details of challenges by Messrs Mabey and Forsyth to their prosecution under this order).

[iii] Richard Alderman, Director of the SFO, SFO press release, 13 January 2012 (http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx)

[iv] See Clifford Chance briefing note, 23 July 2009 (http://www.cliffordchance.com/publicationviews/publications/2009/07/clifford_chance_commentsfoissueslongawaitedguidancetocorporateso.html). 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] Part V of POCA has been in force since December 2002

[vi] Although there are some exceptions to the civil recovery powers under Part V POCA, they are extremely widely drawn. In particular, "unlawful conduct" is defined to include all conduct worldwide which is unlawful where it occurs and which, had it occurred in the UK, would be unlawful. As in this case, the powers can also be used to recover property in the hands of innocent parties in addition to participants in the conduct.

[vii] Richard Alderman, Director of the SFO, SFO press release, 13 January 2012 (http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx)

[viii] http://www.justice.gov.uk/downloads/guidance/making-reviewing-law/bribery-act-2010-guidance.pdf

[ix] Richard Alderman, speech to Risk Advisory dinner, Washington D.C., 5 October 2011 (http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2011/risk-advisory-dinner,-washington-dc.aspx. See also, for example, further comments by Richard Alderman on self-reporting and engagement between the SFO and corporates at http://www.sfo.gov.uk/about-us/our-views/director's-speeches/speeches-2009/bribery-bill--anti-corruption,-richard-alderman.aspx and http://www.sfo.gov.uk/media/166872/08.%2017-mar-11%20richard%20alderman%20strengthening%20of%20anti-corruption%20mechanisms%20in%20business%20activities,%20st%20petersburg.pdf

[x] *Serious Organised Crime Agency v Hymans and others* [2011] EWHC 3332, *Serious Organised Crime Agency v Gale* (2011) UKSC 49

[xi] http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey--johnson.aspx

[xii] Phillippa Williamson, Chief Executive , Serious Fraud Office, *Serious Fraud Office Annual Report and Accounts 2010-2011*, page 4 (http://www.sfo.gov.uk/media/175084/resource-accounts-2010-11.pdf) and

[xiii] http://www.sfo.gov.uk/media/163662/business-plan.pdf

[xiv] *R v Innospec*, 26 March 2010 (unreported)

[xv] See Clifford Chance briefing note, 18 November 2011, *The Bribery Act 2010 – From small acorns...* at http://www.cliffordchance.com/publicationviews/publications/2011/11/the_bribery_act_2010fromsmallacorns.html