New tool to tackle corporate wrongdoing—life after the first DPA

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Corporate Crime analysis: Crispin Aylett QC and Rachna Gokani of QEB Hollis Whiteman Chambers advise that the success of the first deferred prosecution agreement (DPA) should mean that the Serious Fraud Office (SFO) will see this is an opportunity to save time and money in the prosecution of corporate defendants.

Original news

SFO agrees first deferred prosecution agreement, LNB News 30/11/2015 52

Lord Justice Leveson has approved the SFO's first application for a deferred prosecution agreement (DPA). It was agreed with ICBC Standard Bank Plc following its indictment alleging a failure to prevent bribery contrary to the Bribery Act 2010. Under the DPA, the bank will pay financial orders of $25.2m, among other payments. The bank will also be subject to an independent review of its anti-bribery and corruption controls.

What does this case tell us about how deferred prosecution agreements (DPAs) are being used by the SFO?

It is difficult to establish any pattern based on a single DPA but the success of this one will encourage the SFO to continue with those that are ongoing and to use DPAs in appropriate cases. There is now a benchmark against which future proposed applications can be measured and 'a template for future agreements' (David Green, director of the SFO). However, the SFO has made it clear that its willingness to enter into a DPA in this case should not be mistaken for a desire to force a DPA onto every corporate case. The bar remains high.

What were the challenges in securing this DPA?

Although it was apparent from an early stage that both sides were keen to enter into a DPA, nonetheless the negotiations over the precise terms of the statement of facts--which has to be an agreed document--were protracted. Once that was agreed, issues arose over who in the document should be anonymised.

There was an obvious tension between transparency and privacy which was resolved (after lengthy discussions between the parties and also in the course of the paragraph 7 hearing in chambers) by publishing the names of those who had been significantly involved in the transaction: the two leading parties in Standard Bank Tanzania, the three directors of the third party (EGMA) and the man in charge of the Debt Capital Markets Team at Standard Bank in London. Everyone else was anonymised.

That said, the court attached 'considerable weight' to the fact that the bank had immediately (within days) reported itself to the authorities and adopted a genuinely proactive response. While the discussions relating to the statement of facts were lengthy and difficult, that document was substantially reliant on evidence disclosed voluntarily, pursuant to an SFO-sanctioned internal investigation. It was this self-reporting and cooperation, which included sensible concessions (on both sides) during the process, later described by the judge as being 'of particular significance', that militated very much in favour of a finding that the DPA was likely to be in the interests of justice.

What does this mean for the availability or otherwise of DPAs in the future--will they be more readily used?

The success of the first one should mean that the SFO will see this is an opportunity to save time and money in the prosecution of corporate defendants--it simultaneously allows the corporate defendant to put right what went wrong. In this case, for example, Standard Bank was applauded for properly serving its shareholders, customers and employees by recognising its failings and by committing itself to the highest standards going forward, rather than, 'in the hope of getting away with it' not self-reporting.

Have attitudes towards DPAs changed since their introduction (and somewhat frosty reception) in the UK?

On 19 June 2015, the UK's leading anti-corruption NGOs, Transparency International, Corruption Watch, and Global Witness, wrote to David Green to express their concern that DPAs will become an easy option for corporates and agencies alike. They noted that the UK is embarking on DPAs at a time when their use has become increasingly controversial in the US and that the UK must, and can, avoid the more controversial elements of the settlement process.

It is hoped that the extensive public scrutiny of the Standard Bank DPA will have assuaged those fears. This was very far from a private compromise without independent judicial consideration; the court played a pivotal role in the assessment of the terms of the agreement and through publication of the court judgments, the DPA itself and the statement of facts, the circumstances in which this DPA was considered to serve the interests of justice can be examined closely.

While one swallow does not make a summer, this was a good case with which to begin--an isolated instance of corruption in Africa which the defendant company's compliance procedures failed to prevent.

Any further points of interest?

The DPA documents also give useful guidance on the application of the sentencing guideline for fraud, bribery and money laundering, and, perhaps more significantly, far greater clarity (through practical application) of the standards of adequacy against which a corporate's policies and procedures will be judged.

Crispin Aylett QC has a wealth of experience in all areas of criminal law, including fraud. He was Senior Treasury Counsel at the Old Bailey for seven years, following five years as Junior Treasury Counsel. He has been instructed on some of the most grave and high profile murder cases of the day and is currently instructed in cases of terrorism and murder. In this first DPA case, Crispin was instructed on behalf of the SFO.

Rachna Gokani acts for the defence and prosecution in cases of serious and complex business and general crime. She has extensive experience in multi-jurisdictional cases. Rachna is on the SFO's list of approved counsel.

Interviewed by Kate Beaumont.

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