LIBOR INVESTIGATION – WHERE NOW?

Sean Larkin QC 23 October 2013

Following revelations of manipulation of the LIBOR rate, financial institutions have been fined in excess of a billion pounds by the UK, US (and foreign) regulators. More institutions are expected to settle. Civil actions are live. In light of such findings prosecutions seem inevitable and straightforward. The UK and US have charged seven people; in the UK, three suspects will be tried in January 2014 for offences of conspiracy to defraud[1]. Press reports suggest twenty-two people are under investigation by the Serious Fraud Office (SFO) leading to the prospect of more trials. Where now?

David Green QC, the Director of the SFO, has said the case is the largest and most complex on his books. An indication of size was given in Bob Diamond's evidence, to the Treasury Select Committee, that the regulators had examined millions of files. Notwithstanding the scale of the challenge, the SFO are investing resources and reputation in this investigation and prosecution. Success is likely to be measured by number of convictions and seniority of those convicted.

It is the scale of the investigation that creates a problem for the SFO. Piecing together events from evidence is like putting together a jigsaw puzzle from different boxes of puzzles, missing pieces and no picture on the box to guide you. Historically, the investigator has sought to find the 'picture on the box' to guide him. Such a picture may come in a number of ways:

- A ' blueprint for fraud' found in the evidence that sets out the nature of fraud and the actors within it and is used as evidence at trial. Naturally, it is very rare for conspirators to record the conspiracy. More commonly, investigators seek to piece together the picture from witnesses, correspondence, and other evidence – the greater the amount of material, the harder to sort the wood from the trees
- a person is offered immunity from prosecution in return for spilling the beans and then giving evidence – such powers were extensively used by the SFO in the pharmaceutical price-fixing case where there were more 'guilty' individuals due to give evidence as prosecution witnesses than sitting in the dock
- a person pleads guilty and gives evidence in return for a greatly reduced sentence,
- investigators use information obtained in interviews of suspects, regulatory investigations, disclosed internal investigations of financial institutions or civil actions – these may not be admissible as evidence but direct lines of enquiry and provide an overview.

The SFO will have material in the first and fourth of the categories above - almost too much of it. A big question will be its approach to using insiders as witnesses? The former Attorney General appreciated 'we need to encourage the accomplices and lieutenants to (give) evidence so we can get at the Mr Bigs'. The approach of the SFO in LIBOR may guide us all as to how it will conduct future investigations. Will it expect insiders to plead guilty or will it offer immunity before giving evidence? Who makes the first move: the SFO or the suspect? If offered immunity will suspects still be liable to be extradited to US (or elsewhere)? Will they be liable to pay monies under the proceeds of crime regime

[1] The new offence under section 91 Financial Services Act 2012 is not retrospective

or civil actions? Will they be required to give evidence at any trial, any time, anywhere in the world?

The SFO are still processing information. Their approach in the next few months may be an indicator of the direction the new regime wish to take.