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THE MURKY BUSINESS OF INVESTIGATING CORRUPTION

By Alistair Graham and Chris Roberts

Allegations of fraud, bribery or corruption can damage or destroy a company's reputation even when there is no basis to the allegations. Once the allegations are made the Director of the Serious Fraud Office (**"SFO"**) need only believe that there are "reasonable grounds" to suspect that an offence which involves serious or complex fraud has been committed in order to open an investigation (section 1(3) of the Criminal Justice Act 1987), with the added adverse attention and publicity that brings.

The SFO has identified the mining industry as the corporate sector with the highest rate of foreign bribery[1] with 41% of these bribery cases concluded since 1999 involving knowledge by corporate management, including the CEO. As the SFO's Joint Head of Bribery and Corruption put it in a recent speech: "we're talking about companies like yours, and people like you."[2]

It is important to remember that the SFO is both investigator and prosecutor – ultimately it is judged by how many successful prosecutions it can secure. In this context, when faced with an SFO investigation, what stance does the SFO adopt and how should the company react? The situation is changing.

The SFO's point of view – "leave it to us"

When allegations are first raised, the first response of many directors will be that they want to understand all the allegations and the events giving rise to them. This has traditionally been achieved by way of an investigation performed for the company by an external law firm.

Recently however senior members of the SFO, including the Director David Green QC, have publicly and repeatedly warned against a company instructing external lawyers to investigate allegations made against the company or its employees. The SFO does not view these investigations and reports the law firms produce detailing their findings as being sufficiently "independent". It argues that there is an "inherent conflict"[3] in a law firm being instructed by the board of directors to investigate the alleged actions of the company's employees. The SFO also has concerns that the company and the law firm will make inappropriate claims of legal privilege which may have the effect of hindering the SFO in its investigation or subsequent prosecution. Finally, the SFO believes that "the crime scene can be churned up"[4] by a law firm's investigation.

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1 OECD Foreign Bribery Report 2014 – the extractive industries represent 19% of cases involving bribery of a foreign official.
2 Speech at the Global Anti-Corruption and Compliance in Mining Conference 2015.
3 David Green interviewed in *The Times* on 27 August 2014.
4 David Green interviewed in *The Times* on 27 August 2014.

The SFO's recent stance is to try to persuade companies that there is no advantage in hiring an independent law firm to investigate the allegations of fraud, bribery or corruption. On the contrary the SFO would prefer and advocate that the company should trust the SFO to investigate, without recourse to the company's own lawyers and in some cases suspend any ongoing investigation. The most high-profile example where this has occurred is the SFO's investigation into Tesco's accounting practices, where Tesco is reported to have halted its inquiry to allow the SFO to complete its own.

The stick – the SFO's approach to prosecutions

Recent cases have shown that where the SFO has started a prosecution it will pursue it determinedly, even at considerable cost to all concerned. A recent example demonstrating the SFO's approach in relation to the natural resources sector is the prosecution of the directors of Celtic Energy Ltd.

The SFO charged the directors of Celtic Energy and its lawyers with allegedly conspiring to defraud local authorities in South Wales by prejudicing their ability effectively to enforce obligations to restore open case mining sites to open countryside and/or agricultural use. After a 2 year investigation and a year-long prosecution the charges against all the defendants were dismissed in February 2014. The SFO had substantially changed its case several times during the course of the prosecution.

However, rather than accept the Court's decision, the SFO applied for a rarely-sought order, "a voluntary bill of indictment", which in effect allowed it to bring the prosecution a second time. This second attempt was rejected in November 2014 and the judge described the SFO's changing its case several times as causing the defendants "real prejudice"[5]. At a subsequent hearing in February 2015 the judge ordered the SFO to pay the defendants' costs and described the SFO's legal analysis in the case as being subject to "regular, cataclysmic change, each successive change being fundamental" and that these changes "lacked legal merit and.... [e]ach was, from the outset, doomed to fail."[6]

However the SFO has also had a number of recent successes; so how should a company respond?

The carrot – Deferred Prosecution Agreements ("DPAs")

In February 2014 the SFO was granted the authority to agree DPAs with companies. Under the terms of a DPA the SFO must charge the company with a criminal offence but proceedings are automatically suspended because the company has agreed to certain conditions with the SFO. These could include payment of a financial penalty or compensation to third parties. The DPA must be approved by a judge and, if approved, a costly and disruptive criminal trial will have been avoided and an agreed sanction imposed. Note that DPAs cannot be offered to individuals. DPAs avoid the need for a prosecution and provide certainty to the company that the investigation is over, drawing a line under the allegations.

However the SFO will only agree to offer a DPA where the company is regarded by the SFO as cooperating. This enables the SFO to exert significant pressure over the company until it is satisfied that the company is cooperating.

Further, entering into a DPA requires that the company admits an element of wrongdoing. A major risk companies need to consider if offered a DPA in such circumstances is that where the company has not instructed an external law firm to perform a complete independent

5 *Serious Fraud Office v Evans & ors* [2014] EWHC 3803 (QB), paragraph 95.

6 *Serious Fraud Office v Evans & ors* [2015] EWHC 263 (QB), paragraphs 157 to 158.

investigation it will be entirely reliant upon the information identified by the SFO, as will any law firm advising on the terms of the DPA.

Therefore whilst a DPA may bring certainty and draw a line under allegations, it is still in effect an admission that an offence took place. Once a DPA has been agreed the SFO will consider if it should try to prosecute individual directors who were involved in the relevant events – who, it must be remembered, cannot agree a DPA with the SFO.

The tightrope

The SFO has become an increasingly aggressive organisation in both its guises as investigator and as prosecutor. Companies under investigation are presented with a range of ways to respond, including from cooperating fully (by allowing the SFO to investigate without any independent legal investigation) to refusing to cooperate at all (by instructing an external law firm to perform a full independent investigation and defending allegations all the way to trial) save for complying with the SFO's requests as far as it is legally required to do so.

The position a company should adopt will vary depending upon the circumstances. Whilst a board will want to know if the allegations have any foundation and, if so, how wide they spread, it may wish to commission an independent investigation. However if in the course of that investigation it becomes clear that an offence has been committed, then it may be appropriate to consider ceasing the internal investigation and allowing the SFO full access to the relevant documentation.

The key is to ensure that the Board takes the decision that is in the best interests of the company in all the circumstances. This may involve cooperating with the SFO at an early stage or asserting its right to defend and defeat allegations which lack legal merit and are doomed to fail. Unfortunately both options can be long, complex and costly whatever stance the Board decides to adopt.

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