

UK Executives Sentenced for Bribing Foreign Government Officials

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Summary

On February 12, two executives of Smith & Ouzman Limited, an English printing company, were sentenced for corruption offenses following a trial brought by the U.K.'s Serious Fraud Office (SFO). The chairman, aged 71, received an 18-month suspended sentence and his son, the international sales director, was sentenced to three years' imprisonment. The company, which chose not to cooperate with the SFO's investigation, was also convicted by a jury in December 2014, and its sentencing hearing has been separately scheduled for October. This case is significant because it showcases the SFO's willingness to take companies to trial where they refuse to cooperate with the SFO's investigation and that executives brought before the U.K. courts can expect significant jail time for organized and serious corruption-related offenses at home or abroad.

Factual Overview

The case was brought under U.K.'s pre-Bribery Act 2010 laws and concerned corrupt payments totaling £400,000 that were made by Smith & Ouzman to third-party agents to secure print contracts in Kenya and Mauritania. On December 22, 2014, a jury convicted the company and the executives for corruptly agreeing to make payments, contrary to Section 1(1) of the Prevention of Corruption Act 1906. The jury accepted SFO evidence that the company and executives inflated commission payments to overseas agents to conceal bribes that were to be passed on to public officials involved in the award of print contracts for ballot papers, examination papers and certificates.

Under the U.K.'s pre-Bribery Act laws, a company will normally only be criminally liable where the commission of the offense can be attributed to someone who at the material time was the "directing mind and will"¹ of the company or "an embodiment of the company."² Historically, this high bar has been an obstacle to prosecutors in foreign bribery cases and other serious economic crimes. The Bribery Act significantly expands corporate liability by introducing a "failure to prevent" bribery offense that can be committed by the company, and by expanding the rules of attribution. Covered senior executives' unlawful conduct can now be attributed to the company where they consent to or connive in a bribery scheme.³ Additionally, a company can be liable for failure to prevent bribery by associated third parties.⁴

In Smith & Ouzman, the two convicted executives, the chairman and the international sales director, took an active role in the management of the company and were both on the board of directors. Once the SFO proved the guilt of these individuals, it was able to show that they also were the guiding minds of the company.

Analysis

UK Regulators Are Targeting Bribery of Foreign Public Officials

Demonstrating the agency's continued resolve to prosecute companies and executives involved in overseas corruption, the SFO spent three years bringing the prosecution of Smith & Ouzman and its executives to trial. The agency has continued its push to prosecute companies and executives involved in overseas corruption, even when faced with doing so under technically complex pre-Bribery Act laws.⁵ The current director, David Green, has stated that the SFO has 68 additional cases in the pipeline, including eight

¹ *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd* [1915] AC 705.

² *Tesco Supermarkets Ltd v. Natrass* [1972] AC 153.

³ Bribery Act 2010, Section 14(2).

⁴ Bribery Act 2010, Section 7.

⁵ See also "U.K. Serious Fraud Office Returns to First Principles in Bribery Act Guidance."

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possible Bribery Act enforcement matters, most of which are likely to have an element of overseas corruption. Currently, there are publicly reported bribery and fraud investigations involving numerous U.K. and multinational companies, and there are undeclared investigations into other well-known U.K. companies. This crop of cases likely involves conduct both before and after the Bribery Act came into force and suggests that there will be a significant number of enforcement actions in the years ahead.

Working in High-Risk Territories, Sectors and With Third Parties

Smith & Ouzman's operations and business model reflects the reality of many companies that work in developing economies. Smith & Ouzman entered into contracts to provide goods and services in partnership with governments and used third parties to assist in the markets concerned. Such activities pose heightened bribery risks and require strong corporate compliance controls as well as adequate due diligence of third-party agents.

High-Risk Sectors and Markets

A number of U.K. settlements have demonstrated that the U.K. courts do not accept as mitigation any argument that a company has been effectively coerced into paying bribes or facilitation payments, either to enter a market or to maintain market share in a perceived "dirty market." In a U.K. case arising from the Johnson & Johnson case brought by the U.S. Department of Justice, the U.K. Lord Chief Justice stated that "it is neither a defence nor mitigation for a businessman in this country who has involved himself in corruption abroad to demonstrate that he is merely following local practices in that foreign country, or that others doing business there use the same murky practices."⁶

The U.K. Bribery Act reaffirms the then-Lord Chief Justice's statement that the SFO will disregard arguments made relating to traditional or historically accepted practices in determining what is or is not corrupt. Stated another way, while the Bribery Act contains a narrow local law exception for practices that are clearly enshrined in local law either by statute or by judicially accepted case law, the SFO will closely scrutinize defenses predicated on local or past practices.⁷

Working With Third Parties

The Bribery Act creates a discrete corporate liability offense that imposes corporate criminal liability on commercial organizations that carry on all or part of a business in the U.K., for the failure to prevent bribery by an "associated person." Whereas the evidence adduced at trial showed that Smith & Ouzman deliberately used agents to commit bribery, under this "failure to prevent bribery" offense, criminal liability may be imposed

when a person "associated" with a commercial organization pays a bribe intending to obtain or retain business or a business advantage for the entity. An associated person is broadly defined to include any person who performs services for or on behalf of the entity, and includes (but is not limited to) employees, agents and subsidiaries.

As a counterpoint to the broad reach of the corporate offense, the Bribery Act provides a defense if an entity can demonstrate that it has established "adequate procedures" to prevent bribery by associated persons. Adequate procedures, or an "adequate" compliance program, must include appropriate diligence into the appointment, remuneration and retention of agents and consultants.

Compliance in Small- and Medium-Sized Enterprises as Important as in Multinationals

Commenting on the Smith & Ouzman matter, Director Green stated that "bribery of foreign public officials ... whether involving companies large or small, severely damages the U.K.'s commercial reputation and feeds corrupt governance in the developing world."

When the U.K.'s Bribery Act Adequate Procedures Guidance was set forth by the Ministry of Justice on July 1, 2011, the principle of proportionality was emphasized as one of the six factors in assessing the adequacy of anti-bribery policies and procedures. This case demonstrates that the SFO will nonetheless prosecute small companies that fail to adopt appropriate compliance practices, even if doing so may threaten the company's continued ability to stay profitable.

Conclusion

In the U.K., companies and operations of every size should have regular risk assessments and tailored compliance procedures to the risks the company faces. Compliance should be practical, effective and overseen by senior management and board governance bodies. The importance of tailoring control procedures to specific industry and geographic risks sits alongside the importance of procedures that function in practice, and the necessity of fulsome internal reporting to senior management.

Given the increasingly active enforcement environment in the U.K., companies should consider enhancing their compliance programs and developing a Day 1 plan for responding to regulators should an inquiry arise. The sentence Smith & Ouzman's executives received also shows that the U.K. courts will not shy away from ordering significant jail time for directors who engaged in overseas corruption and failed to heed the warnings that adequate anti-corruption controls are essential, now more than ever.

⁶ *R v. Dougall* [2010] EWCA Crim 1048.

⁷ Bribery Act 2010, Section 5 (2): "In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of any part of the United Kingdom, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned."