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# In Second DPA, SFO and U.K. Court Focus on Cooperation, Self-Reporting and Compliance

By Elizabeth Robertson
*Skadden (UK)*

On July 8, 2016, Lord Chief Justice Leveson (LJ Leveson), sitting in the Crown Court, approved the second Serious Fraud Office (SFO) application for a Deferred Prosecution Agreement (DPA). The identity of the counterparty remains confidential but is understood to be a small to medium-sized U.K. entity (U.K. SME) wholly owned by a U.S. corporation. In the first DPA, approved by the same judge in November last year, the counterparty was Standard Bank Plc (now known as ICBC Standard Bank Plc), a financial and, thus, regulated institution. This article will discuss the key points of interest in the most recent DPA and provide additional insight by examining some of the differences between this and the Standard Bank case. It is also worth considering, briefly, the guilty plea by Sweett Group, on not dissimilar facts. See "*Lessons From the U.K. Sweett Group Prosecution*" (Mar. 23, 2016).

## *Background on the U.K. SME Case*

Between June 2004 and June 2012, the U.K. SME, through a small but important group of its employees and agents, systematically offered or paid bribes to secure contracts in a foreign jurisdiction for a total of £17.24 million. This represented 15.81% of the total revenue of the U.K. SME during that period. In total, 28 of the 74 contracts ultimately examined revealed specific evidence suggesting that those contracts were procured as a result of the offer or payment of bribes. The total gross profit from the implicated contracts amounted to £6,553,085 or, to put it another way, 20.82% of the U.K. SME's total gross profit.

### *Discovering the Questionable Conduct*

In late 2011, the U.K. SME's U.S. parent launched a global compliance programme. The U.K. SME admitted that prior to that date it did not have adequate compliance provisions in place. In August 2012, as the compliance programme was rolled out at the U.K. SME, concerns were raised about how a significant number of the company's contracts had been secured.

Immediate action was taken by the U.K. SME and a law firm was retained in September of 2012 to conduct an independent internal investigation. At a meeting on November 12, 2012, with the SFO, the lawyers for the U.K. SME confirmed that it would be making a written self-report following the conclusion of the internal investigation.

### *Self-Reporting to the SFO*

In total, three self-reports were submitted to the SFO between January 31, 2013, and November 27, 2014. The U.K. SME identified evidence relating to corrupt payments made to secure a number of contracts. The SFO formally accepted the case for criminal investigation pursuant to § 1(3) of the Criminal Justice Act 1987 in June 2013 and, with the full cooperation of the U.K. SME and its parent company, conducted its own investigation which concluded on January 14, 2016.

### *SFO Seeks Approval of a DPA*

The Director of the SFO sought judicial approval of a DPA with the U.K. SME reflecting two counts of conspiracy to corrupt or bribe contrary to § 1 of the Criminal Law Act 1977 (for the pre-2011 conduct) and one count of failure to prevent bribery contrary to § 7 of the Bribery Act 2010 which came into force on July 1, 2011, and is not retroactively enforceable.

The financial penalty imposed totalled £6,201,085. Broken down, this reflects a disgorgement of profits of £3.3 million, a financial penalty of £1.3 million and

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a £1,953,085 contribution from the U.S. parent as repayment of part of the dividends received during the offending period.

The Judge expressly acknowledged that the parent company was "entirely ignorant" of the practices taking place, and did not find that the parent company had violated the law even though it had received dividends from its subsidiary which may have raised money laundering issues. LJ Leveson further praised the U.K. SME's parent for its cooperation.

The U.K. SME must also pay £325,000 from its own resources over the three- to five-year duration set for the DPA, continue to cooperate with the SFO and consent to a review of its existing compliance programme.

The two amounts – the financial penalty of £6,201,085 and the £325,000 the U.K. SME must pay itself – added together total the gross profit from the unlawful contracts. The full final judgment and the SFO's statement will stay private until criminal proceedings against individuals have concluded. This penalty reflects a huge discount from a starting point of just under £16.4 million (gross profit times a multiplier of 250%) which is discussed in more detail below.

## *Background of the Standard Bank Case*

Standard Bank had a sister company, Stanbic Bank Tanzania Ltd (Stanbic), and in 2012 the Government of Tanzania received financing from Standard Bank and Stanbic that initially involved a fee of 1.4% of gross proceeds raised. Stanbic increased the proposed fee to 2.4% in September 2012. That 1% increase would be paid to a "local partner," a Tanzanian company which had as one of its three shareholders and directors a serving member of the government of Tanzania.

Neither Standard Bank nor Stanbic sought to understand what role the local partner would be playing for this additional fee (which amounted to US $6 million), nor sought justification for the size of the fee, nor conducted enhanced due diligence on the public official. On the closing of the transaction, US $6 million was paid to the Tanzanian company from an account at Stanbic and the funds were quickly withdrawn in cash, with the consent and assistance of Stanbic's CEO and acting head of corporate and investment banking.

Staff at Stanbic raised concerns about the withdrawals immediately. These were promptly investigated and Standard Bank's lawyers self-reported on behalf of the company within weeks. Following an internal investigation, a report disclosing its findings was sent to the SFO on July 21, 2014.

### *SFO Penalty*

The penalty imposed in the DPA was made up of compensation and interest of US $6 million and US $1 million respectively, and a financial penalty of US $16.8 million, reduced from US $25.2 million for its guilty plea and £330,000 towards the SFO's costs.

### *Separate FCA Penalty for AML Violations*

Standard Bank was a regulated entity and, therefore, also subject to the jurisdiction of the Financial Conduct Authority (FCA). The bank had separately self-reported to the FCA which concluded in a Final Notice issued on January 22, 2014, that it should pay a fine for failure to comply with the U.K. money laundering regulations. The FCA noted in particular that Standard Bank's due diligence processes were insufficiently robust in relation to politically exposed persons before entering into business relationships with them.

See "*Standard Bank Fined by Both the SEC and the SFO in a Coordinated Settlement Featuring the First British DPA*" (Dec. 2, 2015).

## *Different Evidentiary Thresholds and Penalty Calculations for the Two DPAs*

The Deferred Prosecution Agreements Code of Practice issued by the Director of Public Prosecutors and the Director of the SFO (the DPA Code) lays out a two-stage test for prosecutors in order to enter into a DPA. The first stage of the test is determining whether there is an evidential basis for liability. That can be met if:

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a) the prosecutor is satisfied that there is sufficient evidence to provide a realistic prospect of conviction against the company (what is known as the "Full Code Test" under the Code for Crown Prosecutors) or, if this is not met, that
b) there is at least a reasonable suspicion based upon some admissible evidence that the company has committed the offence, and there are reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the Full Code Test.

Once the evidentiary basis for the DPA is established, the second test is whether the DPA serves the public interest, a determination that can consider many factors.

### *FCA Reporting Obligations May Have Forced Standard Bank to Disclose to SFO*

In the Standard Bank DPA, the Director of the SFO certified that he was satisfied that the lower of the two evidential thresholds in the DPA Code of Practice had been met. Specifically, he certified that while there was not sufficient evidence to prosecute Standard Bank, he believed there were reasonable grounds that a continued investigation would produce the necessary evidence. It is, therefore, not certain that the SFO would, in fact, have been able to prosecute Standard Bank. Additionally, the Director also concluded that there was insufficient evidence contained within the documentation disclosed to suggest that Standard Bank could avail itself of the defences set out in the Bribery Act of having adequate procedures in place to prevent bribery.

Considering that the SFO lacked evidence at the time of the DPA to provide a realistic prospect of conviction, along with the historic difficulties in gathering evidence from Tanzania, the author wonders whether the decision to self-report to the SFO would have been made by Standard Bank if it did not have an effective obligation to report to the FCA. Indeed, it is unclear whether the SFO could have been sufficiently confident to reach the conclusion that it did in relation to the evidential threshold for a DPA – that there was a reasonable suspicion that the company had committed the offense – without the findings of the FCA's Final Notice. Those findings made it very difficult for Standard Bank to assert that its due diligence processes for establishing normal third-party business relationships were any more robust than in the context of its banking services.

### *A High Fine for Standard Bank to Stave Off U.S. Prosecutors*

Nevertheless, Standard Bank was given full credit for its very prompt and "genuine" self-report within days of discovery of the issue, which took place even before the external law firm appointed by Standard Bank had begun its investigation. However, in the U.K. SME case, LJ Leveson notes that a penalty discount of 50% could be appropriate for a defendant that self-reports and admits guilt at an early stage, because such a discount could encourage others to conduct themselves similarly when confronted with possible criminal liability. Standard Bank did not receive that full 50% discount.

The reason for this may have been an effort to stave off the real risk of further regulatory action in the U.S., where fines in such cases are considerably higher. In determining not to prosecute itself, the U.S. Department of Justice acknowledged that appropriate action had been taken against Standard Bank in the U.K. and expressly confirmed that, in making its decision to decline prosecution, the DOJ had considered whether the level of fine was comparable to the penalty that would have been imposed had the matter been dealt with in the U.S. Thus, it appears that Standard Bank had very little to gain and much to lose from protracted discussions with the SFO.

### *Strong Evidence of Guilt But a Possibility of Insolvency Lead to Small Penalty*

LJ Leveson made it clear that the decision to sanction the agreement and approve the DPA with the U.K. SME was much more nuanced than in the Standard Bank case. In contrast to the Standard Bank DPA, in the U.K. SME case the Director was satisfied to the higher of the two

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evidentiary standards, affirming that there was sufficient evidence to prosecute. Indeed, in agreeing to the DPA for this modestly resourced SME, LJ Leveson observed that it was "demonstrably guilty of serious breaches of the criminal law." However, the U.K. SME was in a poor financial situation and ran the risk of a severe penalty rendering the company insolvent.

LJ Leveson found that it was in the public interest to allow the SME to continue to trade and that, therefore, any financial penalty needed to be mitigated to avoid insolvency. At the same time, he acknowledged the importance of imposing a financial penalty that would discourage the pursuit of such criminal behavior, particularly through a subsidiary that could then be abandoned as insolvent if necessary. LJ Leveson reserved his reasoning but imposed a financial penalty that he considered fair, reasonable and proportionate.

This consideration for the financial situation of the defendant in the U.K. SME case is an interesting contrast to the outcome for the financially troubled Sweett Group which was prosecuted by the SFO and pleaded guilty to failing to prevent bribery by one of its Middle East subsidiaries in relation to a single consultancy agreement. It was fined £1.4 million with a £850,000 confiscation order, representing a very significant financial cost to a business that was already loss making.

### *A Demonstration of the Breadth of Judicial Oversight*

LJ Leveson reminds the parties, by quoting his previous judgment approving the Standard Bank DPA, that a DPA cannot proceed without detailed examination by the court, unlike in the U.S., stating that "judicial involvement in the process is pivotal." This message is reinforced by his detailed and careful judgment that seeks to give some insight into what is – and will be for some time – developing case law that is highly fact-sensitive.

Unsurprisingly, in the context of incentivizing the exposure and self-reporting of corporate wrongdoing, LJ Leveson explicitly rewards full cooperation and a "genuinely" proactive approach in both settled DPAs, significantly reducing the financial penalty that could have been imposed on both defendants. Although it would seem that the precarious financial state of the U.K. SME was the most significant factor in reducing the penalty in that case, pressure from U.S. prosecutors to ensure a very high fine meant that Standard Bank did not receive a similar full discount.

There was some disquiet by commentators at the time about whether it was appropriate for an English judge to, apparently, take into account the harsher U.S. sentencing regime. Regardless of whether such a consideration was appropriate, it does illustrate the breadth of factors that can be taken into account by a judge approving a U.K. DPA in what is essentially a discretionary process, notwithstanding the various Guidelines that apply.

### *Standard Bank, Sweett Group and U.K. SME DPAs Highlight Focus on Compliance*

It is very difficult to draw specific conclusions from the three cases. On the face of it, one could argue that Standard Bank's penalty was very high in all the circumstances. One might also ask why the U.K. SME was suitable for a DPA and not the Sweett Group. It seems at the very least, that there has been a concerted effort by the SFO and the judiciary to establish the core purpose of the creation of DPAs to expose and punish corporate wrongdoing by incentivizing and rewarding timely and cooperative self-reporting. It is also clear on the facts of these cases that corporations' compliance culture and processes – both historical, in cases of failure, and forward-looking, when a corporation is allowed to renew its ethical and compliance culture as part of its rehabilitation – are fundamental.

See "*How to Build a Compliant Culture and Stronger Company From the 'Middle' (Part One of Three)* (Apr. 1, 2015); *Part Two* (Apr. 15, 2015); *Part Three* (Apr. 29, 2015).

*Elizabeth Robertson is a partner in Skadden's government enforcement and white collar crime practice, based in London. She has more than 20 years of experience advising on internal investigations and multijurisdictional white collar crime cases involving allegations of fraud, corruption and money laundering, and she regularly represents clients facing prosecution by the Serious Fraud Office, the Financial Conduct Authority and other regulatory agencies around the globe.*

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