UK Bribery Digest
Fraud Investigation & Dispute Services
This edition incorporates the case write-ups for the second half of 2014, together with our summary table of cases since 2008.
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Introduction

The second half of 2014 featured a number of events which demonstrate progress in improving the UK’s counter-corruption landscape:

- The SFO’s first prosecution under the Bribery Act, which is also the first prosecution of commercial bribery under the Bribery Act.
- The SFO’s first conviction, after trial, of a corporate for offences involving bribery of foreign public officials. As the offences pre-date the Bribery Act the prosecution was under older legislation.
- The publication of the cross-governmental UK Anti-Corruption Plan.

We comment on these cases in this edition of the Bribery Digest. Alongside these two cases we consider one other criminal case and two civil cases.

We also set out our initial views on the UK Anti-Corruption Plan published in mid-December 2014 which has the potential to see major changes in tackling bribery and corruption should those charged with putting it into action choose to take full advantage of its reach.

This edition of the Bribery Digest also considers a recent case in which a business that regarded itself as a ‘victim’ of commercial bribery by a competitor was unsuccessful in seeking damages for the loss it believed it had suffered. More generally it is understandable that a party that feels aggrieved because of a competitor’s bribe paying may be tempted to attribute wide-ranging consequences to the corruption. The temptation is possibly even greater where, as in this case, the bribery has already been the subject of a completed criminal action. The temptation may be dangerous: the case provides a number of cautionary notes to those considering this course of action.

As usual, we also include the updated table of UK bribery and corruption cases since April 2008 and we hope you continue to find our Bribery Digest useful and informative in your work.

Jonathan Middup
Partner, UK Head of Anti-Bribery and Corruption

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1 The Bribery Digest reports only completed cases and only civil cases where bribery is a central feature (we do not seek to include all civil cases with an element of bribery).
Cases in the second half of 2014

41. International Tubular Services Limited (December 2014)

International Tubular Services Limited (“ITS”), a Scottish oil and gas services company, admitted that it had benefited from corrupt payments made by a former Kazakhstan-based employee to secure additional contractual work from a customer in Kazakhstan. The bribery and corruption was discovered as part of the due diligence when the company was being acquired. ITS reported their discovery of the corrupt payments to the Crown Office & Procurator Fiscal Service in November 2013 under the self-reporting initiative that has been in place in Scotland since mid-2011.

In return for self-reporting, a full admission (based on a comprehensive internal investigation), putting in place effective systems to prevent bribery recurring, repaying the illegitimate profits and co-operating with any criminal investigation into any individuals who may have committed offences, the Scottish Crown Office & Procurator Fiscal Service and Scotland Civil Recovery Unit will, in appropriate circumstances, consider resolving any corporate liability of the commercial organisation by way of a civil settlement instead of launching a criminal investigation, although this is not guaranteed.

In this case, the Civil Recovery Unit recovered £172,200 under the Proceeds of Crime Act, the amount representing the total profit made under the corrupt contract in Kazakhstan. The funds are passed to the Scottish Consolidated Fund, to be reinvested back into Scottish communities.

The settlement guarantees that there will be no criminal enforcement against ITS in Scotland in respect of the matters reported. In view of any criminal investigation of others that may follow, any further details of the corrupt payments have not been published.

This is the second corporate bribery case resolved in Scotland under the self-reporting initiative. The first corporate settlement was in November 2012 when Abbot Group admitted it had benefitted from corrupt payments and settled for £5.6m (see case reference 28 in the Bribery Digest).

The self-reporting initiative in Scotland – which is distinct from the self-reporting regime in the rest of the UK – may be renewed in mid-2015 or may be subsumed into a wider initiative such as the potential introduction of corporate Deferred Prosecution Agreements into Scotland.

It is reported that there are other corporate self-report cases in Scotland in the pipeline.

This case underlines the importance of acquisition due diligence focused on corruption risk, especially of businesses operating in higher risk sectors and territories.
40. Smith and Ouzman Limited, Christopher Smith and Nicholas Smith (December 2014)

This case is the SFO’s first conviction, after trial, of a corporate for offences involving bribery of foreign public officials. As the offences pre-date the Bribery Act, (the bribes were paid between November 2006 and December 2010) the prosecution was under the Prevention of Corruption Act 1906.

The company, Smith and Ouzman Limited, is a printing firm based in Eastbourne which specialises in security documents such as ballot papers and certificates. Christopher Smith was the Chairman and Nicholas Smith was the Sales and Marketing Director. The corrupt payments totalled £395,074 and were made to public officials for multiple contracts awarded to the company, primarily in Kenya but also in Mauritania, with total value £2,220,520.

The bribes were paid through a number of mechanisms:

- Primarily as inflated “commissions” to the company’s agents in Kenya and in Mauritania. It was these two agents that mainly had contact with the corrupt government officials (at the Independent Interim Electoral Commission and the Kenyan National Examinations Council in Kenya and the Ministry of the Interior in Mauritania) and distributed the “commissions” to them.
- In some instances by direct bank transfer from the company.
- In some instances by cash payments to the corrupt government officials for “subsistence” during their visits to the company in the UK.
- In respect of the main part of the Mauritania bribes, by direct bank transfer from the company to the accounts of the daughters of one of the corrupt government officials in France described as “educational costs” or similar.

The defendants sought to argue that the commissions were either entirely for the agents or for entirely legitimate purposes. The artificially inflated commissions resulted in additional costs of the products to the buyers of about 25% in respect of the Kenyan contracts and 15% in respect of the Mauritania contracts. The corrupt government officials’ modus operandi was to either justify single sourcing of the contracts on the grounds that there was limited time for open tendering or to adjust the contract price after awarding the contract to allow for the added commissions.

There were two principal sources of evidence of the bribes:

- Pricing summary schedules within the directors’ records which showed two separate commissions, one for the agent and an additional much larger one which the prosecution successfully demonstrated was for bribes. In several instances these showed the breakdown by recipient identified by their initials.
- Emails between Messrs Smith and the agents. Those with the Mauritanian agent appeared to take little effort to conceal their messages and several of them are quite explicit, but those with the Kenyan agent adopted the stratagem of referring to the bribes as “chicken”. This required interpretation of the emails. Examples of possible interpretations are as follows:
  - “…we shall all go to my bank and I’II give the chicken to karani” (I will take one of the government officials to my bank to pay over the bribes).
  - “…they are desperate for the chicken” (the government officials want to receive the bribes soonest).
  - “…the chickens will fly straight away” (the bribes are available immediately).
  - “We will keep our chickens for now” (do not make cash payments to any of the government officials on their visit to the UK as some of them are clean).
  - “These guys are already on the table waiting to be served” (the government officials await their bribes).
  - “…we have sharpened our pencils and the chickens are all dead” (we have re-examined the proposed units prices and they are too low to fund any bribes).

“Your behaviour was cynical, deplorable and deeply antisocial, suggesting moral turpitude”

HHJ Higgins in sentencing the former directors of Smith and Ouzman Limited
When interviewed, Christopher Smith stated that his father (who presumably was previously involved in the same business in Kenya) used to give out actual chickens. It is to be inferred that the jury did not accept the defendants various explanations of the meaning of “chicken” nor of the purpose of the “commissions”.

Christopher Smith was sentenced to 18 months imprisonment suspended for 2 years (he is 72 years of age), 250 hours of unpaid work and 3 months curfew. Nicholas Smith was sentenced to three years imprisonment. Both were disqualified from acting as directors for six years. The company will be sentenced at a later date. Confiscation proceedings against them and the company are scheduled for later in 2015.

We comment on this case as follows:

- The SFO announced this case as its first conviction, after trial, of a corporate for offences involving bribery of foreign public officials. (As the offences pre-date the Bribery Act, the prosecution was under the Prevention of Corruption Act 1906). This might suggest a corporate dimension of greater significance than is merited. On our reading, the prosecution of the company merely reflects the fact that Christopher Smith and his son Nicholas Smith were the key players in what is in essence a family business and therefore the “directing minds” of the business (or “the bosses” as the prosecution succinctly put it). It therefore followed as a matter of course that their successful prosecution also made the company guilty of an offence under the Prevention of Corruption Act 1906.

- This is yet another arrangement that involves agents playing key roles in the bribery schemes.

- This case again demonstrates that email is a key source of evidence.

- The investigation required the co-operation of the authorities in Kenya and Switzerland. The trend has been for increasing international co-operation and this is likely to continue.

39. Gary West and Stuart Stone
(December 2014)

Gary West, a former Director and Chief Commercial Officer of Sustainable AgroEnergy plc (“SAE”) and Stuart Stone, Director of SJ Stone Ltd, a sales agent of unregulated pension and investment products, were convicted of conspiracy to commit fraud, conspiracy to furnish false information, fraudulent trading and Bribery Act offences. The offences arose from the selling and promotion of SAE investment products based on “green biofuel” Jatropha tree plantations in Cambodia. The investment products were sold to UK investors primarily via self-invested pension plans (SIPPs). These investors were deliberately misled into believing that SAE owned land in Cambodia, that the land was planted with Jatropha trees and that there was an insurance policy in place to protect investors if the crops failed.

The judge described the fraud as a “thickening quagmire of dishonesty… there were more than 250 victims of relatively modest means some of whom had lost all of their life savings and their homes.” The judge added that the bribery was an aggravating feature. It is reported that Mr West received bribes for his role in submitting false invoices to Mr Stone which allowed exorbitant commission rates (of as much as 65%) to be charged on investors’ funds. Irregular transactions were disguised using false e-mail addresses, Swiss bank accounts and overseas companies registered in the Seychelles and British Virgin Islands. At the time of writing, a more detailed description of the fraud scheme and the nature of the bribe payments is not publicly available.

Mr West received a sentence of four years for each of the Bribery Act offences (both under Section 2 for the offence of being bribed) to run concurrently with his nine year sentence for the fraud offences. He was also disqualified from being a director for 15 years.

Mr Stone received a sentence of six years for each of the Bribery Act offences (both under Section 1 for the offence of bribing another person) to run concurrently with his six year sentence for the fraud offences. He was also disqualified from being a director for 10 years.

“These three individuals preyed on investors, many of whom were duped into investing life savings and pension funds. As a result, many lost life-changing amounts of money.”

The Director of the SFO commenting on the Sustainable AgroEnergy plc case
We comment as follows on this case.

Mr West’s and Mr Stone’s convictions are the first to be secured by the SFO under the Bribery Act since the Act came into law in July 2011. They also comprise the first commercial bribery case under the Bribery Act. Commentators have been waiting some time for this event, but it is something of a false dawn. This was substantially a traditional investment fraud case with aspects of bribery within it. The case therefore sheds no light on the aspects of the Bribery Act and its enforcement, including Deferred Prosecution Agreements, on which commentators await clarification. For example:

• No charges were brought against the companies involved and Section 7 of the Bribery Act (the corporate offence of failing to prevent bribery and the related defence of having “adequate procedures”) was not therefore at issue.
• There do not appear to be any extra-territorial jurisdictional issues.

The outcome of this case might suggest that bribery convictions are more likely to be sought under the Bribery Act – as part of broader fraud schemes or separately – compared with the more complex laws that it replaced. At the same time, the fact that Mr West was acquitted of one count of bribing another person, even in the context of a significant fraud, serves as a reminder that the prosecution of bribery offences in more complex scenarios is not straightforward.

38. FHR European Ventures LLP and others v Mankarious and others (July 2014)

This long-running case (legal proceedings commenced in 2009 following an initial complaint in 2005), concerning a secret commission relating to the sale of a hotel, was subject to an appeal judgement in July 2014.

At the centre of the dispute was the sale of a long leasehold interest in the Monte Carlo Grand Hotel in December 2004, purchased by the claimants for €211.5 million. Mr Mankarious operated Cedar Capital Partners (“Cedar”) with the intention of providing consultancy services to the hotel industry. (Cedar was also involved in the sale of the Savoy Hotel in London, the Danieli in Venice, the Intercontinental in Paris and the Hotel de l’Europe in Amsterdam).

Cedar had entered into an exclusive agreement with the vendors of the Monte Carlo Grand Hotel giving Cedar the right to sell the hotel and to receive a fee of €10 million upon the sale. Mr Mankarious, through Cedar, also negotiated the purchase of the hotel as the agent of the claimants. In April 2005, the claimants discovered that Cedar had been paid a fee of €10 million by the claimants in relation to the sale of the hotel.

The main issue at trial was whether Cedar had made sufficient disclosure of its relationship with the vendor so that it could be said that Cedar had acted with informed consent of the claimants. One of the principal findings in this case was that while Cedar had made certain disclosures to some of the purchasing parties for which it acted as agent, Cedar failed to get fully informed consent from the parties to receive and retain the €10 million fee from the vendors. Counsel for both the claimants and the defendants had argued that the €10 million fee was not intended to be a corrupt payment or bribe. Mr Mankarious had made limited disclosure of this retainer “but not enough to deprive the fee... of its character as a secret profit”, the trial judge concluded.

Cases in the second half of 2014 continued...
The claimants successfully claimed the €10 million of undisclosed commission that had been received by the defendants in breach of their duties as fiduciary agents not to secretly profit from their position or to put themselves in a position where their interest and duty were in conflict. The defendants had unsuccessfully argued that they were entitled to retain the commission as it was known to the claimants.

The appeal concerned the legal point of the nature of the remedy against Cedar – whether it is a personal or proprietary remedy. This in turn concerned the question of whether the secret commission received by an agent is held on trust for the principal or whether the principal merely has a claim for equitable compensation. As the Supreme Court itself noted, this is a “rather technical sounding question, which has produced inconsistent judicial decisions over the past 200 years, as well as a great deal of more recent academic controversy…” As it is not the purpose of this Bribery Digest to offer legal analysis, this is not further described other than to note that this has significant practical implications for the claimant’s capacity to follow and trace the amount and would also affect the claimant’s ranking in insolvency proceedings.

37. Bruce Hall (July 2014)

Bruce Hall, an Australian national extradited from his home country, was found guilty of conspiracy to corrupt in relation to contracts for the supply of goods and services to a Bahraini smelting company, Aluminium Bahrain B.S.C. (“Alba”). Mr Hall served as CEO of Alba from September 2001 to June 2005. The court heard how Mr Hall received £2.9 million in corrupt payments between 2002 and 2005. The payments were made in exchange for Mr Hall agreeing to and allowing to continue corrupt arrangements dating back to 1998 that Alba’s Chairman (a member of the Bahrain royal family and Minister of Finance at the time) had been involved in before Mr Hall’s appointment as CEO.

The judge commented “In any view, this was an extremely serious use of corruption... You breached the trust that was placed in you as the CEO of Alba... there was a reluctance by you to accept that what was done by you was as corrupt as it so obviously was.”

Mr Hall was sentenced to 16 months in prison for the offences of corruption and conspiracy to corrupt (contrary to Section 1 of the Criminal Law Act 1977 and Section 1 of the Prevention of Corruption Act 1906) and acquiring and transferring criminal property (contrary to Sections 327(1) and 329(1) of the Proceeds of Crime Act 2002). He was also required to pay a confiscation order of £3 million (or face serving an additional term of imprisonment of 10 years) and compensation of £500,000 to Alba.

Commenting on Mr Hall’s actions, the judge noted that he had cooperated with numerous authorities throughout the investigation. If he had not been so cooperative, he could have faced around six years in prison, close to the maximum sentence for conspiracy to corrupt. He was also entitled to a further reduction due to entering a guilty plea.

He also agreed to divest himself of other corrupt payments totalling US$900,000 he received during his time as the CEO of Alba. These payments were not part of the indictment as the SFO did not have the jurisdiction to prosecute and they were recovered by way of civil proceedings under Part 5 of the Proceeds of Crime Act 2002.

“Corruption has been described as an insidious plague that has corrosive effects across communities... In any view, this was an extremely serious use of corruption... You breached the trust that was placed in you as the CEO of Alba... there was a reluctance by you to accept that what was done by you was as corrupt as it obviously was.”

Judge Loraine-Smith in sentencing the former director of Alba
In December 2014 the government published its long awaited cross-government UK Anti-Corruption Plan ("the Plan").

Three purposes are set out in the Ministerial Foreword to the Plan:

- To demonstrate the breadth of the UK’s anti-corruption activities.
- To set out clearly the actions that government will take to tackle corruption in the UK.
- To set out the government’s priorities for raising international standards and leading the global fight against corruption in all its forms.

Within the UK, the government’s immediate priorities are stated to be to:

- Build a better picture of the threat from corruption and the UK’s vulnerabilities.
- Increase protection against the use of corruption by organised criminals and strengthen integrity in key sectors and institutions, including the criminal justice system and regulated professions.
- Strengthen the law enforcement response so that the government can pursue, more effectively, those who engage in corruption or launder their corrupt funds in the UK.

Internationally, the government’s stated priority is to continue to be at the forefront of engaging with overseas partners (including foreign governments, the United Nations and other international institutions) in order to:

- Improve transparency, tackle money-laundering and return stolen assets.
- Raise global standards for all, including through international development programmes.
- Promote sustainable growth, including through the government’s work to stop bribery.

Thus, the Plan takes a broad perspective of corruption and commercial bribery is but one element within it. While the Plan is entitled “UK Anti-Corruption Plan”, several of the action points could impact counter-fraud measures and compliance obligations (and in particular anti-money laundering) more generally. There are also a number of action points in the Plan that are described quite generally and which have the potential for far-reaching consequences, depending on how they are interpreted (we highlight these below).

At the heart of the Plan are 66 action points. Most, but not all, of these action points are new - some of the action points merely acknowledge measures that have recently been taken or are already in process. The Plan is wide-ranging in scope and variegated in the nature of its action points, ranging from quite specific and localised (such as extending the prison and probationary services corruption prevention programme to non-directly employed staff) through to fundamental changes in the law.

The action points are grouped in the Plan as follows:

- Understanding and raising awareness of the risk from corruption (nine actions).
- Tackling corruption risks in the UK (27 actions).
- UK law enforcement response to corruption (four actions).
- Recovering stolen assets and tackling illicit financial flows linked to corruption (14 actions).
- Leading the fight against international corruption (10 actions).
- Implementing the Plan (two actions).

The wide-ranging scope of action points is indicated by the large number of government departments, agencies and institutions tasked with the actions.

1 Government departments: the Home Office (18 actions), the Cabinet Office (11 actions), the Department for Business, Innovation & Skills, HM Treasury, the Department for International Development, the Foreign & Commonwealth Office (“the FCO”) (five actions each), the Department for Communities & Local Government (four actions), the Department for Culture, Media & Sport, the Ministry of Justice, the Ministry of Defence (three actions each), Agencies: the National Crime Agency (8 actions), the Gambling Commission (two actions), the Border Force, the Criminal Procedure Rule Committee, Her Majesty’s Inspectorate of Constabulary and the National Offender Management Service ("NOMS") (one action each), Institutions: the Chartered Institute of Public Finance & Accounting (one action). Together with other government departments, civil society organisations, “experts in the field”, professional regulators, “AML supervisors” and academics referred to generally.
We highlight below what appear to us to be the potentially more far-reaching initiatives under each of the headings as set out in the Plan.

**Understanding and raising awareness of the risk from corruption**

The two potentially most impactful actions under this heading appear to be:

- The establishment by the National Crime Agency (the NCA) of a national multi-agency intelligence team focussing on serious domestic and international corruption (action 3). Closely related to this is the proposed development of a single reporting mechanism for allegations of corruption (action 6). We have commented in the past on the importance of information sharing across agencies for effective enforcement.

- Measures to further incentivise and support whistle blowers in cases of corruption and to evaluate recent changes in the law on whistle blower provisions (actions 8 and 9). As we have often noted, whistle blowing is shown to be the most common source of disclosures of acts of corruption. The Plan does not rule out “in all cases” financial incentives for whistle blowers and our view is that these need to be considered in relation to the City, where blowing the whistle may prove a threat to career progression, for which compensation would appear to be justified.

The remaining actions under this heading concern various other aspects of the systems for reporting and communicating data on corruption.

**Tackling corruption risks in the UK**

This is the part of the Plan with the largest number of action points (27). Several are focussed on potential corruption in very specific areas:

- The police (actions 10, 11 and 12).
- Member of Parliament (actions 20 and 21).
- The Border Force (actions 15 and 16).
- The Ministry of Defence (actions 27, 28 and 29).
- Sport and gambling (actions 30, 31 and 32).
- Juries (action 14).

A number of the action points concern corruption risk in the public sector, including local government, and in public procurement (actions 19, 22, 23, 24, 25 and 26).

Two of the action points specifically address the City:

- The commencement of the provisions of the Financial Services (Banking Reform) Act 2013 around the approval and vetting regime of financial services staff and their compliance with rules of conduct (action 34).
- The Fair and Effective Markets Review, which was announced in June 2014 to address those wholesale markets in which most of the recent concerns about misconduct have arisen, and which is to report in June 2015 identifying policy options (action 35).

A further action point that could have far-reaching consequences for both the City and for other sectors is the examination of the case for a new offence of corporate failure to prevent economic crime and wider corporate criminal liability (action 36). In essence, the idea behind it is to extend the Section 7 corporate offence under the Bribery Act (the failure to prevent bribery by associated persons) to cover fraud and economic crime more generally. This proposal has been floated for some time now.

The Plan states that “...there are likely to be other forms of economic crime for which it is appropriate to ensure that senior corporate actors are sufficiently accountable”. This language may suggest that extension of Section 7 of the Bribery Act should be expected. If, by way of example, corporate liability were extended to cover fraudulent trading of financial products, then the concept of “rogue trader” could be consigned to history and the oversight of trading by financial institutions would need to be rigorously reassessed.

“We are committed to making sure that the UK takes a ‘whole government’ approach to combating corruption and to ensuring that the actions in this document [the UK Anti-Corruption Plan] are delivered.”

*Ministerial Foreword to the UK Anti-Corruption Plan*
UK law enforcement response to corruption

We have commented previously on the critical importance of effective enforcement of the law as a stimulus to business to take anti-fraud and anti-bribery laws seriously, and that effective enforcement requires adequate and suitably qualified resources. We have also noted the apparently low level of prosecutions in the UK.

As part of the UK Anti-Corruption Plan (action 37) it has been announced that a specialist unit to fight bribery and corruption is to be set up in the NCA drawing together the existing 12-strong City of London Police unit and the Metropolitan Police’s 35-strong overseas anti-corruption team, as well as specialists already in the NCA. Measures to improve the recruitment and retention of specialists to support corruption investigations will be addressed (action 38).

At the time of writing, the government had yet to decide whether the unit will be given extra funding to increase staffing levels and case load. It therefore remains to be seen whether the reorganisation will, of itself, lead to a significant change in the level of enforcement activity. Specifically, as regards the level of enforcement activity focussed on the City, as the Department for International Development (OfDID) funded Metropolitan Police’s overseas anti-corruption team has a different remit, it is difficult to see how the reorganisation will impact the level of enforcement activity in this area.

The re-organisation appears to leave the Serious Fraud Office (the SFO) unaffected for now, although the actions described above would appear to impinge on it to some extent. The Home Secretary had proposed in 2011 to roll the SFO into the NCA, but this plan was abandoned at that time. The plan was revived in October 2014 and it is reported that the SFO is subject to a continuing review. We have commented in the past that the amalgamation of agencies does not necessarily improve performance and can be a distraction in the short and medium term. Furthermore, the SFO investigates and prosecutes complex cases, a function that is critical to an effective anti-fraud and anti-corruption regime.

Given the critical importance of enforcement for an effective anti-corruption regime, it is surprising that there are only four action points under this heading in the Plan, two of which reflect initiatives already undertaken. On the other hand, one of the action points (action 39 - a review of the enforcement response to bribery and corruption more broadly) has the potential for far-reaching consequences, depending on how the Cabinet Office chooses to interpret it.

“The UK has a strong track record of tackling corruption, with the level of corruption in the UK far lower than the majority of other countries around the world. But more can be done to improve, yet further, our standing at home and strengthen our reputation for dealing with corruption and bribery offences overseas.”

Ministerial Foreword to the UK Anti-Corruption Plan
**Recovering stolen assets and tackling illicit financial flows linked to corruption**

This part of the Plan contemplates a number of possible changes in the law which are open to potentially wide-ranging interpretation:

- Changes in the Proceeds of Crime Act to increase investigative powers (actions 46 and 47).
- A possible further strengthening of the financial investigation powers available to law enforcement (action 49).
- A new offence of participating in the activities of an organised crime group (action 54).

Four of the action points concern anti-money laundering and more specifically terrorist financing, focussed on a National Risk Assessment, and action plan to be derived from it by the Home Office and HM Treasury (actions 42, 43, 44 and 48). No specific new measures or powers are set out in the Plan, however.

The Plan also acknowledges the legislative initiative already in process, and subject to the Parliamentary timetable, to implement a central register of UK company beneficial ownership information and to abolish bearer shares (actions 50 and 51) in order to promote greater transparency in company ownership. If the legislation were to create a criminal offence of assisting the concealment of true beneficial ownership, this will create useful leverage for investigators against those who assist the beneficiaries of criminal funds. Two action points are aimed at professionals who assist in a similar way (actions 52 and 53).

The Plan also requires DfID to develop proposals for establishing an international rapid reaction team to deploy to countries where regime change has taken place, in order to provide expert assistance in mutual legal assistance and asset recovery (action 41).
UK Anti-Corruption Plan continued...

_Leading the fight against international corruption_

The most notable action point under this heading aims to extend by late 2016 the relevant anti-corruption conventions, and thereby anti-corruption laws, in those Overseas Territories with a financial services industry.

The remaining action points under this heading would appear to acknowledge arrangements and initiatives which one might reasonably assume were in the normal course of business of DfID, the Foreign and Commonwealth Office (FCO), the Ministry of Justice (MoJ) and the Cabinet Office.

_EY commentary_

The Plan deserves praise for a number of reasons:

- It is an obvious but important point that the Plan is an action focussed document and not a mere discussion document. It is difficult to imagine such a Plan being published even five years ago, and it is therefore a positive demonstration of progress. Most of the action points are for completion within 2015, and it is therefore a statement of the commitment to further progress in the near term.

- The Plan states that it “...will bring more coherence to our efforts and ensure that future activity to tackle corruption is joined up and collaborative”. A truly cross-government approach to corruption would be a step change and could provide a powerful catalyst for change. The Plan states that the cross-departmental unit on international corruption, which is tasked with supporting the Government Anti-Corruption Champion in implementing the Plan has already been established (action 65).

- Importantly, the Plan reflects a holistic approach to combatting corruption. The Plan captures these various aspects under the rubric: Prevent people from engaging in corruption; Protect against corruption; Prepare to reduce the impact of corruption when it occurs; Pursue through prosecution those involved in corruption.

- As noted, one feature of the Plan is that it contains a large number of very specific and localised actions. These may prove as important as bigger headline-grabbing initiatives. For example, the actions that address the role of professionals in organising corrupt schemes (actions 52, 53 and 54) may appear arcane points, but they respond to the pivotal role played by corrupt professional advisers in, for example, the Ibori scandal.

- It is important to the UK’s ability to influence other countries to improve corruption risk management that the UK can demonstrate it meets a high standard itself. It is to be hoped that other countries follow the initiative of committing to an action plan of improvements.

The Plan might, however, attract criticism in some regards:

- Given that City scandals were one of the main prompts for articulating the Plan, it is perhaps surprising that few of the new action points are specifically aimed at conduct in the City, outside of money laundering.

- The Plan does not set out any actions to improve practical governmental support for UK entities operating in difficult locations, such as detailed briefings of corruption risks from in-country consulate staff and the sharing of intelligence.

- There is little in the Plan that requires greater collaboration between the government and private sector in the counter-corruption agenda. The main focus of the Plan is on a joined up and collaborative approach across the public sector.

- The Plan does not include steps to encourage or facilitate collective action by UK and non-UK entities operating in difficult locations, which appears to us to be a potentially fruitful way of addressing the problem of small bribes.
There is little reference in the Plan to the potential of technology in counter-corruption initiatives. Technology appears to us to have the potential to increase transparency and reduce face-to-face interactions that provide the opportunity for bribery, especially at borders.

- The Plan does not directly address the challenges faced by private sector entities as a result of data protection and privacy laws on sharing information for legitimate counter-fraud purposes.

- Whilst the Plan is ambitious in its scope, it is perhaps not ambitious enough in pushing forward more radical solutions. These solutions may not be wholly in the gift of the UK government, but the Plan could have been used to promote discussion of these more radical solutions. Among these more radical solutions are possibly: incorporating a corruption risk score into countries’ credit ratings; the use of penalties for bribery offences to fund counter-corruption projects in susceptible countries; and schemes to promote a greater self-interest in susceptible communities for counter-corruption projects.

As already noted, there are a number of action points in the Plan that are described quite generally and which have the potential for far-reaching consequences, depending on how the responsible parties choose to interpret them. It is to be hoped that some of the more generic actions listed in the Plan may provide the mechanisms to address some or all of the potential areas of criticism listed above; they most certainly have the potential to be used in this way. These actions include:

- The Fair and Effective Markets Review which is to report in June 2015, identifying policy options (action 35).
- A Ministry of Justice examination of the case for a new corporate offence of failure to prevent economic crime and the rules on establishing corporate criminal liability more widely (action 36).
- A Cabinet Office led review of the enforcement response to bribery and corruption more broadly (action 39).
- The National Risk Assessment on Money Laundering and an action plan to be derived from it by the Home Office and HM Treasury (actions 42 and 43).
- Changes in the Proceeds of Crime Act to increase investigative powers (actions 46 and 47).
- A possible further strengthening of the financial investigation powers available to law enforcement (action 49).
- DFID and the FCO are to “continue to fund innovative projects on anti-corruption and transparency” (action 55).
- The Cabinet Office is to arrange “a regular forum for civil society and business leaders to engage with the Government on corruption and bribery issues” (action 66). We believe that the first of these forums is scheduled for late February 2015.

The Plan has the support of the Prime Minister, building on commitments made at last year G8 summit. It is to be hoped that the upcoming general election does not disrupt the Plan and that it has set in motion an ongoing programme of developments in this important area that will gain momentum.

In summary, the Plan is a positive step and it has the potential within it to precipitate major changes in tackling bribery and corruption.
Third party implications of bribery: recovering losses arising from the bribery of others

A case reported in October 2014 indicates that while in principle an aggrieved party that believes it has suffered loss as a result of bribery by a competitor may seek damages, this may face evidential challenges. It is perhaps understandable that a party that feels aggrieved because of a competitor’s bribe paying may be tempted to attribute wide-ranging consequences to the corruption. The temptation is possibly even greater where, as in this case, the bribery has already been the subject of a completed criminal action. The temptation may be dangerous: the case provides a number of cautionary notes to those considering this course of action. The aggrieved party is at risk of falling into what we refer to as “the evidence gap”.

The case, Jalal Bezee Mejel Al-Gaood & Partner (a Jordanian company trading as “NUFT”) and another company v Innospec Ltd and others, concerned the claimants unsuccessful attempt to seek damages of US$26.6 million for the loss of business for its product MMT between 2003 and 2008 as a result of Innospec’s corrupt sales of its competitor product TEL in Iraq (see cases referenced 7 and 36 in the Bribery Digest). The claimants contended that, had it not been for Innospec’s corruption, the Iraqi Ministry of Oil (“MOO”) would have entered into a major contract for the purchase of MMT.

On the evidence, it was found that, contrary to the claimants’ case, there had been no decision by the MOO to replace TEL with MMT, to only continue using TEL until stocks of it were exhausted and to purchase 1,000 metric tons of MMT. Rather, the evidence was that the MOO had decided to enter a three year contract for the purchase of TEL and in parallel the purchase of 1,000 metric tons of MMT, but not for the replacement of TEL by MMT. Although the MOO had been considering that possibility, the decision had been made to purchase 120 metric tons of TEL for field testing before any more substantial purchases would be made. There was no evidence that the decision had been procured by bribery.

NUFT’s case was doubtless not helped by the fact that the agent who had been paid US$155,000 to bribe officials to fail MMT in the field testing admitted in the US criminal proceedings that, while he had accepted the money for that ostensible purpose, he had in fact kept the money for himself and no such bribes were paid. He completed the deception with a false translation of the field testing conclusions which made it appear that the result was indeed a failure when in fact it was not.

The case provides a number of cautionary notes to those considering this course of action.

Firstly there is what we refer to as “the evidence gap”. This relates to the different scope and perspectives on the context and consequences of the bribery in criminal and civil proceedings. A successful criminal prosecution does not need to prove that the bribery was effective or successful, as these are not elements of the offence under several of the most important anti-bribery laws (including the UK Bribery Act). For example, amounts paid ostensibly as bribes may comprise a criminal offence even though they were not in fact paid as bribes, and therefore could not have been causally effective. By way of further example, as the judge noted in this case as regards the UK criminal indictment, it did not include a statement of detailed facts covering such things as when the bribes were actually paid – they were merely described as being between two particular dates.

As a result, a successful criminal prosecution does not necessarily entail any detailed analysis of the particular context and consequences of the bribery and there may be no need to examine the issue of causality. There was no reason in the Innospec criminal proceedings to examine key assertions of the claimants in the civil case (i.e. that there had been a decision by the MOO to replace TEL with MMT, to only continue using TEL until stocks of it were exhausted and to purchase 1,000 metric tons of MMT) and the claimants failed to evidence this at trial.

The trial judge noted that he had “only a partial glimpse at best into the decision making process within MOO”.

Jalal Bezee Mejel Al-Gaood & Partner and another company v Innospec Ltd and others

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2 It is possible that the claimants had also noted the fact that in September 2011 Innospec had settled civil proceedings in the US for US$45 million (relating to the business in both Iraq and Indonesia) brought by Ethyl Corporation, the manufacturer of both TEL and MMT, regarding allegations described by the judge in the NUFT case as “broadly similar to the allegations made by [NUFT] in the present proceedings”.
In contrast, analysis and proof of the loss caused by the bribery are key requirements of a successful civil claim. A large part of the 84-page judgment in this case is dedicated to a detailed analysis of how MOO made particular decisions to provide the context for assessing the causality of the bribery. What is therefore needed in a civil claim for damages arising from bribery is precise analysis of the key decisions made by the potential customer and the extent of the impact on them of bribes actually paid (or promised, although this is likely to be subject to greater uncertainty). The absence of this sort of analysis and proof was the essence of Innospec’s successful defence in this case.

A significant related factor here, as highlighted by the trial judge, is that of the source of evidence. The key decisions in question were those made by MOO, which was not a party to the litigation. There was a “complete dearth” of MOO documents and therefore there was little direct evidence on the key matter of how MOO made certain decisions. The trial judge noted that he had “only a partial glimpse at best into the decision making process within MOO” and while “the court inevitably has to draw inferences from the other evidence”, the court “should proceed cautiously” in assessing the reasons for MOO decisions and whether there was an influence of bribery. This absence of evidence concerning the decision maker is likely to be normal in these types of actions, as the parties to the litigation are likely to be competitor suppliers, but not the purchaser.

In the absence of evidence from MOO, the claimants placed “great reliance” on correspondence with their own agent, as evidence as to MOO’s decision making. The trial judge was sceptical of the agent’s evidence, for the reason described above. As the trial judge also noted, the agent was attempting to present a particular view of the purchaser’s situation and intentions. The reliability and accuracy of an agent’s evidence therefore needs to be scrutinised.

In summary, a successful criminal prosecution of bribery should not be regarded by an aggrieved competitor as any assurance of success in a civil claim for alleged loss suffered as a result of that bribery.
Abbreviations

CoLP  City of London Police
COPFS  Crown Office & Procurator Fiscal Service
CJA  Criminal Justice Act 1967
CLA  Criminal Law Act 1977
CPS  Crown Prosecution Service
CRO  Civil Recovery Order
DoJ  US Department of Justice
DPA  Deferred Prosecution Agreement
ECU  Economic Crime Unit
FCA  Financial Conduct Authority
FSA  Financial Services Authority
FSMA  Financial Services and Markets Act 2000
NCA  National Crime Agency
OECD  Organisation for Economic Co-operation and Development
PCA  Prevention of Corruption Act 1906
POCA  Proceeds of Crime Act 2002
SAR  Suspicious Activity Report
SEC  Securities and Exchange Commission
SFO  Serious Fraud Office
SOCA  Serious Organised Crime Agency

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