Briefing

BURGES SALMON

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Sweett victory: Lessons learned from Sweett Group's Bribery Act conviction

Sweett Group plc, the first company to be convicted of the "corporate offence" under Section 7 of the Bribery Act 2010, has now been sentenced. Having entered a guilty plea, Sweett has been ordered to pay a fine of £1.4m, a £851,152 confiscation amount and £95,000 in prosecution costs.

Sweett's guilty plea followed an SFO investigation which discovered that a Dubai-based former employee of Cyril Sweett International Limited (CSI), a subsidiary of Sweett, had made corrupt payments to the Chairman of the Real Estate and Investment Committee of Al Ain Ahlia Insurance Company (AAAI) in order to secure a contract for the building of the Rotana Hotel in Abu Dhabi.

This sentence follows shortly after SFO v ICBC Standard Bank plc, in which the UK's first Deferred Prosecution Agreement was approved. Whilst the judge in Sweett did not discuss the reasons for the case proceeding as a formal prosecution, rather than DPA, comparing the two cases provides interesting guidance as to the dos and donts when faced with allegations of bribery.

Responding to allegations of bribery: Lessons from Sweett and Standard Bank

Self-reporting and early admission

The Standard Bank case related to payments made by the former sister company of Standard Bank to a Tanzanian company, partly owned by a serving member of the Government of Tanzania, in order to secure a $600 million financing transaction and generate the resulting transaction fees of US $8.4 million. In resolving Standard Bank's criminal liability by way of DPA, the SFO praised Standard Bank for promptly self-reporting upon becoming aware of the circumstances surrounding the payments. In his judgment, Leveson LJ made it clear that it was significant that Standard Bank had referred itself to the SFO on the "earliest possible date".

Conversely, in Sweett, Judge Beddoe remarked that Sweett had only self-reported once the Wall Street Journal had tipped it off that it was about to publish allegations that the group had engaged in bribery. As Sweett's hand had been forced, it was given no credit for self-reporting.

It is clear, therefore, that the SFO is likely to give credit for self-reporting where it is done in a timely manner and in circumstances where the SFO is unlikely to discover the allegation from another source.

Genuine cooperation

Allied with the promptness of its self-report, it was materially significant that Standard Bank had sought to adopt *"a genuinely proactive approach to the matter"*. Lord Leveson stated that this had included: *"identifying relevant witnesses, disclosing their accounts and the documents shown… making witnesses available for interview… providing a summary of first accounts of interviews, facilitating interviews of current employees, providing a timely and complete response to requests for information and material, and providing access to its document review platform."*

Conversely, the court found evidence that Sweett had attempted to conceal its wrongdoing from the SFO. Sweett had contacted AAAI, seeking a letter stating that the fees paid were legitimate finder's fees, rather than criminal bribes. Instead of ceasing the corrupt payments, Sweett's behaviour included the setting-up of an escrow account to hold monies to pay-out after the SFOs investigation had "*gone away*". Judge Beddoe said that this was a "*cynical commercial decision"* taken in an attempt to deliberately mislead the SFO.

Both companies instructed lawyers to undertake internal investigations. Whilst Standard Bank was praised for being open and transparent in disclosing its findings to the SFO, Sweett was criticised for being uncooperative, opaque, and attempting to *"spin"* the results of its internal investigation when presenting its findings. Sweett's delay in acknowledging that the payments were, in the judge's words, *"so obviously a bribe"* damaged Sweett's credibility and was a key factor in determining that Sweett had not been sufficiently cooperative.

Adequate controls and processes

In 2010, Sweett had become aware of serious concerns in the way that CSI was operating. At this time, KPMG was instructed to carry out an audit of the group's financial controls. This audit flagged material weaknesses in CSI's systems and processes. KPMG made clear recommendations that management address the control failings as a matter of high priority. One key observation was CSI's failure to document the business justification for engaging subcontractors/consultants.

A follow up review in 2014 again concluded that CSI's controls were inadequate and recommended urgent reform. CSI's lack of a clear policy surrounding engagement of third parties was

continued over

again cited as a significant issue. Both reports were widely circulated within CSI and Sweett, including to members of Sweett's senior management. Judge Beddoe said that Sweett had "*wilfully ignored*" both of these KPMG reports, and he noted that there were no polices or procedures at all relating to the due diligence of agents and transactions, and no evidence of training being delivered to key individuals.

In Standard Bank, however, the SFO took account of the improvements Standard Bank had made in its systems and controls upon being notified of deficiencies by the FCA and Leveson LJ stated that "*… I have no doubt that Standard Bank [has demonstrated] its determination in the future to adhere to the highest standards of banking".*

Both cases demonstrate the importance of supervision and oversight of foreign subsidiaries and their activities, and of addressing any control issues that are raised in respect of their operations. In Sweett, the court stated that the whole purpose of the section 7 offence was to impose a duty on those running companies to supervise them properly and highlighted that pleading ignorance of corrupt operations demonstrated that this supervision was not occuring.

The level of fine

Whilst the SFO has described the Standard Bank case as a "*template*" for institutions responding to allegations of corrupt practice, the respective fines imposed do not suggest that a DPA will necessarily yield financial benefits to an organisation that demonstrates the SFO's desired behaviours. As part of the DPA, Standard Bank's gross financial penalty was approximately £22.5m, with £330,000 costs. This is clearly considerably more than the amounts to be paid by Sweett.

When agreeing financial penalties as part of a DPA, the SFO is obliged to ensure that the amount is "*broadly comparable*" with the amount that would have been fined, had the company been prosecuted and pleaded guilty. Therefore, the SFO has very little discretion to offer incentives to entities to cooperate with them, rather than simply to plead guilty. The Standard Bank case suggests that entities may be expected to pay a significant premium when seeking to avoid criminal prosecution by way of DPA. Notwithstanding this, avoiding criminal prosecution by way of DPA may be a crucial factor for companies concerned that they will be debarred from entering into public contracts for a period after conviction. It is by no means certain, however, that Sweett will be debarred, as this is not mandatory for a section 7 offence and Sweett may avoid this consequence if it can demonstrate that it has complied with the judge's imploration that Sweett put its "*house in order*".

Comment

The implications of Sweett and Standard Bank are significant in providing guidance as to what the SFO expects from businesses operating in the UK that are made aware of suspected corruption and in regard to what behaviours are considered to amount to "*genuine and proactive*" cooperation with an investigating authority. The SFO states that a DPA represents an entity's opportunity to "*resolve their criminal liability… quickly and with a degree of control and certainty largely absent from traditional prosecution*". It is clear that a failure to demonstrate the positive behaviours outlined above is likely to persuade the SFO that entering into DPA with the offending entity would not be in the interests of justice.

The cases are also useful in illustrating the extra-territorial implications of the Bribery Act for companies incorporated in the UK which transact, or which have subsidiaries that transact, with entities outside of the UK, and both provide a reminder to corporate entities that they must ensure that they exercise strong oversight over their global operations. UK connected companies must remember that their activities anywhere in the world are potentially subject to the provisions of the Bribery Act, and to the investigatory and enforcement powers of the SFO.

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