Herbert Smith

Herbert Smith in association with Gleiss Lutz and Stibbe

Anti corruption e-bulletin

2 November 2009

UK's Serious Fraud Office historic first prosecution of company for overseas corruption

Mabey & Johnson Limited ("M&J"), an English company supplying bridging equipment, largely in the developing world, has been the subject of a landmark prosecution for overseas corruption by the UK's Serious Fraud Office ("SFO"). Herbert Smith advised M&J.

On 25 September 2009, M&J was sentenced at Southwark Crown Court following its decision to plead guilty to offences of overseas corruption in respect of historical contracts entered into with the governments of Ghana and Jamaica and of breaching sanctions in relation to a contract with the government of Iraq under the auspices of the UN's Oil for Food Programme.

The company was fined £3.5m and was made the subject of a confiscation order in the sum of £1.1m. The company also agreed to pay compensation to the affected customers and to pay the SFO's costs.

The case is significant as it represents the first successful UK prosecution of a company for overseas corruption. It is also the first time a defendant has been sentenced following the SFO undertaking plea discussions with the company in accordance with the terms of the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud which were published in March 2009. This led to the SFO and the company putting forward, on an agreed basis, a sentencing proposal for the court's consideration.

The company's decision to self report the overseas corruption concerns to the SFO in early 2008 was taken at a time of great uncertainty as to how the SFO would react. However, M&J considered that in the light of the evidence reviewed during the investigations it had conducted with the assistance of Herbert Smith, that to report to the SFO would enable it to draw a line under the past and allow it to move forward with its business in an ethical manner. By proceeding in this way and providing full co-operation to the SFO during the course of its investigation and subsequent prosecution, it resulted in the case coming before the court much faster than would otherwise have been the case.

The SFO's approach to M&J's decision to self-report mirrors the approach that the SFO advocated in the Guide it subsequently published in July 2009, which sets out how it would deal with companies that self report instances of suspected overseas corruption to it.

It is plain from the Guide and subsequent pronouncements by the SFO that it is actively seeking to encourage companies to self-report the sins of the past. The SFO offers to companies a carrot in the form of the prospect of receiving a proportionate and possibly a civil outcome. Conversely a failure to self-report will run the risk of more serious consequences in the event that the SFO becomes aware of these matters through its own investigations and sources. In some cases, that could lead to money laundering prosecutions of individuals who became aware of the corruption after the event and used the proceeds without making any report.

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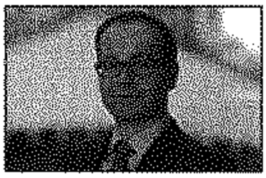

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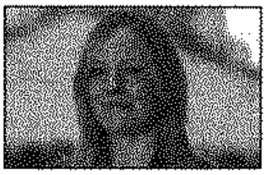

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In order to give reticent companies pause for thought the SFO has also said recently that in appropriate cases it will be prepared to tap telephone calls in order to investigate companies suspected of being involved in overseas corruption. We shall consider in greater detail in a separate client briefing the factors that commonly need to be considered by companies in determining the pros and cons of self-reporting overseas corruption issues to the SFO.

Based on our involvement advising M&J in connection with its decision to self-report and, subsequently, to enter into plea discussions with the SFO we consider that in an appropriate case the approach reflected in the Guide and the Guidelines can provide companies who self-report with a number of benefits.

Based on the evidence that had come to light as a result of its own investigations M&J notified the SFO at an early stage of its decision to plead guilty. M&J took this decision before waiting to see whether the SFO would seek to prosecute its former directors. This was a pragmatic decision that enabled M&J to be sentenced and achieve closure on this historical episode much sooner than would otherwise have been the case. During the same period there was a change in the composition of M&J's board with board members associated with the historical issues stepping down and new board members appointed.

M&J's decision to co-operate fully with the SFO's investigation and to share the findings from its own investigations with the SFO enabled a constructive dialogue to take place with the SFO. The fact that the board members who had involvement with the historic contracts had stood down and new board members been appointed assisted M&J to build a rapport with the SFO and enabled, for example, agreement to be reached that M&J could instruct us as its lawyers to undertake detailed document reviews and undertake interviews. It also allowed M&J to agree the scope of the investigation. Where a company self-reports and can show a genuine commitment to resolving historic issues it increases the prospects of it being able to influence what further investigations are undertaken and by whom. It goes without saying that the SFO must be satisfied that the ambit of the proposed investigations is sufficient, that those investigations will be undertaken properly and the results shared with it in an appropriate fashion. The approach set out in the Guide therefore, provides the platform for sensible discussions to take place concerning the extent of further reviews. That is to be welcomed as in most cases it would be disproportionate to look under every rock "just in case".

The Attorney General's Guidelines state that the purpose of plea discussions is to narrow the issues in the case with a view to reaching a just outcome at the earliest possible time, including the possibility of reaching an agreement about acceptable pleas of guilty and preparing a joint submission as to sentence. The Guidelines recognise the importance of ensuring that any plea discussions command judicial and public confidence and regardless of any recommendations which the prosecutor and defendant may have made concerning the appropriate sentencing, the sentencing judge remains the sole arbiter of what is an appropriate sentence and can choose to disregard such recommendations. We shall set out in a separate client briefing a more detailed analysis of the Guidelines and some of the practical implications that can arise.

In determining whether or not to accept an offer by a defendant the prosecutor must still have regard to the principles set out in the Code for Crown Prosecutors and be satisfied that the charges:

1. reflect the seriousness and extent of the offence;
2. give the court adequate sentencing powers;
3. enable the case to be presented in a clear and simple way;
4. the basis of plea enables the court to pass a sentence that matches the seriousness of the offence;
5. the interests of the victim are taken into account; and
6. that the investigating officer's views are taken into account with regard to the suitability of the proposed plea agreement.

The Attorney General's Guidelines gave M&J an opportunity to discuss the factual position in detail with the SFO and to identify the areas which were and were not agreed and to discuss whether or not it was necessary to have a contested hearing in order to resolve these factual issues.

Thereafter there was an opportunity to debate with the SFO the number and nature of proposed charges bearing in mind the need for the court to be able to pass an adequate sentence and for the case to be presented in a clear and simple way. Whilst every case will turn upon its own particular facts it should be noted that plea discussions concerning companies are in practice likely to be more straightforward as the prospect of a custodial sentence does not have to be considered in the same way it does where individuals are concerned.

The Guidelines provide that once agreement has been reached concerning the pleas, the parties are to present a joint written submission to the court regarding what would be an appropriate sentence with a view to a document listing both aggravating and mitigating factors being agreed.

It was therefore possible in M&J's case as part of the formal plea agreement to agree with the SFO a joint approach to what would constitute an acceptable sentence and a written joint submission on sentence was presented to the court in advance of the sentencing hearing that made proposals concerning the amount of fine/confiscation and the basis on which compensation should be paid to the affected customers.

The historical nature of the conduct in M&J's case meant that the provisions on confiscation contained in the Criminal Justice Act 1988 as originally enacted applied. The consequence of this was that there was no power vested in the court to initiate a confiscation enquiry of its own motion unless the SFO applied for an order. As part of the plea discussions, the SFO had agreed with M&J not to provide the required written notice to the court in order to give the court jurisdiction to make a confiscation order under the terms of the Criminal Justice Act 1988 unless the court had first indicated it was satisfied that the total of the financial orders was appropriate. This therefore enabled M&J to insulate itself from the risk of a potentially draconian confiscation order.

In any case involving a corporate where a fine and/or confiscation is the principal remedy, the issue is what should the approach to calculating the fine/confiscation order be. Should it be by reference to turnover, the gross proceeds of any tainted contracts, or net profits. In M&J's case, the principle put forward and endorsed by the court was to look at the net profits plus RPI of the tainted contracts which were the subject of the charges. It was then for the Judge to allocate between fine and confiscation and between the charges. It is hoped that such an approach will become the norm, since a confiscation order which could be based on the gross proceeds of the tainted contracts could mean that, in financial terms, the company should fight.

At the sentencing hearing the Judge, His Honour Judge Rivlin QC, noted that this was the first case to be sentenced following plea discussions having taken place in accordance with the Attorney General's Guidelines. The Judge made it clear that it was for the court to decide, quite independently of the parties, whether the proposed sentence was appropriate in the circumstances of the case and it had to be the court's sentence. Having said that the Judge considered that in its discussions on sentencing with M&J, the SFO had taken into account the correct factors and the sentence against M&J reflected the level of the financial award that had been discussed by the parties. The Judge also stated that he considered M&J's decision to self report provided its most important mitigation and he acknowledged the considerable co-operation that it had provided throughout the process.

Note: As mentioned in this briefing further client briefings will be circulated shortly which deal with:

1. Factors to be considered by companies when deciding whether to self-report to the SFO.
2. Practical issues to be considered when undertaking plea discussions with the SFO in accordance with the Attorney General's Guidelines.

Herbert Smith LLP, Gleiss Lutz and Stibbe are three independent firms which have a formal alliance.