IN THE CROWN COURT AT SOUTHWARK

IN THE MATTER OF s.45 OF THE CRIME AND COURTS ACT 2013

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 1 July 2021

Before :

THE RT. HON. LORD JUSTICE EDIS

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Between :

Director of the Serious Fraud Office **Applicant**

- and -

Amec Foster Wheeler Energy Limited **Respondent**

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Sasha Wass QC, Cameron Brown QC and **Kabir Sondhi** (instructed by **the Serious Fraud Office**) for the **Applicant**

David Perry QC, Miranda Hill, William Hays, and **Katharine Hardcastle** (instructed by **Slaughter and May**) for the **Respondent**

Hearing dates: 25 June and 1 July 2021

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Approved Judgment

Lord Justice Edis:

Introduction

1. As I explain below, the court does not make findings of fact in the present exercise. It is necessary to assess the culpability of the behaviour of a company but no process has taken place by which the culpability of individual people has been determined or assessed. Companies act through individuals, and it is necessary to consider some conduct for that reason, but the court has not heard from any individuals or called upon them for their side of the story. This judgment deals with the culpability of the company Amec Foster Wheeler Energy Limited (AFWEL) and not that of any individual person. That culpability is

determined by reference to agreements reached between AFWEL and the SFO and documents supplied by those parties. No individual has agreed any of these facts, or supplied any document to the court about them. I make no findings of any kind against any individual, and my comments below are to be read in that context.

2. On 25 June 2021 I heard an application in private in which I was asked to make a declaration in preliminary approval of a then proposed deferred prosecution agreement (a DPA) which has now been reached between the Serious Fraud Office (SFO) and AFWEL. The offending occurred between 1996 and 2014 when AFWEL was known as Foster Wheeler Energy Limited (FWEL). That DPA is to be accompanied by an undertaking from John Wood Group PLC (Wood). Wood now owns AFWEL and is promising to meet its liabilities under the DPA, if approved. At that hearing, I made a declaration that it was likely to be in the interests of justice for such agreement to be made and that its proposed terms were fair, reasonable and proportionate. Today, 1 July 2021, I make a final declaration and Order to that effect at a hearing held in public. Prior to doing so, a further private hearing was held at my request to consider with all interested parties what material should now enter the public domain, and, with the parties, some issues raised by the parties in response to the distribution to them of a draft of this judgment.

3. Paragraph 8(7) of Schedule 17 to the Crime and Courts Act 2013 (the 2013 Act) provides as follows:-

Upon approval of the DPA by the court, the prosecutor must publish-

The DPA,

The declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,

In a case where the court initially declined to make a declaration under paragraph 7, the court's reason for that decision,

The court's declaration under this paragraph and the reasons for its decision to make the declaration,

Unless the prosecutor is prevented from doing so by an enactment or by an order of the court under paragraph 12 (postponement of publication to avoid prejudicing proceedings).

4. Paragraph 12 of Schedule 17 says that the court may order that the publication of information by the prosecutor under paragraph 8(7) be postponed for such period as the court considers necessary if it appears to the court that postponement is necessary for avoiding a substantial risk of prejudice to the administration of justice in any legal proceedings. I have heard submissions from counsel on behalf of some individuals and have decided that such an order is necessary. There are to be charging decisions within three months and if there are any prosecutions of individuals then it is necessary in the interests of justice that reporting of these proceedings should be controlled. That order is made now, at the moment when the material is deployed in open court. I will hear submissions as to the extent of that order from the parties when they have seen what is deployed in open court. In particular, I will hear submissions about the anonymised Statement of Facts once counsel for the individuals have read it. For now, it is covered by the reporting restriction order, and must not be published by the SFO in pursuance of its statutory duty until further order.

5. The Statement of Facts required by paragraph 5(1) of Schedule 17 in a version which anonymises the names of the individuals and some of the corporations involved is incorporated into this judgment. I was supplied with a version which contains that information. Similarly, the Indictment is attached to this judgment in a form which omits the names of the persons with whom it is alleged that FWEL jointly committed the 10 offences. Again, I have seen a version of the

Indictment which contains that information. There is no obligation in the 2013 Act which requires the publication of these full versions, which I do not make part of this judgment. The purpose of proceeding in this way is to protect the fair trial rights of those who may be prosecuted and to protect other rights of those who reside in some other jurisdictions where those rights may be prejudiced by publication of their names. Once decisions have been taken about which individuals, if any, will be prosecuted as a result of their involvement in this case, I will hold a further hearing in order to receive submissions about whether these reasons should be supplemented by the substituted statement of facts and Indictment containing names which have presently been omitted. I expect that hearing to take place before the end of this year.

6. One of the consequences of this Order is that AFWEL must pay a total financial sanction of around £99,910,423.61 to the Consolidated Fund via the SFO, and costs of £3,367,088 to the SFO. The precise figures will depend on the rate of exchange of sterling against the US Dollar at the date of transfer of $8,125,010.40 which comprises part of the total amount payable by AFWEL. A crediting agreement has been put in place between the SFO, the Department of Justice (DoJ), and the Securities and Exchange Commission (SEC), the US authorities, with respect to the offending in Brazil. This crediting arrangement will operate by offsetting sums paid by AFWEL to the SFO against the amounts due from Amec Foster Wheeler entities to the DoJ and the SEC. The Brazilian Authorities are also party to an agreement with the US authorities which relates to the sum due from AFWEL as a result of the offending in Brazil. This is because the offending in Brazil came to light as a result of an investigation in the US, and it was decided that the US authorities would have conduct of the proceedings in relation to it. A DPA under US law has been concluded in relation to that, and the financial penalty required by it has been shared with the UK and Brazilian authorities by way of the crediting agreement I have just described. A similar arrangement has been made in respect of the civil Cease and Desist Order agreed with the SEC.

The Nature of the Jurisdiction

7. I gratefully adopt and incorporate into this judgment the analysis of the legal framework and applicable principles set out by the President of the Queen's Bench Division in her judgment in the case of *Director of the Serious Fraud Office v. Airbus* [2020] 1 WLUK 435 | [2021] Lloyd's Rep. F.C. 159. The relevant passages of general application are at [6]-[10] and her statement and application of the relevant principles at [58]-[119]. It is unnecessary for me to repeat that material here. I shall summarise the facts, and then analyse the interests of justice, and finally consider the terms of the DPA itself.

8. Before embarking on that exercise, I will set out my approach to the exercise. This is not designed to give any guidance for any future cases, but simply to explain how I have approached this task.

9. DPAs entered the law of England and Wales by section 45 of and Schedule 17 to the 2013 Act. These provisions permit a designated prosecutor to come to an agreement with a person, other than an individual human person, who is suspected of the commission of offences specified in Part 2 of Schedule 17 which will, if honoured, prevent the prosecution of that person for those offences. It requires the approval of the court. The Schedule requires that approval to be considered in a two stage process.

1. **The paragraph 7 declaration**. The prosecutor must apply in a private hearing for a declaration, which must be made in private and explained in private reasons, that:-
    1. Entering into a DPA is likely to be in the interests of justice, and
    2. The proposed terms of the DPA are fair, reasonable and proportionate.

2. **The paragraph 8 declaration**. After the paragraph 7 declaration the parties must agree the terms of the DPA and must then apply for a declaration that:-

    1. The DPA is in the interests of justice; and

    2. The terms of the DPA are fair, reasonable and proportionate.

- There may be a private hearing about the paragraph 8 declaration, but if the court makes the declaration, it must do so, and give its reasons, in open court.

10. There is a Code of Practice governing the approach to DPAs, and the relevant procedure, some of which is reflected in Criminal Procedure Rules Part 11.

11. The 2013 Act, the Code of Practice and the Rules are prescriptive about the material which the court requires as part of this process. An application attaching a draft indictment and a statement of facts is required as set out in CrimPR 11.3. The facts set out in this material must be agreed, or, where facts are not agreed, the statement of facts must specify what is not agreed and explain why this is immaterial for the purposes of the proposal to enter into an agreement. The Code of Practice makes the following point at 6.2:-

"The parties should resolve any factual issues necessary to allow the court to agree terms of the DPA on a clear, fair and accurate basis. The court does not have power to adjudicate on factual differences in DPA proceedings."

12. In a DPA application, the court is concerned with two areas of factual material: that concerning the commission of the offences; and that concerning the situation and conduct of the suspect after the offences were committed, during the investigation and its current situation. In neither area can the court make any findings of fact. It is dependent on the information with which it is supplied, and relies on the prosecutor to make enquiries and to satisfy itself that the court is being asked to proceed on an accurate statement of the relevant facts. Of course, the process enables the court to seek further information or clarification if necessary, as happened in this case.

13. I have relied on the accuracy of the information with which I have been supplied. On 23 June 2021 I asked for some further information by a Note to the parties which asked for some assistance on some areas of the case which I felt were not fully covered by the material. I received supplementary documents prior to the hearing on 25 June 2021 which I was able to consider. The significance of these questions will become clearer as the judgment proceeds. My main concern was to test the extent to which Wood was bearing the financial burden of the DPA as an innocent party, and the extent to which the culpable employees of FWEL had left the company. This seems to me to be the most important area in the case, so far as the present questions are concerned. I also wanted to understand the approach to the assessment of the financial penalty a little more fully, and to be informed about how the period over which the payments were to be made had been assessed. My Note said:-

FWEL

1. It is an extremely important part of the case that Wood is "twice removed" from the management of FWEL which was responsible for the misconduct. This occurred because of the acquisitions by Amec in November 2014 and by Wood in October 2017. I have not identified any information about the terms of these acquisitions or any due diligence carried out by Amec or Wood, or any warranties. Were they aware of material such as the Baker Botts Report of 3-10-07, and the Minute of the Board Meeting of 5-11-07? How was the issue of legacy liabilities addressed in November 2014 and October 2017? These issues may affect the way the court should view the position of the acquiring companies. I note that the last payment to the corporate agent, CA7, was made in October 2014, a few weeks before the

acquisition by Amec. The acquisition by Wood occurred after the SFO enquiry was announced on 11 July 2017. In these circumstances an acquisition would be expected to deal with contingent liabilities by an adjustment to the price, and/or by warranties or indemnities. If any part of the financial penalty is to be paid, directly or indirectly, by those responsible for the offending that may be relevant to its amount.

2. In the Board Minute of 5 November 2007 the following appears:-

"Management advised that based upon its consultation with outside legal experts, there was no obligation at the present time to make any such disclosure or otherwise report any aspect of the above. The Board agreed with this assessment."

3. Is it agreed that this legal advice was correct? Would it be possible to identify other instances of suggested culpable non-self reporting at a senior level prior to the Unaoil investigation in Brazil, by providing a list with references to relevant material?

4. What has happened to the people named in the Indictment as co-conspirators? Are any of the named conspirators still employed in AFWEL?

5. Is it fair to conclude that the investigation into this offending was triggered by the investigation into CA8 [Brazilian offending], and that the other offending was discovered as a result of disclosure by AFW and, later, Wood? This is not a case where the investigation was started by self-reporting, but it is a case where self-reporting was essential to it once it had started.

6. As to the financial penalty, I have only three questions. The assessment of harm appears to me to be sound. My questions are:-

1. How should the very long duration and the very wide geographical scope of the offending be recognised? This may be a guideline factor increasing seriousness listed as "Fraudulent activity endemic within corporation". In fact, the proposed calculation allows a discount to reflect totality, that is to say the number of offences operates to reduce rather than to increase the penalty for each. Is this right?

2. Associated with this: is the classification of the case as one where there was "wilful disregard of the commission of offences" correct? A number of these offences did not involve "wilful disregard" but actual complicity of senior officers.

3. Paragraphs 167-171 of the application deal with "Time to Pay" and refer to material which the court does not have. This is an important part of the proposed DPA and the court will need to be satisfied that the time to pay allowance is appropriate.

7. Anonymity: in principle I am content to anonymise those who are included within the categories identified in paragraph 181 of the application. Is that everyone who is mentioned in the Statement of Facts? I would appreciate assistance in that regard.

8. I received answers to these questions which include some sensitive commercial information which it is not necessary to set out in this judgment. I am satisfied that proper consideration has been given to the issues by the SFO, which means that the court can properly proceed on the basis of these three fundamental factors:-

1. Wood is an innocent party in that it acquired FWEL (by then AFWEL) in October 2017, when it acquired its parent company Amec Foster Wheeler plc. At that time it knew that there was an investigation by the SFO but it was in its early stages. Since the acquisition Wood has co-operated fully with the SFO and has also put in place corporate governance systems which involve far greater protection against corrupt

activity. It has also guaranteed the performance by AFWEL of all its obligations in the DPA.

2. The financial penalty has been calculated using the Fraud, Bribery and Money Laundering Guideline for Corporate Offenders by a rational means. Paragraph 5(4) of Schedule 17 to the 2013 Act says:-

"The amount of any financial penalty agreed between the prosecutor and P must be broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea."

- The agreement in relation to time to pay has been properly negotiated, having regard to the current commercial position of Wood, and the size of the financial penalty.

15. The 2013 Act requires the court to answer two connected questions, namely whether the DPA is in the interests of justice and whether its terms are fair, reasonable and proportionate. These are, in essence, the same question although the first looks at whether a DPA is appropriate in principle, and the second looks at the terms of the particular DPA in question. In both cases, the real question is whether what is proposed is in the interests of justice. Fairness, reasonableness and proportionality are considerations each of which is relevant to that assessment.

The facts of the offending

16. In this case, there is a Statement of Facts which is anonymised as I have said. That Statement of Facts in this form will at some point enter the public domain because it forms part of the reasons for making the declarations in this case. It is unnecessary for me to repeat what it says. I need only identify the factual matters which are relevant to the declarations I have made, and which are necessary to explain my decision pending the publication of the anonymised Statement of Facts. I will give references where appropriate to paragraphs in the Statement of Facts as "SF[paragraph number]".

17. The SFO investigations and the concurrent global investigations identified at SF[2] all relate to activity by FWEL prior to the acquisition of the Foster Wheeler Group by Amec plc in November 2014, SF[6], and the acquisition of the resulting group, Amec Foster Wheeler plc, by Wood in October 2017. The dates in the Indictment make this clear as follows:-

2004. The Nigerian offending (counts 1 and 2) spans March 1996-May 2004.

2005. The Saudi Arabian offending (counts 3 and 4) spans June 2004-November 2007.

- The Malaysian offending (counts 5 to 8) spans March 1997-November 2010.

2012. The Indian offending (count 9) spans December 2005-November 2012.

2013. The Brazilian offending (count 10) spans September 2011-October 2014.

18. The first offending to come to light outside FWEL was that in Brazil. That investigation into the Brazilian offending (the latest in time) began while AFWEL was owned by Amec Foster Wheeler plc and continued after the sale to Wood. Both Amec Foster Wheeler plc and Wood co-operated with the SFO and with foreign investigators and that process resulted in the provision of documents to the SFO both voluntarily and in answer to statutory notices which led to the discovery of the offending in the earlier counts on the Indictment. This process revealed very serious offending and one particularly serious aggravating feature. It will not be immediately apparent from the anonymised documents, and I should therefore spell it out. I refer below to a Board Minute dated 5 November 2007 at which the directors of Foster Wheeler Limited (at that time, FWEL's ultimate parent company which was incorporated in Bermuda) (FWL) received and discussed the report of Baker Botts LLP

(Baker Botts) into the Saudi Arabian offending All five of the Foster Wheeler Group personnel named in Count 10 were very senior. That this offending occurred after the process of investigation in 2007-2009 of which I give some details below is relevant to the gravity of the offending, and also to some of the mitigating factors relied upon. I have decided that this issue does not prevent my granting the declarations, but that is principally because of the two takeovers of FWEL which have occurred since, and because of the co-operation by Wood since the second of those takeovers. But for that, I would not have done so. The offending is all extremely serious and its persistence despite what the Board discovered in 2007-2009 makes it all the more so.

The "cleansing" in 2007-2009

19. In my Note I refer to events in Saudi Arabia in 2007, and the way in which they were dealt with by FWEL. The documents include a report by Baker Botts, lawyers, in October 2007 followed by a minute of a Board Meeting in November at which it was discussed. This material suggests to me that the main Board of FWL was primarily concerned to minimise the adverse consequences of the offending for the Group. In my judgment the proper course for it to have adopted, not as a matter of legal duty, but as a matter of ethical corporate governance was to report the known facts to the SFO.

20. In July 2008 Baker Botts prepared a risk report for FWL about potential corruption in four other countries. The Baker Botts report into the Malaysian offending is dated October 2008. The fact that no report was made of any of its discoveries at the time by the company means that it may be more difficult to investigate and prosecute individual offenders now. I accept that there was no legal requirement to report suspected crime to the authorities, but there is a moral duty on all citizens in this respect which extends at least equally to corporations. This failure by the Board of FWL was deplorable. It is compounded by the fact that their efforts to address corruption even within their own organisation were unsuccessful. Within a short time the very similar offending in Brazil began.

Culpability

21. My first task is to assess overall culpability. Bribery is a very serious offence whose principal victims are the populations of the states where it is practised. It means that political and commercial decisions are not taken in the best interests of those states, but in the private interests of the officials who are bribed and of those who bribe them. The economy functions less well, and public and other large projects are less efficiently managed. It traps poor and ill-governed states in poverty, while those holding public office become rich. Other victims are the enterprises which attempt to compete honestly for contracts, and in some cases the bribe is intended to cause actual loss. Although only one of the counts on this indictment caused direct loss (in count 2 a reduction in tax payable was achieved in Nigeria), bribery on this scale must inevitably have caused significant harm by these more indirect means I have briefly described.

22. A financial value of approximately £50m is put on the harm to reflect the loss caused on count 2 and the profits made on the contracts in the other counts. This is the sum which is used for the purposes of compensation and disgorgement of profits. It is also used as the base figure for the fine, to which a multiplier is applied as laid down in the Guideline. A spreadsheet showing these calculations has been prepared by the SFO, and is attached to this judgment. I will return to this when considering the second part of the paragraph 8 declaration, but refer to it now because the "harm" figure is one measure of culpability.

23. The scale and duration of corrupt practices within FWEL between 1996 and 2014 amounted to very significant and systemic corruption. At all times during this period FWEL had in place policies which ought to have prevented this from happening, but it has transpired that these policies were not followed. Documents were created to conceal the fact that the company had employed agents to channel money to public officials. There is no room for doubt about this, because many of the emails exchanged within the company are very transparent. SF[34] says:-

"The SFO's investigation identified multiple occasions on which the above policies and procedures were circumvented and breached, leading the SFO to conclude that there existed within FWEL a culture of disregard for compliance policies and procedures."

24. I read this to be a reference to all the "above policies" and to be a description of a state of affairs which had persisted throughout the Indictment period. The policies changed, but they never worked because FWEL did not want them to.

25. This is true of the period before and after the "cleansing" in 2007-09. SF[28] sets out the fact that FWEL at board level became aware in October 2007 that "several senior employees and directors at FWEL had engaged in activities which were likely to be a breach of certain applicable anti-bribery legislation" in respect of the count 3 and 4 offending in relation to Saudi Arabia. This is a reference to the Baker Botts report, which I have mentioned above. No report was made of this finding to the relevant authorities. The Board received legal advice that they had no obligation to make a disclosure to the relevant prosecuting authorities, and did not do so. There is no criticism of Baker Botts, their lawyers at the time, in this respect, or any other. I have described my approach to the company's conduct above. FWEL put in place some measures in 2007 and 2008 which might have been intended to reduce the risk of this kind of behaviour in the future, but these measures were ineffective. Some of those engaged in the offending discovered at this time, and in the corporate response to it, appear in subsequent offending.

26. SF[13] says:-

"On at least four occasions [including Saudi Arabia] between 2007 and 2010 senior employees and directors within the Foster Wheeler Group instructed Baker Botts LLP to conduct internal investigations into suspicions that employees within FWEL (including senior employees and directors) had engaged in corrupt activities and in some instances had concealed these activities. Despite these investigations uncovering evidence that FWEL senior employees and directors may have violated applicable laws relating to bribery and appropriate record keeping, the Foster Wheeler Group did not report the outcome of these investigations to authorities in any jurisdiction, including the UK, at the time."

27. These reports were historical in their nature in that in 2008 Baker Botts produced a report into events in Malaysia, and in 2009 a report into the Nigerian events. These reports examined matters which had occurred some time before. However, this activity was not successful in stopping corruption as the dates in the Indictment reveal.

The First Declaration: Is a DPA in the interests of justice?

28. I have already said that my conclusion is that a DPA is in the interests of justice in this case. I will now identify the reasons for that conclusion. Given what I have said about the gravity of the offending and the particular aggravating feature I have identified, it is a conclusion which I have reached after careful thought.

29. It is a matter of great significance in the present context that the widespread and high level culture of criminality, which is accepted to have existed, does not in fact taint the modern company. I would not approve a DPA in this case except in circumstances where the company was under new management, and where there is good reason to accept that Wood fully intends to ensure that its activity is carried on without corruption in the future. The criminal activity accepted by AFWEL is so serious that if those who were individually responsible for it had any continuing connection with or interest in the company a DPA would not be appropriate. The change is a change of ownership and management.

30. The second critical matter is related to the first. As appears from my Note, I was concerned to test the extent to which Wood should be treated as an innocent party who is now clearing up the mess caused prior to October 2014 when FWEL was in different ownership and under different management. One thing I particularly needed to understand was whether the acquisition price paid by Wood for Amec Foster Wheeler plc in October 2017 was reduced to reflect the SFO investigation which had been announced the previous July. If Wood had acquired Amec Foster Wheeler plc and its subsidiary AFWEL at a discount to reflect the contingent liabilities which might result from that investigation then it would benefit inappropriately if those liabilities were then reduced by the court to reflect their position. I have received an assurance that the offer price was based on publicly available information. I was told that the SFO investigation was not factored into the valuation because it was announced after the offer was made. I was also shown a presentation given by Wood to the SFO dated 23 October 2020 in which these issues were explained to the SFO. I received submissions and information on the same subject from counsel. I accept that Wood will ultimately pay the liabilities arising under the DPA and that it has also been put to substantial costs by dealing with the investigation and the DPA. This outlay was not caused by any fault on its part. Wood is the corporation which will "carry the can" for the activities detailed in the Statement of Facts and it was entirely innocent of them. That is a very important factor in my deciding that a DPA is in the interests of justice in this case. The further material referred to in this paragraph is commercially sensitive and I do not attach it to this judgment.

31. Consideration has been given by the SFO to whether any further investigation might reveal any more criminality, and decisions have been taken that the prospects of any significant new offences being added are not such as to justify the resources which any further investigation would require. I approve that approach. The material assembled so far shows that during the very long period of the indictment, FWEL was thoroughly corrupt in the way that it carried on its business in jurisdictions outside the United Kingdom. It is likely in these circumstances that there are further examples of this behaviour which might be detected and prosecuted but unlikely that this would change the overall finding about the nature of the company and its business practices. I therefore accept that the Statement of Facts and the Indictment properly encompass the offending of FWEL.

32. By paragraph 5(4) of Schedule 17, a DPA must contain a financial penalty which is "broadly comparable to the fine that a court would have imposed on P on conviction for the alleged offence following a guilty plea", see [9(ii)] above. I shall return to this when dealing with the second part of the paragraph 8 declaration below. The court must, when dealing with companies who have been convicted of bribery offences, follow the Guideline identified at [9(ii)] above. This means that the principal punishment imposed is the fine, together with compensation, confiscation and costs. A DPA must impose as one of its terms something which is "broadly comparable" to that fine and the company will therefore not escape that punishment. Provided that in making the second declaration the court is satisfied that this condition is met by this DPA, appropriate punishment will be achieved and this is a factor relevant to the interests of justice.

33. The terms of the DPA are set out in summary in paragraph 7 of it, and more fully in Part A (co-operation), Part B (compensation), Part C (disgorgement of profits), Part D (financial penalty), Part E (costs), Part F (corporate compliance programme), and in the attached Undertaking by Wood. That undertaking is something which could not be imposed by a court following a prosecution of AFWEL. It is important because it means that the financial liabilities under the DPA are guaranteed by Wood and thus more likely to be actually paid. This is in the interests of justice.

34. The undertaking by Wood to ensure the performance by AFWEL of its obligations under Parts A and F of the DPA is also of importance. That undertaking extends to the whole of the Wood Group and is therefore wider in its effect than any Serious Crime Prevention Order imposed on AFWEL alone under section 19 of the Serious Crime Act 2007. Consideration of the imposition of such orders

is required by Step 8 of the Guideline. It seems unlikely that this statutory power could produce anything as tailored to the current case as the provisions of Parts A and F of the DPA and it certainly could not produce Wood's Undertaking. I regard these provisions as important. As I indicated in my private reasons for giving the paragraph 7 declaration, I do not intend to consider these terms in detail either now or when coming to the second part of the paragraph 8 declaration below. They are negotiated between the SFO, as an expert prosecuting agency, and Wood and AFWEL and the court relies on them to agree a package of measures which will "accurately fulfil their intended purpose." I have, of course, reviewed the terms and I conclude that they do represent a significant measure of public protection which is in the interests of justice and are, therefore, a factor to be weighed in favour of the DPA.

35. The DPA is likely to have a beneficial effect on the behaviour of organisations within the jurisdiction of the SFO in that they will be encouraged to report wrongdoing within their organisations when they discover it, and when they find evidence of it on acquiring another entity. A culture of self-reporting of such conduct is of very substantial benefit to the interests of justice in that it should bring criminal behaviour to light which might otherwise go entirely undiscovered, and may also make the investigation of such behaviour much easier, and the conviction of the guilty more likely, see the overriding objective in CrimPR 1.1. This is an important matter both in the interests of the effectiveness of the police, SFO and Crown Prosecution Service whose resources will be better targeted, and also in the wider public interest of detecting crime. An example of the culture which should be discouraged is the "cleansing process" of 2007-2009 in this case. The whole outcome of the case would have been far better if FWEL had self-reported in 2007, although given the fact that corruption appears to have been endemic then and at a very high level, it may be doubted that this would ever have happened. If it had,

1. Some of this offending would probably not have happened.
2. The investigation would have been more contemporaneous with the events and probably simpler.

36. The DPA brings the proceedings against AFWEL to an end far sooner than a prosecution would, thus saving the resources of the SFO and the criminal court system for other work. This is in the public interest, and in the interests of justice. The SFO's costs of the investigation and proceedings will be paid. This factor should not be overstated in view of the fact that the prosecution of individuals remains under consideration and any such prosecutions would be likely to involve a heavy commitment of resources by both the SFO and the court system. For this reason, I regard this factor as having only limited weight in assessing the interests of justice. Whether there is a DPA or not, it is at least possible and perhaps likely that this investigation will result in complex criminal proceedings which will not be resolved for a considerable period of time. Deterrence is more likely to be achieved by the prosecution and punishment of individuals than by a DPA with a company, and the one should not be viewed as an alternative to the other.

37. For all of these reasons, I have come to the conclusion that a DPA in this case is in the interests of justice and I make the first part of the paragraph 8 declaration accordingly.

The Second Part of the Declaration: fair, reasonable and proportionate?

38. The principal role of the court in considering this part of the declaration is the assessment of the financial penalty. The other terms of the DPA are obviously right in principle, and, as I have said, the court relies on the SFO and Wood to collaborate in producing an appropriate agreement. The SFO has expressed its satisfaction with these terms in the written application and I have no reason to disagree with that document. The terms have every appearance of meeting the needs of the public and are certainly fair to AFWEL and Wood. They are described by the SFO as "robust" and the SFO has

sufficient confidence in them that it has decided that no Monitor under the Code of Practice paragraph 7.11ff is required. I accept their judgment on that issue.

39. The approach to the sum payable by AFWEL under the DPA is set out in the spreadsheet which has been supplied to me, and which is attached to this judgment. The level of the financial penalty has caused me more concern than the first part of the paragraph 8 declaration or the other terms of the DPA, but I have concluded that I should make the declaration. This is because of the following factors.

40. The financial penalty has been calculated by using the relevant Guideline.

41. The figures for harm, and therefore for compensation and disgorgement of profits, are a simple matter of calculation and are agreed by the respective accountants. The harm figure is then used for the purposes of the Guideline in setting the fine at steps 3 and 4.

42. The difficulties in the exercise come from the rather mechanistic way in which the SFO has approached the assessment of the appropriate multipliers to reflect culpability. A particular percentage adjustment to the multiplier has been made to address each separate culpability factor which is said to be relevant, either by reference to the Guideline or to the facts of the case. Step Five in the Guideline headed "Adjustment of Fine" says this:-

"Step 5 – Adjustment of fine

Having arrived at a fine level, the court should consider whether there are any further factors which indicate an adjustment in the level of the fine. The court should 'step back' and consider the overall effect of its orders. The combination of orders made, compensation, confiscation and fine ought to achieve:

- the removal of all gain
- appropriate additional punishment, and
- deterrence

The fine may be adjusted to ensure that these objectives are met in a fair way. The court should consider any further factors relevant to the setting of the level of the fine to ensure that the fine is proportionate, having regard to the size and financial position of the offending organisation and the seriousness of the offence.

The fine must be substantial enough to have a real economic impact which will bring home to both management and shareholders the need to operate within the law. Whether the fine will have the effect of putting the offender out of business will be relevant; in some bad cases this may be an acceptable consequence.

In considering the ability of the offending organisation to pay any financial penalty the court can take into account the power to allow time for payment or to order that the amount be paid in instalments.

The court should consider whether the level of fine would otherwise cause unacceptable harm to third parties. In doing so the court should bear in mind that the payment of any compensation determined at step one should take priority over the payment of any fine.

The table below contains a non-exhaustive list of additional factual elements for the court to consider. The Court should identify whether any combination of these, or other relevant factors, should result in a proportionate increase or reduction in the level of fine.

Factors to consider in adjusting the level of fine

- Fine fulfils the objectives of punishment, deterrence and removal of gain
- The value, worth or available means of the offender
- Fine impairs offender's ability to make restitution to victims
- Impact of fine on offender's ability to implement effective compliance programmes
- Impact of fine on employment of staff, service users, customers and local economy (but not shareholders)
- Impact of fine on performance of public or charitable function"

43. There is no Step Five overview in the SFO's calculation. On the basis of that calculation, the SFO suggests that all counts should be assessed at the highest category for culpability at Step 3, namely Category A. I agree. This means that they attract a multiplier in a range of 250%-400%. The suggested Guideline starting point is 300%. I consider that the following guideline factors are relevant at this stage across the board, and that in particular cases further factors are present:-

1. Corruption of local or national government officials.
2. Corruption of officials performing a law enforcement role.

- Offending committed over a sustained period of time.

1. Culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place.

44. I do not think there was wilful obstruction of detection. In 2007-2009 there was series of high level decisions not to report wrongdoing, but that is not a Step 3 culpability factor. The Baker Botts reports involved Nigeria, Saudi Arabia, and Malaysia. There does not seem to have been an equivalent investigation into India, but the corruption there was clear enough to anyone who wanted to see it and the broad picture is, as I have said, that these events involve high level deplorable conduct which should find its expression later in the exercise.

45. The level of culpability varies across the counts with the relevant range. The SFO suggests that weighing the relevant factors in each case a multiplier above the starting point is appropriate in all cases and the spreadsheet sets them out. I do not disagree. The suggestion is made that the Malaysian offences should, in effect, be treated together which justifies a multiplier at the top of the relevant range of 400%. The spreadsheet shows one single fine for all four counts which is described as a "concurrent" fine. This is inaccurate terminology. On conviction the relevant fine could be split between the counts, or imposed on one count with no separate penalty imposed on the others. The technicalities do not matter for present purposes. In essence the suggestion is that a total fine of £21,711,631.64 for the Malaysian offending is fair, reasonable and proportionate and broadly comparable to what would be imposed by way of a fine if there had been a conviction following an early guilty plea.

46. Then, moving to Step Four, the SFO says that the fact that offences were committed across borders or jurisdictions is an aggravating factor which warrants an additional 25 percentage points to the multiplier except in the case of the Malaysian offences, where it is said that the choice of the highest multiplier within the range adequately reflects this factor. No separate account is taken of the other factor in the list of factors increasing seriousness at Step 4 which is undoubtedly present, namely "Fraudulent activity is endemic within corporation."

47. The calculation then proceeds by a series of deductions of percentage points from the multiplier in respect of the financial penalty (shown as % in the table below) namely:-

No previous convictions	-25%
No actual loss to victims (not counts 2, and 5-8)	-50%
Twice-removed reduction	-50%
Mitigation reduction (to represent guilty plea)	-33.30%
Co-operation reduction	-16.70%
Totality reduction (not counts 5-8)	-10%

48. The end result, including the crediting of the fine levied under the US DPA in respect of Brazil, is a financial penalty of £49,341,391.98. The total financial penalty for the offences dealt with by the SFO is £46,033,891.98. That is the sum which I am required to consider, since this court has no involvement in the US authorities resolutions and the crediting arrangement in those cases. I have already said that the other components of the total financial liability of £99,910,423.61 (compensation and disgorgement) are matters of calculation and it is fair reasonable and proportionate that they should be paid.

49. The first point which I wish to make is that my decision on this question is not a decision about how a sentencing judge would or should follow this guideline. I am confident that no sentencing judge would approach it in the way in which the SFO has done. For example, the fact that a company has no previous convictions is not a matter which is particularly relevant to sentence when the offending is as protracted and widespread as this. It just means they have been getting away with it for years, and underlines the poor conduct in 2007-2009 when the company failed to report its discoveries of apparent criminality. In a similar vein, I doubt if there would be separate discounts for the "twice removed" factor and the "co-operation" factor. Both factors would be taken into account as relevant guideline factors reducing seriousness but the court would be careful to avoid double counting since they are closely connected. Totality is an aspect of proportionality, as the Sentencing Council's Guideline on Totality makes clear. If the total sentence is disproportionate when a number of sentences for different offences are added together, they will need to be reduced. If it is not, then they will not. There is no automatic right to a reduction where multiple offences have been committed, especially where their result is to show that fraudulent activity was endemic within the corporation for many years. That is an aggravating and not a mitigating feature. Moreover, this factor is likely to have been considered at Step Five, and is not to be considered again as a separate matter under the Totality guideline. In short, it is not likely that a sentencing judge would apply the guideline in the way suggested in the spreadsheet and, if such an approach were adopted at steps Three and Four, it would require particular care at the Step Five stage. That is the point at which the court looks at the overall size of the fine and considers whether it meets the purposes there identified. It may be the most important stage of the process. It is the point at which the means of the offender and the impact of the fine on it are considered.

50. The method set out in the spreadsheet, therefore, does not replicate the thought process of a sentencing judge, but it does offer a helpful yardstick against which to measure the total fine of £46m, in round figures, for the offending for which this DPA must include a financial penalty which is "broadly comparable" to that which would be imposed by way of fine on a guilty plea. I take the view that this means that I do not myself set about sentencing AFWEL and only approve a DPA which

provides for payment of the sum I arrive at. If that were the right approach, the court would be imposing the penalty and not approving an agreement as to penalty. I consider that the 2013 Act means that a DPA cannot be approved unless the court considers that it includes an agreed financial penalty which is "broadly comparable" to the fine. I consider that the fine which has been included in the DPA does meet that test. It has been arrived at by applying the Guideline which the court would be bound to follow. It makes an appropriate selection of the offending category for culpability and harm. The starting points are appropriate, and allowances are made for aggravating and mitigating factors as is required. Those allowances are not all ones which I would make, or made in the way I would make them, but the end result is a fine for counts 1-9 which is broadly comparable to the fine which a court would impose. The two principal reasons for making a substantial discount are (1) the fact that the fine will be paid by AFWEL, whose character has entirely changed since the offending occurred, or by a company, Wood, which is wholly innocent of any crime and (2) the guilty plea discount. The age of the offences and what has happened since they ended means that the company which would be prosecuted and fined if convicted is now an entirely different entity from that which committed the offences. In that situation the interests of its employees, service users, and customers become highly relevant at the Step Five stage. I add to that list in the Guideline, on the facts of this case, the interests of the parent company and shareholders. The fine must make a real economic impact on the company, but there is no purpose in undermining unnecessarily the commercial position of a company which has entirely reformed and which has co-operated in the investigation to the extent it has. It is in the public interest that Wood should continue to trade through AFWEL and its other companies, because that trade is not tainted by any crime.

51. One reason why the "broadly comparable" test is found in the 2013 Act is that the position of an offending company which has concluded a DPA will rarely be identical to that of a company which has not. The mitigating features I have referred to in the last paragraph will be present to a markedly greater degree in many cases where a DPA has been agreed. The provision is designed to give the court a flexibility to give this consideration weight. In the present case it deserves very considerable weight.

52. It was for these reasons that I interrogated the "time to pay" agreement in my Note. Time to pay is a means by which the court can ensure that the right financial penalty is paid. Rather than reducing it because it would cause disproportionate harm to require it to be paid in full immediately, the court may allow time to pay and so recover more money from the offender. This consideration is linked with the Step Five assessment of the impact of the fine on the particular offending company. I was supplied with material concerning AFWEL and Wood which persuades me both that the fine at the suggested level is fair, reasonable and proportionate and also that the time to pay agreement meets those tests. The financial penalty for these purposes is not to be viewed in isolation from the rest of the financial consequences of the DPA of which it constitutes a little under half. It is that total sum which is now to be paid in instalments, and the amount of the fine should take into account the effect of the whole liability on AFWEL and Wood.

53. For all these reasons I am satisfied that I should make the second declaration in this case.