Case No: U20150856

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: 11 July 2016

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(THE RT. HON. SIR BRIAN LEVESON)

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Between :

SERIOUS FRAUD OFFICE	**Applicant**
- and -	
SARCLAD LIMITED	**Respondent**

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Zoe Johnson Q.C. and **Paul Raudnitz**
(instructed by the Serious Fraud Office) for the Applicant
Vivian Robinson Q.C. (of **McGuireWoods London LLP**) for the Respondent

Hearing date: 8 July 2016

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Approved Judgment

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Sir Brian Leveson P :

1. This application by the Serious Fraud Office ("SFO") for approval of a Deferred Prosecution Agreement ("DPA") follows the scheme prescribed by s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act"). It concerns the activities of Sarclad Ltd ("Sarclad"), a small to medium sized enterprise ("SME") which between June 2004 and June 2012 was involved, through its controlling minds, in the offer and/or payment of bribes to secure contracts in foreign jurisdictions. On 24 June, I indicated that I was prepared to grant a declaration pursuant to para. 7(1) of Schedule 17 of the 2013 Act to the effect that the proposed agreement between the SFO and Sarclad was likely to be in the interests of justice and that the proposed terms (viewed overall) are fair, reasonable and proportionate.

2. Following that hearing, on 6 July 2016, an agreement has been signed by the Director of the SFO and the Managing Director of Sarclad and I am now asked, pursuant to para. 8(1) of Schedule 17 to declare that the DPA is in the interests of justice, and, furthermore, that the terms of the DPA are fair, reasonable and proportionate. In other words, I am asked definitively to approve that which I previously approved provisionally. In this way, as I explained in the final judgment in *SFO v Standard Bank* (U20150854), 30 November 2015, the court retains control of the ultimate outcome of the resolution of the investigation. Approval triggers the requirements also set out in para. 8 in these terms:

> "(3) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).
>
> (4) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).
>
> (5) A hearing at which an application under this paragraph is determined may be held in private.
>
> (6) But if the court decides to approve the DPA and make a declaration under sub-paragraph (1) it must do so, and give its reasons, in open court.
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> (7) Upon approval of the DPA by the court, the prosecutor must publish –
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> (a) the DPA
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> (b) the declaration of the court under paragraph 7 and the reasons for its decision to make the declaration,
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> (c) in a case where the court initially declined to make a declaration under paragraph 7, the court's reason for that decision, and
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> (d) 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)."

3. Thus, although the proposal that a DPA meets the criteria set out in the 2013 Act must be the subject of argument in private (so as not to prejudice criminal proceedings should an agreement not be approved), when it is approved, the engagement of the parties with the court then becomes open to public scrutiny, consistent with the principles of open justice. The only exception is where publication is prevented by statute or must be postponed to avoid a substantial risk of serious prejudice to the administration of justice in any other legal proceedings. In this case, on the basis that there are ongoing criminal proceedings, a redacted version of this judgment may be made public and may only be replaced by this judgment which provides full details of the parties involved following the conclusion of criminal proceedings.

4. The present application raises the problems generated when a modestly resourced SME has demonstrably committed offences of bribery and corruption on a prolific scale. It is therefore a less straightforward application of the principles and process that I have set out. In the preliminary judgment (*SFO v Sarclad Ltd* (U20150856), 24 June 2016), at [3], I identified the nub of the matter as:

> "At what level of criminality is it necessary simply to allow the SME to become insolvent and to what extent is it appropriate to mitigate the financial penalty, knowing that the SME is only able to make any substantial payment with the support of the substantial company of which the SME is a wholly owned subsidiary? On the one hand, allowing the SME to continue to trade (assuming necessary compliance has been put in place) is in the public interest but, on the other hand, nothing must be done to encourage the pursuit of criminal behaviour through a corporate vehicle which can be abandoned as insolvent if necessary.".

5. The facts are extensively set out in the Statement of Facts and analysed in the judgment that I gave following the hearing under para. 7 of Schedule 13: see [6] – [22]. In short, Sarclad designs and manufactures technology based products for the steel manufacturing industry globally, generating the majority of its revenue from exports to Asian markets. In February 2000, it was acquired by Heico Companies LLC ("Heico") which is a US registered corporation.

6. During the period June 2004 to June 2012, Sarclad, through a small but important group of its employees and agents, was involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions. The relevant employees were the Managing Director (from 1990 until his retirement in August 2011), who was a controlling mind of Sarclad between 2004 and 2011, the Design Engineer, later Sales Engineer, then Sales Manager and finally Head of Sales and Marketing and a third man who had also been the Sales Manager and later the Project Manager in relation to one of Sarclad's products. Two of the three men had left Sarclad's employment prior to the discovery of what had happened; the employment of the third was terminated. All are now facing prosecution, with the first two being due for trial and an extradition warrant being executed in relation to the third (who had emigrated to Australia).

7. In total, of 74 contracts which were ultimately examined, 46 were characterised as "suspicious" by reason of there being suspicion (but no evidence) that those contracts may have been procured as a result of the offer and/or payment of bribes. Of these, 28 are said to be "implicated", that is to say there is specific evidence to suggest that each contract was procured as a result of the offer and/or payment of bribes. It is these which form the subject-matter of the present application.

8. The way in which these offences were committed was for intermediary agents within a particular jurisdiction to offer or to place bribes with those thought to exert influence or control over the awarding of contracts; this was done on behalf of Sarclad's employees and ultimately the company. It is significant that these were payments which were not part of agency agreements which provided for agents' remuneration on the basis of commission expressed as a percentage of the contract value in each case. Rather, correspondence shows the payment also of what is described as "fixed commission", "special commission" and "additional commission". It is also important to emphasise that there is no direct evidence of any illegal agreement between the agents concerned and the purported recipients of bribes. However, given the context and correspondences between Sarclad employees and agents, this DPA preliminary application proceeds on the basis that the various terms used represent euphemisms for bribes.

9. In the period 2004-2013, a total of £17.24 million was paid to Sarclad on the 28 implicated contracts on which bribes were offered. This sum represented 15.81% of the total turnover of Sarclad in the period (being £109 million). The total gross profit from the implicated contracts amounted to £6,553,085 out of a total gross profit of £31.4 million (i.e. 20.82%). Sarclad estimates a net profit of approximately £2.5 million in respect of the implicated contracts.

10. It is also appropriate to say something of the involvement of Heico in the business of Sarclad which, effectively, it rescued following acquisition. Heico provided support for annual budgeting, marketing and product development while also providing long-term strategic planning, supply chain and global sourcing resources. In 2007, a group-wide health and safety programme was rolled out which remains in place. Heico has also provided services in relation to cost-saving measures, a compliance manual, a code of conduct with online training together with management consultancy along with support in comprehensive environmental health and safety (EHS), corporate HR and internal audit. Sarclad paid Heico a total of £2.3 million in management fees over this period. During the period following the February 2000 acquisition, Heico received dividend payments totalling some £6 million.

11. By its own admission, prior to 2012, Sarclad did not have adequate compliance provisions in place. In order to address this problem, in late 2011, Heico sought to improve matters in its subsidiary by implementing its global compliance programme within Sarclad. It was within the context of this compliance programme that, at the end of August 2012, concerns came to light about the way in which a number of contracts had been secured. Sarclad took immediate action by retaining a law firm to undertake an independent internal investigation. After making a written self-report on behalf of its client, the law firm continued to supplement the SFO with information while it conducted its own investigation. Two further self-reports were made.

12. At this stage, it should be noted that the 28 implicated contracts straddle the coming into force of the Bribery Act 2010 ("the 2010 Act") on 1 July 2011. With this in mind and on the basis of its and the law firm's investigations, acting in accordance with the full code test set out in the Code for Crown Prosecutors and, therefore, para. 1.2.i(a) of the DPA Code of Practice, the Director of the SFO was satisfied that there was sufficient evidence to provide a realistic prospect of conviction against Sarclad. The offences contained within the draft indictment are, in relation to the pre-2010 Act conduct, conspiracy to corrupt, in relation to post-2010 Act conduct, conspiracy to bribe contrary to s. 1 of the Criminal Law Act 1977 and failure to prevent bribery, contrary to section 7 of the Bribery Act 2010. The particulars are set out in my judgment on the preliminary application.

The Terms of the DPA

13. The essential basis of this DPA is that effective from the date of a declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of at least three years, and up to a period of five years (in broad terms), the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, at the end of the period, discontinue the proceedings. Conditions include the provision that there is no protection against prosecution of any present or former officer, employee or agent or, indeed, of Sarclad for conduct not disclosed by it prior to the date of the agreement (or any future criminal conduct); prosecution can also follow if the organisation provided information to the SFO which it knew or ought to have known was inaccurate, misleading or incomplete.

14. The other requirements falling upon Sarclad are as follows:

    i) Disgorgement of gross profits of £6,201,085 (of which £1,953,085 will be contributed by Heico being the repayment by Heico of a significant proportion of dividends that it had received from Sarclad, albeit entirely innocently);

    ii) Payment of a financial penalty of £352,000 being a reasonable estimate of the unencumbered balance of cash available following a review by the SFO of Sarclad's cash flow projections over three years;

    iii) Past and future cooperation with the SFO (as further described) in all matters relating to the conduct arising out of the circumstances of the draft indictment; and

    iv) Review, maintenance of and reporting to the SFO on the organisation's existing compliance programme (as further described).

    It is also acknowledged that no tax reduction shall be sought in relation to the payments (i) and (ii) above.

15. In the judgment which followed the application under para. 7(1) of Schedule 17 of the 2013 Act, I extensively analysed the interests of justice (at [32]-[46]). I identified the relevant factors (at [32]) as including the seriousness of the predicate offence or offences; the importance of incentivising the exposure and self-reporting of corporate wrongdoing; the history (or otherwise) of similar conduct; the attention paid to corporate compliance prior to, at the time of and subsequent to the offending; the extent

to which the entity has changed both in its culture and in relation to relevant personnel; and the impact of prosecution on employees and others innocent of any misconduct.

16. In short, as to the seriousness of the conduct, there is no doubt that Sarclad's systematic bribery over a period of eight years was grave. That said, the great majority of bribes were offered at the instigation of agents who were not under any pressure from Sarclad putting them at risk of (often very severe) penal consequences in their home countries, and the bribing mechanism was not particularly sophisticated or redolent of a corporate cover-up. Of particular importance, reflecting a core purpose of the creation of DPAs to incentivise the exposure and self-reporting of corporate wrongdoing, was the promptness of the self-report, the fully disclosed internal investigation and co-operation of Sarclad.

17. Further, although inadequate during the period the conduct at issue, Sarclad (after Heico's investment) has implemented new training programmes, policies and procedures and it was this implementation that led to the discovery of the conduct. In that respect, it is important to note there is no question in this case of the parent company knowingly making profit from its subsidiary's criminality; neither is there any suggestion (let alone evidence) that Heico should have known about what was going on or behaved otherwise than with complete propriety when it was discovered. Given Heico's lack of knowledge and the self-report when the new compliance programme started to reveal a problem, there is absolutely no suggestion that Sarclad was deliberately operated as an impecunious vehicle through which corrupt payments might be made.

18. Moreover, prosecution and conviction would lead to significant legal costs and financial penalty at an unfavourable time in the global steel industry, a context where Sarclad currently operates on an 'economic knife-edge': Sarclad would risk insolvency harming the interests of workers, suppliers, and the wider community. In any event, it is clear that Sarclad in its current form is effectively a different entity from that which committed the offence.

19. Turning to the terms of the DPA, its proposed duration of at least three years, and up to five years, allows for the financial terms to be met. There is also no issue about the SFO reserving the right to prosecute former employees or Sarclad in the event that it provided inaccurate, misleading or incomplete information: terms that will be standard in DPAs. Terms as to future co-operation and compliance (see [74]-[76] of the preliminary judgment), requiring continued full and truthful cooperation and an internal compliance review in light of the Bribery Act 2010 and other applicable anti-corruption law respectively (itself to be reported annually by Sarclad's Chief Compliance Officer to the SFO), are also clearly appropriate.

20. As to financial terms, compensation was not appropriate as it was not possible to positively identify any victims as entities who may be compensated (see [52]-[53]). With that in mind, the disgorgement and financial penalty sums merit particular attention. In particular, it should be noted that they were determined in a context where Sarclad has limited means and ability such that the maximum amount it would be able to provide towards paying any financial obligation imposed without becoming insolvent is estimated to be £352,000. It is appropriate, therefore, to consider them both individually and together.

21. In this context, Sarclad's parent company, Heico, has offered to provide the necessary financial support should a DPA be agreed although, to be clear, there was neither contractual nor legal obligation on Heico, as an innocent parent company, to contribute towards a financial penalty imposed upon one of its subsidiaries for criminal conduct by that subsidiary. Ultimately, of course, the subsidiary can be prosecuted and, if unable to pay an appropriate penalty, wound up. On the other hand, as Mr Vivian Robinson QC for Sarclad accepted, a parent company receiving financial benefits arising from the unlawful conduct of a subsidiary (albeit unknown) must understand how this will be perceived: see [54]-[57] with regard to disgorgement. In that regard, it is important to note that Heico has received £6 million in dividends from Sarclad since acquiring it in February 2000.

22. In the initial DPA, disgorgement of profits in the sum of £3.3 million was proposed along with a financial penalty of £1.3 million, making a total financial commitment of £4.6 million. In light of the dividends received, Sarclad and Heico have now jointly agreed that Heico will also return £1,953,085 for Sarclad to pay towards disgorgement, which brought the total sum to be disgorged to £6,201,085 which is the total gross profit less the sum of £352,000 available over the period from Sarclad's resources.

23. As to financial penalty, given the type and extent of the offending, it is not surprising that the correct culpability starting point, as the SFO had proposed, is high (see [60]-[63]). The parties submitted a lower than expected harm multiplier figure of 250%, but such a figure was always going to be academic given Sarclad's means and ability to pay (see [64]-[67]). 250% of gross profit (£6,553,085) amounts to a starting point for a financial penalty of just under £16.4 million ([68]). In accord with para. 5(4) of Schedule 17, discounting that sum for a guilty plea, a discount of 50% was appropriate not least to encourage others to conduct themselves as Sarclad has when confronting criminality; this reduces the figure to £8.2 million ([69]).

24. Such a financial penalty is wholly unrealistic for Sarclad. Stepping back, therefore, it is essential to consider all the circumstances. These include the conclusion that the interests of justice did not require Sarclad to be pursued into insolvency. Thus, Sarclad's means and the impact of any financial penalty on Sarclad's staff, service users, customers and the local economy are all significant factors. SFO accountants accept that £352,000 is a reasonable estimate of the sum that will be available to Sarclad to provide towards any financial obligations and that the balance would have to be provided through support from Heico. As a result, taking into account the sum to be disgorged of £6,201,085, a financial penalty of £352,000 leads to a total which equates to the gross profit on the implicated contracts (see [70]-[73]). This figure could equally have been reached by reducing the disgorgement and increasing the financial penalty by equal amounts. The pragmatic answer is that, in these circumstances, the overall sum payable (whether called disgorgement or financial penalty) sufficiently marks the offending and is itself fair, reasonable and proportionate. That is the conclusion that I reached following the preliminary hearing and I remain of that view.

25. In terms of costs and ancillary provisions, with regard to the former, the SFO has agreed not to seek costs in light of Sarclad's means and ability to pay. With regard to the latter, at the sole discretion of the SFO, late payment of instalments in accordance with the DPA's financial terms by up to 30 days will not constitute a breach of the DPA agreement but will be subject to interest at the prevailing rate applicable to judgment debts in the High Court. These terms are incorporated into the agreement: [76].

26. Taking all this together, pursuant to para. 8(1) of Schedule 17 of the 2013 Act, I declare that the DPA is in the interests of justice and that its terms are fair, reasonable and proportionate. I therefore consent to the preferring of the bill of indictment charging Sarclad with two offences contrary to s. 1 of the Criminal Law Act 1977 and one offence contrary to s. 7 of the Bribery Act 2010 in the terms proposed (see s. 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933) and note that, pursuant to para. 2(2) of Schedule 17, these proceedings are automatically suspended. The terms of the DPA now fall to be enforced in default of which an application can be made under para. 9(1) of Schedule 17.

Concluding remarks

27. This application for a DPA involved consideration of issues which did not arise in *SFO v Standard Bank* and one of the purposes both of the preliminary judgment and this judgment has been to identify principles which the court is likely to have in mind when considering whether a future DPA is in the interests of justice. In that respect, the court has played an important role in not only assessing proposed terms but also laying down principles to ensure future DPAs are in the interest of justice with fair, reasonable, and proportionate terms.

28. Before parting from this case, I must underline one further point. Heico was entirely ignorant of what had been happening at Sarclad and its conduct when it had intimation of the facts has been beyond reproach. Its behaviour and its support for Sarclad have been important features in allowing the case to be resolved in the way in which it has. Furthermore, I repeat from the preliminary judgment (at [45]):

> "… it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile."

Having said that, however, any evidence that a parent company has set up a subsidiary as a vehicle through which corrupt payment may be made so that the company can be abandoned in the event that the payment comes to light is likely to lead to prosecution of the parent company under s. 7(1) of the Bribery Act 2010. The onus will then pass to the parent company to establish the defence under s. 7(2) of having in place adequate procedures designed to prevent associated persons from undertaking bribery. A pre-existing plan to behave corruptly through the subsidiary would obviously be treated as a seriously aggravating feature.

29. For the reasons set out in [5] of the preliminary judgment and [3] above, this final judgment may not be reported (other than in the approved redacted form) until the conclusion of criminal proceedings arising out of the facts of this case (T20167068) or further order. In addition, I make an order under para. 12 of Schedule 17 to the 2013 Act to the effect that the publication of the Deferred Prosecution Agreement reached in this case and the associated statement of facts shall similarly be postponed until the conclusion of the criminal proceedings.