Case No: U20150854

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: 30 November 2015

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 -	
STANDARD BANK PLC	**Respondent**
(Now known as ICBC Standard Bank plc)	

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Sir Edward Garnier Q.C., Crispin Aylett Q.C. and **Allison Clare** (instructed by the Serious Fraud Office) for the Applicant
Nicholas Purnell Q.C. (instructed by **Herbert Smith Freehills LLP, London**) for the Respondent

Hearing date: 30 November 2015

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Approved Judgment

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Sir Brian Leveson P :

1. The concept of a deferred prosecution agreement ("DPA") was introduced in the United States of America and, by s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act), albeit in a very different form, it has since been adapted for this jurisdiction. Its purpose is to provide a mechanism whereby an organisation (being a body corporate, a partnership or an unincorporated association, but not an individual) can avoid prosecution for certain economic or financial offences by entering into an agreement on negotiated terms with a prosecutor designated by the 2013 Act.

2. In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA. Thus, following the commencement of negotiations, the scheme mandates that a hearing must be held in private for the purposes of ascertaining whether the court will declare that the proposed DPA is "likely" to be in the interests of justice and its proposed terms are fair, reasonable and proportionate: see paras. 7(1) and (4) of Schedule 17 of the 2013 Act. Reasons must be given and, if a declaration is declined, a further application is permitted (paras. 7(2) and (3) *ibid*). In that way, the court retains control of the ultimate outcome and, if the agreement is not approved, the possibility of prosecution is not jeopardised as a consequence of any publicity that would follow if these proceedings had not been held in private.

3. If a declaration has been granted pursuant to para. 7(1) of Schedule 17 and the DPA is finalised on the terms previously identified, para. 8 of Schedule 17 comes into play. This provides:

> "(1) Where a prosecutor and P have agreed the terms of a DPA, the prosecutor must apply to the Crown Court for a declaration that –
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> (a) the DPA is in the interests of justice, and
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> (b) the terms of the DPA are fair, reasonable and proportionate.
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> (2) But the prosecutor may not make an application under sub-paragraph 1 unless the court has made a declaration under paragraph 7(1) (declaration on preliminary hearing).
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> (3) A DPA only comes into force when it is approved by the Crown Court making a declaration under sub-paragraph (1).
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> (4) The court must give reasons for its decision on whether or not to make a declaration under sub-paragraph (1).
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> (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,
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> 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. Thus, even having agreed that a DPA is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate, the court continues to retain control and can decline to conclude that it is, in fact, in the interests of justice or that its terms are fair, reasonable and proportionate. To that end, it remains open to continue the argument in private, again on the basis that, if a declaration under para. 8(1) is not forthcoming, a prosecution is not jeopardised. Once the court is minded to approve, however, the declaration, along with the reasons for it, must be provided in open court. The engagement of the parties with the court then becomes open to public scrutiny, consistent with the principles of open justice. Thus, the DPA (containing an expiry date and a statement of facts: see para. 5 of Schedule 17) must be published along with the declarations provided under both para. 7 and para. 8 and, in each case, the reasons provided by the court for doing so. 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.

5. On 4 November 2015, an application was made by the Director of the Serious Fraud Office ("the SFO") pursuant to para. 7(1) of Schedule 17 of the 2013 Act in relation to a proposed DPA between the Director of the Serious Fraud Office and Standard Bank plc (now known as ICBC Standard Bank plc) ("Standard Bank"). A considerable body of material was put before the court and, having heard Sir Edward Garnier Q.C. for the SFO and Nicholas Purnell Q.C. for Standard Bank, I declared that entering into the DPA was likely to be in the interests of justice and that its proposed terms were fair, reasonable and proportionate: my reasons for doing so were subsequently reduced into writing. The DPA now having been agreed, the Director of the SFO applies for a declaration under para. 8 that it is in the interests of justice and that its terms are fair, reasonable and proportionate. In other words, I am asked definitively to approve that which I previously approved provisionally. Having regard

to my conclusion that I would grant the appropriate declaration, I ordered that the proceedings should be held in public and gave leave for an appropriate stock market announcement to be published pursuant to the Johannesburg Stock Exchange Rules governing Standard Bank Group Ltd, the shareholder upon which the financial impact of the DPA will fall.

6. 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 [8] – [21]. As I have said, both will fall to be published along with the DPA. In short, the Government of Tanzania wished to raise funds by way of a sovereign note private placement. Stanbic Bank Tanzania Ltd ("Stanbic"), which is a subsidiary of Standard Bank Group Ltd (a publicly owned company registered in South Africa), was not licensed to deal with non-local foreign investors in the debt capital market and so Stanbic involved Standard Bank, another subsidiary of the same group that was licensed, and together they sought to obtain instructions to raise the funds. Negotiations did not progress until Stanbic entered into an agreement with a Tanzanian company called Enterprise Growth Market Advisors Limited ("EGMA").

7. Two of the three directors and shareholders of EGMA were the Commissioner of the Tanzania Revenue Authority (and, thus, a member of the Government of Tanzania) and the former Chief Executive Officer of Tanzanian Capital Markets and Securities Authority ("CMSA"). EGMA's fee was agreed at 1% of the funds raised and in order to meet the cost of that agreement, the fee for the placement was increased from 1.4% to 2.4%. In the event, although the potential for corrupt practices to affect this type of business were well known, Standard Bank, which did not have adequate measures in place to guard against such risks, relied on Stanbic to conduct appropriate due diligence in relation to EGMA; Standard Bank made no enquiry about EGMA or its role.

8. The mandate to raise the funds was placed with Standard Bank and Stanbic and US $600 million was raised but there is no evidence that EGMA provided any services in relation to the transaction. Meanwhile, EGMA had opened a bank account with Stanbic and its fee of US $6 million was paid (as agreed) via Stanbic into the account. Very shortly thereafter the vast majority of the sum had been withdrawn in cash. The withdrawals excited the concern of staff at Stanbic who referred the matter to the head office of Standard Bank Group Ltd; Standard Bank were alerted and very quickly thereafter, a law firm was appointed to investigate the matter and, within three weeks of the first report, both the Serious and Organised Crime Agency and the SFO were informed.

9. The SFO was thereafter fully appraised of the results of the internal investigation the result of which is that the view was formed that there was a reasonable suspicion, based upon admissible evidence, that Standard Bank had failed to prevent bribery contrary to s. 7 of the Bribery Act 2010. Further, there were reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction: see the full code test for prosecutions as set out in para. 1.2(1)(b) of the DPA Code of Practice.

10. The particulars of the offence contrary to s. 7 of the Bribery Act 2010 in the indictment which it is intended to prefer (subject to the consent of the court following

the approval of the DPA: see para. 2(1) of Schedule 17 of the 2013 Act) are as follows:

> "Standard Bank PLC, now known as ICBC Standard Bank PLC, between 1st day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Stanbic Bank Tanzania Limited and / or Bashir Awale and / or Shose Sinare, from committing bribery in circumstances which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by:
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> (i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank PLC and Standard Bank Tanzania Limited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and
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> (ii) Intending thereby to induce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank PLC and Stanbic Bank Tanzania in the process of appointing or retaining them in order to raise the said monies."

11. It is important to underline that no allegation of knowing participation in an offence of bribery is alleged either against Standard Bank or any of its employees; the offence is limited to an allegation of inadequate systems to prevent associated persons from committing an offence of bribery. This is specifically put by the SFO on the basis that the material disclosed was insufficient to enable Standard Bank to rely on the defence set out in s. 7(2) of the Bribery Act 2010 by demonstrating that there were adequate procedures in place designed to prevent persons associated with the commercial organisation from undertaking the bribery. Thus, the applicable policy was unclear and was not reinforced effectively to the Standard Bank deal team through communication. Further, Standard Bank's training did not provide sufficient guidance about relevant obligations and procedures where two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank entity engaged an introducer or a consultant.

The Terms of the DPA

12. The essential basis of this DPA is that effective from the date of the declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of three years, the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, after three years, discontinue the proceedings. Conditions include the absence of any protection against prosecution of any present or former officer, employee or agent or against Standard Bank for conduct not disclosed by it prior to the date of the agreement (or any future criminal conduct) and provisions if the Bank were to have provided information to the SFO which it knew or ought to have known was inaccurate, misleading or incomplete.

13. Taken together, the requirements falling upon Standard Bank which the court declared were likely to be in the interests of justice and were fair, reasonable and proportionate are as follows:

> i. Payment of compensation of US $6 million plus interest in US $1,046,196.58;
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> ii. Disgorgement of profit on the transaction of US $8.4 million;
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> iii. Payment of a financial penalty of US $16.8 million;
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> iv. Past and future co-operation with the relevant authorities (as further described) in all matters relating to the conduct arising out of the circumstances of the draft Indictment;
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> v. At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws (as further described); and
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> vi. Payment of the costs incurred by the SFO.
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> It is also acknowledged that no tax reduction shall be sought in relation to the payments (i) to (iii) and (vi) above.

14. 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 [24]-[35]). In short, as to the seriousness of the conduct, although the predicate offence of bribery involved public officials and utilised public funds, the criminality potentially facing Standard Bank arose out of the inadequacy of its compliance procedures and its failure to recognise the risks inherent in the proposal. Of particular significance was the promptness of the self-report, the fully disclosed internal investigation and co-operation of Standard Bank. Finally, also relevant were the agreement for an independent review of anti-corruption policies and the fact that Standard Bank is now differently owned, a majority shareholding having been acquired by ICBC.

15. As for the terms of the DPA, its proposed duration (discussed at [38]) was sufficient to implement the co-operation and corporate compliance obligations (see [59] to [61] of my judgment): these are critical to the agreement. The only amendment relates to the identification of the independent reviewer. The financial terms required compensation to the Government of Tanzania of the total fee paid to EGMA plus interest calculated at the rate to be paid for the loan notes ([39] – [41]), now calculated to 30 November 2016 rather than to a future date in March 2016, along with disgorgement of US $8.4 million being the total sum earned by Standard Bank as a consequence of its involvement in the sovereign note private placement.

16. The most difficult assessment was as to the appropriate financial penalty which para. 5(4) of Schedule 17 mandates must be "broadly comparable to the fine that a court would have imposed" following conviction after a guilty plea. This has required

detailed consideration of the Definitive Guideline for corporate offenders issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences. Assessment of culpability and harm led to a conclusion that the appropriate penalty should be 300% of the total fee reduced by one third to represent the earliest admission of responsibility i.e. US $16.8 million. A detailed analysis of the reasoning is set out at [43] – [58] of my earlier judgment.

17. The DPA also properly reflects the fact that costs incurred by the SFO in the investigation and negotiation of the DPA must also be met (see [62]): these are now put at £330,000 in place of the sum assessed to an earlier date. As for ancillary matters, bearing in mind that there is no suggestion that Standard Bank is not able to meet all the financial liabilities within 7 days and comply with the remaining terms within three years, these are also incorporated into the agreement: [63].

18. At the hearing brought pursuant to para. 7 of Schedule 17, I concluded that this DPA was likely to be in the interests of justice and that its terms were fair, reasonable and proportionate. At that time, I was aware that the appropriate authorities in Tanzania (the Prevention and Combatting Corruption Bureau) had been informed of this investigation. I have now been told that the Bureau has opened its own investigation into Stanbic and, having been informed of the proposed resolution of this matter, including the payment of compensation to the Government of Tanzania, does not object to it. In addition, I have also been told that the proposed resolution of the matter has been brought to the attention of the Securities and Exchange Commission in the United States which has concluded its own investigation into potential violations of s. 17(a)(2) of the Securities Act 1933 and, aware of the proposed disgorgement of profit of US $8.4 million, is today to announce that it has accepted a civil money penalty of US $4.2 million pursuant to s. 8A of that Act.

19. The attitude of the Tanzanian authorities and the settlement with the Securities and Exchange Commission are supportive of (and do nothing to undermine) the conclusion that I have reached. Furthermore, I am assured both by the SFO and by Standard Bank that nothing else has happened in the period since 4 November to which my attention should be drawn as a potential justification for now reaching a different conclusion either as to these issues or as to any of the terms of the DPA. I have also reviewed the circumstances afresh and remain of the same view that I then expressed. Therefore, 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.

20. I consent to the preferring of a bill of indictment charging Standard Bank with one offence contrary to s. 7 of the Bribery Act 2010 in the terms set out in this judgment (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. The DPA, the Statement of Facts and both my rulings must now enter the public domain.

Concluding Remarks

21. Although these proceedings have been required to validate a proposal and, then, a concluded agreement in relation to the investigation by the SFO into the role played

by Standard Bank in respect of the raising in 2012-13 of US $600 million by the Government of Tanzania, it is important to emphasise that the court has assumed a pivotal role in the assessment of its terms. That has required a detailed analysis of the circumstances of the investigated offence, and an assessment of the financial penalties that would have been imposed had the Bank been convicted of an offence. In that way, there is no question of the parties having reached a private compromise without appropriate independent judicial consideration of the public interest: furthermore, publication of the relevant material now serves to permit public scrutiny of the circumstances and the agreement. Suffice to say that I am satisfied that the DPA fully reflects the interests of the public in the prevention and deterrence of this type of crime.

22. Having said that, the concluding remarks in my judgment in relation to the application under para. 7(1) of Schedule 17 are sufficiently important to bear repetition (at [66]):

> "It is obviously in the interests of justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business.

23. It only remains for me to express my appreciation to counsel and those who instruct them on both sides for the very great care that they have taken in the presentation of this case, the first example of a DPA in this country. This attention to detail and to ensuring that all sides of the argument are properly reflected should create the benchmark against which future such applications may fall to be assessed.