BLP Corporate Crime & Investigations column: July 2017

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Berwin Leighton Paisner LLP's Corporate Crime & Investigations team is led by Aaron Stephens. The team regularly shares their views on topical corporate crime and investigations issues with our subscribers.

Corporate crime implications of the election result

Theresa May's underwhelming victory in the 2017 General Election has rendered the future of her corporate crime-related manifesto pledges, as well as the proposed corporate liability law reforms currently under consultation, somewhat uncertain. Coupled with the recent successes of the SFO (see *SFO v ENRC and the implications for legal professional privilege* below) and the recent charges brought against Barclays and four former executives, the proposal to incorporate the SFO into the NCA appears to have been dropped altogether.

Incorporation of the SFO into the NCA

The Conservative's 2017 manifesto boldly declared:

> "We will strengthen Britain's response to white collar crime by incorporating the Serious Fraud Office into the National Crime Agency, improving intelligence sharing and bolstering the investigation of serious fraud, money laundering and financial crime."

The incorporation of the SFO into the NCA is a long-held aspiration for Mrs May. As Home Secretary, she first attempted to effect this change in 2011 and, after being met with opposition, again floated the idea in 2014.

Her manifesto proposition was met with much scepticism. Many white collar crime lawyers predicted that, if effected, this change would result in "organisational paralysis", distract investigators and lead to an exodus of staff. There was concern that the resources and funding currently used by the SFO to fight white collar crime would be diverted to other areas of priority for the NCA, which has a much wider remit (dealing with everything from exploitation of young people to guns and drug trafficking and organised crime).

While the SFO has suffered some setbacks over the years (it had to pay damages to the Tchenguiz brothers after a failed dawn raid, and allegedly made secret and unapproved exit payments to staff totalling £1 million), it has had some recent successes. In January 2017, the SFO reached a deferred prosecution agreement (DPA) with Rolls Royce, the British aero-engineering company, in relation to allegations of criminal conduct. The sum of money recovered from this case was approximately £500 million; this is equal to more than half of the total funds given to the SFO during its entire existence, or approximately 15 times its 2015/2016 budget. Similarly, in April 2017, the SFO reached a DPA with Tesco worth £129 million. This recent record of agreeing DPAs for significant sums of money arguably demonstrates a trend of growing success and budget security for the SFO.

There are a number of other SFO investigations currently in progress, and critics have raised concerns that any reorganisation would jeopardise the outcome of these investigations.

Given the recent direction of travel of the SFO, and following Mrs May's weakened mandate, any decision-making on the incorporation of the SFO into the NCA may well be pushed towards the back of the queue, if not dropped altogether. This could explain why no mention was made of it during the Queen's Speech on 21 June 2017.

For more information see *Blog, SFO saved, for now or for the foreseeable future?*

Reform of corporate criminal liability

In January 2017 the Ministry of Justice issued a "call for evidence" on proposed reforms to the law on corporate criminal liability for economic crimes.

It is generally agreed that the law in this area may need updating. Currently, absent a specific Act of Parliament a company can only be held criminally liable for the acts of an individual or individuals who is/are the "directing mind and will". Typically this requires finding proof that a member of the board or other senior officer has a criminal mens rea, which can then be attributed to the corporate entity. This "identification doctrine" has been at the heart of the common law on corporate criminal liability since the decision of the House of Lords in *Tesco Supermarkets Ltd v Nattrass [1971] UKHL 1*. However, critics believe it to be significantly outdated in comparison to the common law on civil corporate liability, as well as criminal law in other jurisdictions, notably the US. Critics also argue that the doctrine has the perverse effect of making it easier to prosecute small companies, while making it more difficult to prosecute large companies (who, it is said, are encouraged to decentralise responsibilities to avoid liability).

The Ministry of Justice's call for evidence sought views on a number of different options for reform. Responses to the call for evidence were submitted on or before 31 March 2017, and no timetable has yet been set for any further steps. There is perhaps a sense that the perceived defects in the law on corporate criminal liability (insofar as financial institutions are concerned) may be adequately dealt with by the new Senior Managers' Regime, and that additional time is needed to assess the effect of the regime before putting in place any new legislative measures.

This, combined with the other issues facing the government, means that it may therefore be a while before we see any further movement on these reforms.

US v UK: a comparison of the US's "obstruction of justice" offence and the UK's "perverting the course of justice" offence

President Trump has come under major scrutiny in recent weeks and months over allegations that he attempted to obstruct the FBI investigation into his former national security advisor, Michael Flynn, and the underlying investigation into Russian attempts to tamper with the election. Several high profile US lawyers have been quoted in the press as suggesting that a case for obstruction of justice could be brought against President Trump. In addition, Mr Trump, Vice President Pence and other administration officials have reportedly hired personal, criminal counsel to represent them.

So what is the US offence of "obstruction of justice", and how does it compare to the UK offence of "perverting the course of justice"?

Obstruction of justice
In US law obstruction of justice generally means acts which are intended to interfere with or thwart official proceedings (including investigations) and the due administration of justice. The offence is set out in a number of federal statutes.

While some of the statutory provisions cover specific scenarios (for example, killing a witness or destroying evidence) the law also includes broad, catch-all prohibitions. For example, 18 U.S. Code 1503 makes it a crime if someone "corruptly", or "by threats or force", or "by any threatening letter or communication" ... "endeavours to influence, intimidate or impede" any official proceedings or "the due administration of justice." There is disagreement between different Federal circuits as to whether the prosecution must prove a "specific intent" to obstruct justice, or simply that the defendant knowingly and intentionally undertook some action from which obstruction of justice was a reasonably foreseeable result. However, the weight of authority requires proof of a "specific intent" to obstruct justice.

The penalty for obstruction of justice, depending on the specific offence, is up to 20 years' imprisonment and/or a fine.

Although it would be constitutionally difficult for a prosecutor to bring criminal proceedings against President Trump while in office, two former US Presidents have famously been accused of obstruction of justice in the context of impeachment proceedings: Richard Nixon in 1974 and Bill Clinton in 2000. Richard Nixon ultimately resigned, and whilst Bill Clinton was impeached by the House of Representatives, he was subsequently acquitted by the Senate. However, it should be recalled that Bill Clinton's approval rating at the time of his impeachment was over 70%. Impeaching a president is as much (or more) about politics as it is about legalities. According to FiveThirtyEight as at 3 July 2017 President Trump's approval rating is a dismal 39.5% and his disapproval rating is 54.4% (see *FiveThirtyEight: How Popular Is Donald Trump?*).

Perverting the course of justice
In English law perverting the course of justice is a common law offence, and generally also covers acts which were intended to interfere with or thwart the justice system. Examples include threatening witnesses, interfering with jurors, fabricating or disposing of evidence and providing false information to the police or authorities.

Perverting the course of justice carries the maximum penalty of life imprisonment and/or a fine.

Examples of British politicians convicted of perverting the course of justice include Lord Archer, who was found guilty of providing a false alibi, and former cabinet minister Chris Huhne, whose wife accepted speeding points on his behalf.

For more information see *Practice note, Perverting the course of justice*.

SFO v ENRC and the implications for legal professional privilege

On 8 May 2017, the SFO received a judgment in its favour (*SFO v ENRC [2017] EWHC 1017*), which declared that all but one category of documents generated during internal investigations by Eurasian Natural Resources Corporation (ENRC) were not subject to legal professional privilege. The documents in question (including interview notes

prepared by a law firm and documents prepared by forensic accountants) had been sought by the SFO during the course of its ongoing criminal investigation into ENRC's activities in Kazakhstan and Africa. The SFO's investigation, which has been on foot since late April 2013, is focused on allegations of fraud, bribery and corruption around the acquisition of substantial mineral assets.

The materials in question were created between October 2010 and March 2013, and thus before the SFO commenced its own investigation in April 2013. ENRC subsequently received a notice under section 2 of the Criminal Justice Act 1987 requiring production of relevant materials, but ENRC refused to produce these materials. Companies and individuals are entitled to refuse to produce privileged materials when responding to a section 2 notice. However, the SFO challenged ENRC's claim to privilege, and ENRC's arguments (addressing both legal advice privilege and litigation privilege) were rejected by the court, except for documents relating to a presentation given by an external lawyer to ENRC's nomination and corporate governance committee and/or the ENRC board, which were found to be protected by legal advice privilege.

While it is clear that ENRC's evidence submitted in response to the SFO's application was below par, and the scope of privilege outlined in this judgment is largely consistent with existing case law, there are certain principles and key points from the judgment that should be borne in mind by anyone undertaking internal investigations:

- **Criminal investigations.** Contemplation of regulatory or criminal scrutiny is not necessarily sufficient to support a claim of litigation privilege. The test applied by the judge required that for litigation privilege to arise an investigation by the authorities must be on foot, or a company must at least be aware of enough incriminating evidence to anticipate that there is some truth in, or material to support, the allegations such that there is a good chance of successful prosecution and conviction. If this part of the judgment survives, companies wishing to assert litigation privilege in this context will be put in a very awkward position indeed.
- **Record-keeping.** The best evidence of what was contemplated or foreseen by the company at the time is contemporaneous documents. Consider keeping full records of decisions to instruct lawyers or third-party advisors and why.
- **Purpose of the documents.** Documents created with the purpose or intention of showing them to the potential adversary in litigation are not subject to litigation privilege. In the case of ENRC, the judgment reflected that from an early stage the company adopted an open, transparent posture with the SFO and promised to share information generated by their internal investigation, no doubt with the aim of achieving a civil (rather than criminal) outcome. When relations soured, the company could not re-characterise the purpose for which it had created relevant documents.
- **"The client".** The narrow definition of "the client" from *Three Rivers (No 5) [2004] UKHL 48* remains the law .Thus, at the outset of any investigation, consider who is authorised to instruct (and receive advice from) external lawyers and how legal advice will be sought and shared within the business.
- **Working papers.** A claim for privilege over lawyers' working papers (which could, in principle, extend to lawyers' notes of witness interviews) will only be successful if the documents would "betray the trend of legal advice".
- **In-house lawyers.** The role of in-house lawyers was considered and the judge re-affirmed that no privilege can attach to communications of a lawyer when carrying out non-legal roles or duties in the business (that is, as a "man of business").
- **Instructing external lawyers.** Carefully consider how you instruct external advisers and your external advisers' role(s). Instructing separate firms for the investigatory and advisory work could undermine a claim for privilege and it may be better to consider instructing one law firm to advise on all aspects of the investigation.

In a judgment that the Law Society's President has called "deeply alarming", the court did acknowledge that this is a controversial area of law, noting the more liberal approach adopted in other jurisdictions. ENRC has made an application to appeal the decision, but in the meantime this victory will no doubt bolster the SFO's confidence and its willingness to push back hard on assertions of privilege.

For more information see *Legal update, Application of LPP to internal investigations (High Court)*.

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