DEBEVOISE & PLIMPTON LLP

FCPA Update

A Global Anti-Corruption Newsletter

September 2014 ■ Vol. 6, No. 2

DOJ Officials Encourage Companies to Cooperate Against Potentially Culpable Individuals

A company's willingness to cooperate in the investigation of its agents has long been one of several factors that federal prosecutors openly consider under guidelines issued by the United States Department of Justice ("DOJ") when determining whether (and how much) to award a company cooperation credit during a government investigation.[1] Until recently, however, corporate cooperation analysis appeared to focus more on a company's voluntary disclosure of corporate malfeasance and less on the assistance it proffered against individual employees who were potentially responsible for the misconduct. Now, amid increasing public criticism regarding the perceived dearth of individual prosecutions following the 2008 financial crisis, government officials are putting new emphasis on a company's efforts to cooperate in the investigation and prosecution of culpable individuals.

As we discuss below, this new focus could have a number of important implications for companies and individuals involved in internal investigations. A more adversarial and mistrustful relationship between companies and their employees may slow the pace of internal inquiries, increase their corresponding cost and complexity, even in cases in which no wrongdoing is found, and potentially reduce the quality of investigative findings. On the other hand, a focus on individual prosecutions – particularly in the FCPA context, in which the government is required to prove willfulness for criminal violations – may restore a useful check on the government's authority, in contrast to the distorted results sometimes reflected in compromises with organizational defendants that cannot sensibly risk the collateral consequences of litigation on a criminal matter.

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1. United States Attorneys' Manual § 9-28.000 *et seq.* (2008), http://www.justice.gov/sites/default/files/opa/legacy/2008/08/28/corp-charging-guidelines.pdf.

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Remarks by Principal Deputy Assistant Attorney General Marshall L. Miller

Marshall L. Miller, Principal Deputy Assistant Attorney General for the Criminal Division of the DOJ, addressed the attendees of a *Global Investigations Review* conference held on September 17, 2014. The primary focus of Miller's remarks was to stress the importance of companies obtaining and providing evidence against culpable individuals in order to secure credit for cooperation under the DOJ's Principles of Federal Prosecution of Business Organizations, also known as the "Filip memorandum."[2] To illustrate his points, Miller highlighted a number of recent FCPA investigations, including the BizJet, Maurubeni, and PetroTiger cases, though his remarks were not limited to the FCPA context.

As Miller explained, the Filip memorandum lists nine considerations, often referred to as "Filip factors," that prosecutors should assess in determining whether to bring criminal charges against a company. The fourth Filip factor instructs prosecutors to consider both "the corporation's timely and voluntary disclosure of wrongdoing *and* its willingness to cooperate in the investigation of its agents."[3] Miller noted that, too often, companies focus on the first prong of this factor and give "short shrift" to the second, which he described as "the heart of effective corporate cooperation." Miller underscored that the DOJ's existing internal guidance on applying the fourth Filip factor instructs prosecutors to consider a company's "willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives."[4] The eighth Filip factor "reinforce[s]" this point, directing prosecutors to assess cooperation credit in light of "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance."[5]

In no uncertain terms, Miller warned his audience to "expect that a primary focus [of the DOJ's evaluation of any Filip factor presentation] will be on what evidence you uncovered as to culpable individuals, what steps you took to see if individual culpability crept up the corporate ladder, how tireless your efforts were to find the people responsible." As Miller "blunt[ly]" explained:

> If you want full cooperation credit, make your extensive efforts to secure evidence of individual culpability the first thing you talk about when you walk in the door to make your presentation.
>
> Make those efforts the last thing you talk about before you walk out.
>
> And most importantly, make securing evidence of individual culpability the focus of your investigative efforts so that you have a strong record on which to rely.

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2. Marshall L. Miller, Principal Deputy Assistant Attorney General, Criminal Division, DOJ, Address at the Global Investigations Review Live (Sept. 17, 2014), http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html.
3. United States Attorneys' Manual § 9-28.300(A)(4) (emphasis added).
4. *Id.* at § 9-28.700(A).
5. *Id.* at § 9-28.300(A)(8).

FCPA Update

FCPA Update is a publication of Debevoise & Plimpton LLP

919 Third Avenue
New York, New York 10022
+1 212 909 6000
www.debevoise.com

Washington, D.C.
+1 202 383 8000

Moscow
+7 495 956 3858

London
+44 20 7786 9000

Hong Kong
+852 2160 9800

Paris
+33 1 40 73 12 12

Shanghai
+86 21 5047 1800

Frankfurt
+49 69 2097 5000

Paul R. Berger
Co-Editor-in-Chief
+1 202 383 8090
prberger@debevoise.com

Bruce E. Yannett
Co-Editor-in-Chief
+1 212 909 6495
beyannett@debevoise.com

Sean Hecker
Co-Editor-in-Chief
+1 212 909 6052
shecker@debevoise.com

Karolos Seeger
Co-Editor-in-Chief
+44 20 7786 9042
kseeger@debevoise.com

Andrew M. Levine
Co-Editor-in-Chief
+1 212 909 6069
amlevine@debevoise.com

Steven S. Michaels
Executive Editor
+1 212 909 7265
ssmichaels@debevoise.com

Erich O. Grosz
Co-Managing Editor
+1 212 909 6808
eogrosz@debevoise.com

Philip Rohlik
Co-Managing Editor
+852 2160 9856
prohlik@debevoise.com

Noelle Duarte Grohmann
Co-Deputy Managing Editor
+1 212 909 6551
ndgrohmann@debevoise.com

Jane Shvets
Co-Deputy Managing Editor
+1 212 909 6573
jshvets@debevoise.com

Blair R. Albom
Assistant Editor
+1 212 909 6022
bralbom@debevoise.com

Alexander McKinnon
Assistant Editor
+44 20 7786 3038
amckinnon@debevoise.com

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Miller went so far as to compare organizations conducting an internal investigation to cooperators in an organized crime case, noting that mob cooperators do not receive credit for disclosing merely their own criminal conduct. Rather, they must offer testimony or other evidence against their co-conspirators to be eligible for sentencing reductions.

Miller also noted that prosecutors intend to "pressure test" internal investigations by conducting their own parallel investigations. In doing so, Miller said, the DOJ will coordinate closely with foreign law enforcement and will not hesitate to employ aggressive investigative techniques "that may not have been used frequently enough in white collar cases in past years," such as "wiretaps, body wires, physical surveillance, and border searches."

Notably, Miller singled out one common issue for multinational companies in conducting an internal investigation – navigating foreign data security laws – as a source of frustration for prosecutors. Miller said that the DOJ would view with particular skepticism a company's claimed inability to gather foreign documents due to foreign data protection laws, citing the DOJ's "deepening relationships with foreign governments and growing sophistication and experience in analyzing foreign laws." Miller warned that companies place their cooperation credit at risk if they use "inaccurately expansive interpretations of foreign data protection laws" to shield potentially culpable individuals or other evidence of misconduct.

Contextualizing the importance of cooperation efforts against individuals, Miller stated that DOJ's publicly-announced declination of charges against Morgan Stanley in 2012 was in part motivated by the firm's identification of, and efforts to secure evidence against, the individual executive responsible for the misconduct, Garth Peterson, who ultimately pleaded guilty to FCPA-related conspiracy violation for knowingly violating Morgan Stanley's internal controls in an effort to enrich himself and a Chinese government official. By contrast, Miller cited the charges brought against BNP Paribas and Credit Suisse earlier this year as examples of how "the lack of timely and complete cooperation," which "frustrated the pursuit of individual prosecutions," can be "one of the tipping points" leading to charges against an organization.

> "Miller's remarks were reinforced by other government officials in recent speeches, including United States Attorney General Eric Holder, and Leslie Caldwell, Assistant Attorney General of the DOJ's Criminal Division."

A Shift in Emphasis

Miller's address appears to reflect a larger, DOJ-wide shift in emphasis on the importance of individual prosecutions in the corporate criminal context, particularly in response to public criticism of prosecutors' failure to hold corporate executives responsible for perceived corporate malfeasance in the aftermath of the financial crisis. Miller's remarks were reinforced by other government officials in recent speeches, including United States Attorney General Eric Holder, and Leslie Caldwell, Assistant Attorney General of the DOJ's Criminal Division.

In an address given on the same day as Miller's, Holder spoke about the importance of individual prosecutions in the financial fraud context. Acknowledging that the dearth of such prosecutions "has been a source of frustration for the public for a long time," Holder assured his audience that "[d]espite the growing jurisprudence that seeks to equate corporations with people, corporate misconduct must necessarily be committed by flesh-and-blood human beings."[6] Holder emphasized that "wherever misconduct occurs within a company, it is essential that we seek to identify the decision-makers at the company who ought to be held responsible."[7]

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6. Eric Holder, Attorney General, Remarks on Financial Fraud Prosecutions at New York University School of Law (Sept. 17, 2014) [hereinafter "Holder Remarks"], http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law; *see also* Client Alert, "Provocative DOJ Proposal Aims to Hold Financial Services Executives Criminally Liable, Even Absent Criminal Intent," September 22, 2014, http://www.debevoise.com/clientupdate20140922b.

7. *See* Holder Remarks, note 6, *supra*.

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Similarly, in an early September interview in which she discussed the guilty plea by BNP Paribas to criminal sanctions violations, Caldwell emphasized that cooperation credit required full disclosure of evidence implicating individuals responsible for corporate misconduct: "Just as we would not allow an individual cooperator, who's a member of a conspiracy, to get credit at sentencing if he didn't implicate other conspirators, we want companies to know they will not get credit for cooperation when they fail to provide full, factual information that's at their disposal about culpable individuals."[8]

> "For those witnesses who do not seek separate representation, investigating attorneys will be well advised to be vigilant in providing *Upjohn* warnings to make clear that the interests of the company and the employee may diverge."

Possible Implications for Internal Investigations

Requiring a company to focus its investigative efforts on securing evidence of individual culpability in order to share such evidence with the DOJ could have significant effects on the tenor, pace and reliability of internal investigations. Most immediately, the DOJ's emphasis on corporate assistance in individual prosecutions may have a chilling effect on communication between employees and investigators during the course of an internal inquiry. Although the potential for a conflict of interest between a company investigating potential misconduct and the employees who may be responsible for that conduct is often present, employees who view the company as starting with a strong incentive to identify potential individual culprits may be reticent to be fully forthcoming during interviews by counsel.

Relatedly, the perception of an adverse relationship between a company and its employees may lead employees to request separate counsel more often and at earlier stages of the investigation, irrespective of whether a conflict truly exists. The precautionary addition of separate counsel for more witnesses will necessarily slow the pace and increase the cost of internal inquiries, even for those in which no wrongdoing is found. For those witnesses who do not seek separate representation, investigating attorneys will be well advised to be vigilant in providing *Upjohn* warnings to make clear that the interests of the company and the employee may diverge.

An atmosphere of mistrust can also have a detrimental effect on the quality of the information gathered in the investigation. Indeed, full and voluntary cooperation by employee witnesses is essential for a company to conduct successfully an internal investigation and respond effectively to any subsequent government inquiries, as well as to develop and implement a viable set of remedial measures. One way to encourage otherwise reluctant employees to cooperate is through the use of corporate cooperation agreements that, among other things, release employees from corporate liability in exchange for their cooperation.[9] Although such agreements cannot (and should not) provide assurances that a company will not bring an employee's conduct to the attention of the government, they nevertheless can provide incentives and protections that may be sufficiently encouraging in some cases. The use of such agreements may be all the more necessary in light of the DOJ's recent statements.

The Benefits of More Individual Prosecutions

Putting aside the potential negative corporate cultural consequences and the additional hurdles that may be imposed in the context of corporate investigations, the government's focus on individual prosecutions could yield some welcome change. Charges against individuals are more likely to result in adversarial proceedings, judicial review, and trials before a jury, all of which may have a beneficial effect on the development of the law. Recent experience shows that companies are often willing to admit wrongdoing as a compromise with the government even when there are no individual employees against whom the government could prove a criminal violation.[10] As our colleague Matthew E. Fishbein has written

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8. Tom Schoenberg and Greg Farrell, "Enron Buster is Back at Justice and Taking Aim at Real People," Bloomberg News (Sept. 12, 2014), http://www.bloomberg.com/news/2014-09-12/enron-busting-godzilla-aids-government-s-hunt-for-crime.html#disqus_thread.
9. *See* Michael B. Mukasey and Helen V. Cantwell, "Encouraging Employee Cooperation in Internal Investigations," *New York Law Journal* (Apr. 15, 2013).
10. *See* Matthew E. Fishbein, "Why Individuals Aren't Prosecuted for Conduct Companies Admit," *New York Law Journal* (September 19, 2014).

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elsewhere, "[b]y using their considerable leverage to induce companies to enter into settlements in increasingly marginal cases and forcing them to admit to egregious conduct to settle charges that likely would not survive a legal challenge or be proved to a jury, prosecutors have created a situation in which the public is deceived into thinking that the individuals involved in corporate criminal conduct are receiving a free pass."[11] Although the Attorney General has recently suggested lowering (or eliminating) the standard of criminal intent required in certain financial services contexts,[12] the FCPA expressly falls at the other end of the spectrum, requiring that the government prove a willful violation in any individual prosecution.[13]

In light of that higher standard, we do not expect to see a flood of individual FCPA prosecutions. Nor do recent charging statistics suggest that a marked shift toward the prosecution of individuals is underway.[14] Moreover, Miller did not point to specific shortcomings in the ways that well-represented companies commonly conduct internal FCPA inquiries (other than his reference to overbroad interpretations of foreign data privacy laws). Whether the recent statements by DOJ officials are primarily a response to public criticism or represent a true shift in prosecutorial priorities remains to be seen. This will be an issue to watch in the coming months.

Sean Hecker
Andrew M. Levine
Bruce E. Yannett
David Sarratt
Blair R. Albom

Sean Hecker, Andrew M. Levine, and Bruce E. Yannett are partners, David Sarratt is a counsel, and Blair R. Albom is an associate, in the firm's New York office. They are members of the Litigation Department and White Collar Litigation Practice Group. They may be reached at shecker@debevoise.com, amlevine@debevoise.com, beyannett@debevoise.com, dsarratt@deebvoise.com, and bralbom@debevoise.com. Full contact details for each author are available at www.debevoise.com.

11. *Id.*
12. Client Alert, "Provocative DOJ Proposal Aims to Hold Financial Services Executives Criminally Liable, Even Absent Criminal Intent," September 22, 2014, http://www.debevoise.com/clientupdate20140922b.
13. *See* 15 U.S.C. § 78dd-2(g)(2)(A).
14. FCPA Update, January 2014, Vol. 5 No. 6, at 3.

Alstom Corruption Charges Receive Initial Review by English Criminal Court

On 9 September 2014, an English magistrates' court reviewed the charges brought by the Serious Fraud Office ("SFO") against Alstom Network UK Ltd ("Alstom UK"), the UK subsidiary of French train and turbine manufacturer Alstom S.A. The magistrates' court forwarded the case on to be heard by Southwark Crown Court.

The initial hearing before the Crown Court, likely to cover administrative and timetabling matters, will take place on 6 October 2014. Although months of proceedings may well ensue, the potential consequences of a conviction could be severe: not only would Alstom UK face a substantial fine, it would also be liable to debarment from competing for public contracts in the European Union, under the Public Sector Procurement Directive.

The treatment of Alstom UK by the English criminal courts will be relatively instructive as it will be one of the first bribery cases to be decided under the UK's new sentencing guidelines, which were published in January of this year. Under those guidelines, any fine against Alstom UK may be calculated as a multiple of the gross profit made by the company.

Background of the Alstom UK Charges

In July of this year, the SFO's Director, David Green, said that the SFO would file corruption charges "imminently" against Alstom UK following a five-year investigation. The charge sheet against Alstom UK was filed by the SFO in July 2014.

Alstom UK has been charged with six offences of corruption and conspiracy: three offences of corruptly giving or agreeing to give payments to an official or officials or other agents under section 1 of the Prevention of Corruption Act 1906 ("PCA 1906"), and three offences of conspiracy to give corrupt payments. The charges relate to payments of approximately $8.5 million in respect of projects in India, Poland and Tunisia. The PCA 1906 was the UK's principal anti-corruption statute before the adoption of the Bribery Act in 2010. Allegations of corruption occurring before July 2011 generally fall to be prosecuted under the PCA 1906.

Charges Related to Conduct in India

Major aspects of the case relate to Alstom UK's conduct in India. Alstom UK is charged with having paid approximately $4.3 million in corrupt payments to the Delhi Metro Rail Corporation Ltd to secure a contract to provide a train control, signalling and telecommunications system for a metro system in Delhi. Alstom UK is charged with having made the payments between August 2000 and August 2006 and having disguised those payments by the use of two consultancy agreements with two separate entities.

Charges Related to Charges in Poland

Other aspects of the matter relate to Alstom UK's conduct in Poland. Specifically, Alstom UK is charged with having made payments of approximately $1.1 million to Tramwaje Wasrszawkie to win a contract to supply 62 trams for the Warsaw tram system. As with respect to its conduct in India, Alstom is charged with having disguised these payments through agreements with two separate consultants. The payments are alleged to have been made between June 2000 and June 2004.

Charges Related to Conduct in Tunisia

Alstom UK is also charged with having made corrupt payments to Tunisian public officials to secure contracts to supply 30 trams for the Tunis tram network and to provide certain infrastructure work in Tunis. The payments, which are said to have been made between April 2003 and November 2006, are calculated at more than $3 million on the charge sheet. Again, Alstom UK is accused of having disguised the payments through the use of a consultancy agreement.

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Alstom Corruption Charges ■ Continued from page 6

Charges Against Alstom Employees

The instant matter involving Alstom UK takes place against a backdrop of criminal proceedings against individuals. In March 2010, the SFO arrested three Alstom UK board members. However, one of those board members has since died and the investigations against the other two have been terminated, after both had failed with applications for Judicial Review relating to warrants used by the SFO to search their homes. The 9 September 2014 hearing before the magistrates' court involved only charges against Alstom UK, but the British press has reported that the SFO has written to former employees of Alstom UK and other Alstom group companies to inform them that they will be charged in the next year.

These reports are plausible because the charges filed against Alstom include charges of conspiring with its directors and others. The involvement of Alstom UK directors is key because of the general English law principle (overridden in certain respects in the Bribery Act) that states that criminal liability of a company for an offence can be established only if a person who is sufficiently senior so as to be the "directing mind" of the company, is involved with the offence. Directors of a company are generally considered to be part of the "directing mind."

"The instant matter involving Alstom UK takes place against a backdrop of criminal proceedings against individuals. In March 2010, the SFO arrested three Alstom UK board members."

Conclusion

The SFO's most recent criminal prosecution of Alstom UK signifies clearly that, despite setbacks in its anti-corruption prosecution efforts in recent years, the SFO remains committed to bringing wide-ranging cases with significant potential ramifications for multinationals. As the Alstom UK matter unfolds, it will be perhaps one of the more important anti-corruption prosecutions globally in the next year.

Karolos Seeger
Matthew Getz
Thomas Jenkins

Karolos Seeger is a partner, Matthew Getz is an international counsel, and Thomas Jenkins is an associate, in the firm's London office. They are members of the Litigation Department and White Collar Litigation Practice Group. They may be reached at kseeger@debevoise.com, mgetz@debevoise.com, and tjenkins@debevoise.com.

Recent English Bribery/Corruption Cases

Introduction

Three recent cases in the UK courts have clarified some important issues relating to corruption and bribery. Two cases are important from a civil liability point of view, widening the scope for claimants to recover damages from a wrongdoer, while the third clarifies the position under the criminal law regarding corrupt payments to public officials.

The criminal case of *R v J* clarifies that consent of the principal/employer is not relevant to a charge of making corrupt payments to public officials for the purposes of the pre-Bribery Act 2010 position. There are a number of proceedings currently before the courts – and undoubtedly some still under investigation – to which the Prevention of Corruption Act 1906 (the "PCA 1906") applies. It remains to be seen whether the case has wider ramifications for the new regime.

In relation to the civil cases, the takeaway message for organisations is abundantly clear: where there has been bribery or corruption, the English courts will not hesitate to give weight to public policy arguments in extending the reach of traditional measures to right the wrong and compensate any victims. For businesses damaged by the effects of bribery and corruption, the cases open up further avenues to seek compensation and ensure that a claimant is not unjustly harmed by the insolvency of a wrongdoer.

In *Novoship v Nikitin*, a classic case of fraud by an agent who is responsible for negotiating contracts for the benefit of his principal, the court considered the extent of liability of a "dishonest assister" (one who assists a person who pays a bribe). It was determined that a dishonest assister may be liable to account for profits to the injured beneficiary as if it were a trustee.

The UK Supreme Court in *FHR European Ventures v Cedar Capital Partners* relied significantly on policy arguments in highlighting the courts' intent to compensate those harmed by bribery and corruption and punish wrongdoers. It overturned previous authority in holding that a principal may elect between a personal and a proprietary claim in respect of an agent who has made a secret commission. This opens up further options for a principal who may be faced with an insolvent agent. The principal will have priority over unsecured creditors and may be able to follow and trace the unauthorised proceeds.

R v J (5 December 2013, Court of Appeal)[1]

R v J confirms that for charges of bribery of public officials under the PCA 1906, consent of the principal is not relevant. However, consent may be relevant in the case of bribery involving commercial parties. This is really an evidential point but a crucial distinction that is now settled. The wider implications remain to be seen.

The defendants were charged with conspiracy to corruptly give agents of the tax authorities of a Commonwealth country a sum of money with a view to inducing them to give a company favourable tax treatment. As the alleged bribes occurred between 1998 and 2006, the defendants were charged under section 1 of the PCA 1906.[2]

Section 1 of the PCA 1906 provides that an agent who *corruptly* obtains or agrees to obtain or accept from any person, for himself, or for a third party, any gift or consideration as an inducement or reward for doing or having done any act in relation to his principal's affairs or business, shall be guilty of a crime, as will anyone who agrees to give any gifts or consideration to an agent for procuring such an act.

The Court of Appeal considered whether consent of the principal to the agent's receipt of funds was relevant. The defence argued that only a *secret* payment constitutes a bribe and that therefore the prosecution must show an absence of consent on the part of the principal. The Court of Appeal disagreed and held that there was no such requirement in the case of a public official as the state could not give such consent. Any payment received by an agent of the state would equate to a bribe. In the case of the agent to a commercial principal, however, the court considered that the informed consent of the principal would usually mean that the payment was not made corruptly. This does not mean that lack of consent needs to be proved in those cases, only that consent of the employer may be a factor taken into account in

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1. [2013] EWCA Crim 2287 (Lord Justices Thomas CJ, Rafferty and Henriques).
2. The Bribery Act 2010 consolidated the UK's bribery and corruption laws, repealing the old Acts but providing that offences occurring under the old Acts before the coming into force of the Bribery Act – 1 July 2011 – would survive: Bribery Act 2010, section 19(5).

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determining whether or not the payment was made or received corruptly.

The question arises as to the implications of this case for prosecutions brought under the Bribery Act, which did away with the principal/agent concept inherent to the PCA 1906. It is possible that consent could be relevant to an offence under section 4 of the Bribery Act, which states that a "relevant function or activity" is performed "improperly" if it is in breach of a "relevant expectation" (breach of good faith, impartiality or because the person in a position of trust failed to act in the manner expected). The question is whether it is "improper" so as to attract criminal liability where an agent makes a payment to a customer with the full knowledge and consent of the principal.

> "The question is whether it is 'improper' so as to attract criminal liability where an agent makes a payment to a customer with the full knowledge and consent of the principal."

Novoship (UK) Ltd v Yuri Nikitin (4 July 2014, Court of Appeal)[3]

"Knowing receipt" and "dishonest assistance" are two common claims in fraud and corruption cases. These claims are generally focused on third parties and could include companies or trusts involved in the wrongdoing. The Court of Appeal in *Novoship* was careful to restrict such claims to those where it can be shown that the dishonest assistance *caused* the profit.

In *Novoship*, an agent who breached his fiduciary duties by taking bribes was assisted by a third party. The question for the court was whether an account of profits could be ordered against this third party (or "dishonest assister"). It determined that it could, though the claimant must establish causation, remoteness and damage.

Mr. Mikhaylyuk, an employee of Novoship, had responsibility for negotiating the charter of vessels in the company group. In breach of his fiduciary duties, Mikhaylyuk set up a series of schemes by which he received bribes in exchange for favours in relation to the chartering of vessels. In one such scheme, he directed a secret commission to be paid by the charterer to both himself and a company owned by Mr. Nikitin, a Russian businessman. At trial, Mr. Justice Christopher Clarke held that Nikitin was aware of the commissions being paid to the company at Mikhaylyuk's request, and that the payments were most likely made for a corrupt purpose (*i.e.* the likely reason for the payments to Nikitin's company was that he (Nikitin) had provided, or would provide, some benefit or advantage to Mikhaylyuk).

Mikhaylyuk and Nikitin also negotiated other charters within normal market conditions and at reasonable rates (the "Henriot Charters"). Nevertheless, considering their other dealings, the judge found that there was a strong possibility that a conflict of interest arose: Mikhaylyuk owed a duty of loyalty to Novoship that conflicted with his personal desire to favour Nikitin. The court held that Nikitin was liable for dishonestly assisting Mikhaylyuk in breaching his fiduciary duty since, given his position, he must have known of Mikhaylyuk's conflict of interest. Nikitin, in assisting to arrange the Henriot Charters, was found to be a dishonest assister to Mikhaylyuk, the agent receiving the bribe. The judge described the relationship as one which "was corrupt at inception and had not been cleansed."

Clarke J held Nikitin liable to account to Novoship for the profits that he and Henriot had made from the Henriot Charters. This ruling was appealed to the Court of Appeal.

The Court of Appeal agreed that an account of profits was available as a remedy against a dishonest assister due to the assister being accountable in equity and liable to account as a constructive trustee. The conclusion was justified on public policy grounds: to deter dishonest third parties from compromising the high standards of conduct expected of fiduciaries and as a matter of equity. As the Court of Appeal said:

> Where, as here, the equitable wrong is itself linked with a breach of fiduciary duty we see no reason why a court of equity should not be able to order the wrongdoer to disgorge his profits in so far as they are derived from the wrongdoing … it would be … inappropriate to differentiate between the availability in principle of remedies relating to profits made by a knowing recipient on the one hand and profits made by a dishonest assister on the other.

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3. [2014] EWCA Civ 908 (Lord Justices Longmore, Moore-Bick and Lewison).

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However, liability attaching to a dishonest assister (*e.g.*, an account of profits) is still subject to common law rules of causation, remoteness and measure of damages. In this case, the profit Nikitin made was not due to his dishonest assistance, but rather an unexpected change in market conditions which worked in his favour. Therefore, there was an insufficient direct causal connection between entry into the charters and the resulting profits. The appeal succeeded.

The decision is an unambiguous reminder that dishonest assisters face very serious consequences if their actions can be said to have caused any improper profit. A dishonest assister could be a professional who has helped to create a network of entities for use in a corrupt scheme, or a related company or other entity. Thus, seeking an account of profits from such a third party is another potential claim available to a claimant on the unfortunate end of a corrupt transaction.

FHR European Ventures v Cedar Capital Partners (16 July 2014, UK Supreme Court)[4]

The Supreme Court in *FHR* has settled the question of whether a principal is entitled to a proprietary remedy (*i.e.* a remedy in respect of a defendant's assets allowing the claimant to priority over the defendant's unsecured creditors) against an agent who has breached his duties by accepting a bribe. It has held that such a remedy is available.

FHR purchased the issued share capital of a company owning the leasehold on the Monte Carlo Grand hotel for €211.5 million. Cedar acted as FHR's advisors on the purchase. Unbeknownst to FHR, however, Cedar also entered into an arrangement with the sellers under which it would receive a €10 million commission from the sellers for securing a purchaser. FHR sought recovery of this secret commission.

The trial judge concluded that Cedar, having failed to obtain FHR's, that, is, the principal's, fully informed consent, had breached its fiduciary duty and should be ordered to repay the sum to FHR. However, the judge refused to grant a proprietary remedy: the remedy was equitable in nature and thus compensation only was available.[5] Prior decisions of the English courts were not clear as to whether a principal has a proprietary claim where an agent breached his duties by receiving a bribe or secret commission (*e.g.*, some authorities suggested that a proprietary claim could only arise in situations in which an agent had derived a benefit from an activity undertaken on behalf of the principal). It was this point that was the subject of the appeal.

> "A dishonest assister could be a professional who has helped to create a network of entities for use in a corrupt scheme, or a related company or other entity. Thus, seeking an account of profits from such a third party is another potential claim available to a claimant on the unfortunate end of a corrupt transaction."

Lord Neuberger, delivering the judgment of the UK Supreme Court, overturned the previous Court of Appeal authority, *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347 (and other prior decisions), which held there could be no proprietary interest in the proceeds of a fraudulent sale of shares as the proceeds were not beneficially owned by the claimant. In other words, it was not necessary for the agent to have derived the relevant benefit from assets which were, or should be, the property of the principal.

Lord Neuberger appears to base the decision primarily on principles of agency law and the weight of policy arguments: the availability of a proprietary claim applies to all unauthorised benefits that an agent receives, consistent with the fundamental principles of the law of agency, and thus the principal is entitled to the entire benefit of the agent's acts in the course of his agency. His Lordship concluded at [42]:

> Wider policy considerations also support the respondents' case that bribes and secret commissions received by an agent should be treated as the property of his principal rather than merely giving rise to a claim for equitable compensation… Secret commissions are also objectionable as they inevitably tend to undermine trust in the commercial

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4. [2014] UKSC 45 (Lords Neuberger, Mance, Sumption, Carnwath, Toulson, Hodge and Collins).

5. When an agent receives a benefit in breach of his fiduciary duty, the remedy is primarily restitutionary rather than compensatory. Therefore the principal has a personal remedy for equitable compensation against the agent.

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> world. That has always been true, but concern about bribery and corruption generally has never been greater than it is now… Accordingly, one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission.

Conclusion

It will not come as a surprise to commercial entities that the mirror image to the increased opportunities to recoup losses as a result of bribery of corruption is the greater risk that non-compliant entities may be forced to pay compensation in wider circumstances. These recent developments are a reminder of the English courts' proactive stance in dealing with corruption and bribery.

The decisions, *FHR* and *Novoship* in particular, provide a timely insight into the policy considerations applied by the English courts in relation to bribery and corruption. Lord Justice *Longmore* in *Novoship* commented, following reference to an example of bribery from Greek mythology, that "centuries later, bribery is still prevalent and pervasive however much legislators and judges try to stamp it out."[6] Lord Neuberger in *FHR* stated that "one would expect the law to be particularly stringent in relation to a claim against an agent who has received a bribe or secret commission."[7]

The conclusion that a remedy of account of profits is available against one who dishonestly assists a fiduciary to breach his fiduciary obligations, even if that breach does not involve a misapplication of trust property (*Novoship*) gives beneficiaries a greater opportunity to recover their entire loss; but it recognises that a real causal connection is necessary. Meanwhile, in *FHR* the Supreme Court has confirmed that the principal will enjoy priority over other creditors in situations in which an agent has made a secret commission or taken a bribe. The decisions in *FHR* and *Novoship* demonstrate that the Court of Appeal and Supreme Court recognise the important policy in deterring bribery and corruption, and the law continues to afford beneficiaries powerful means of recouping losses.

Karolos Seeger
Matthew Getz
Alexander McKinnon

Karolos Seeger is a partner, Matthew Getz is an international counsel, and Alexander McKinnon is an associate, in the firm's London office. They are members of the Litigation Department and White Collar Litigation Practice Group. They may be reached at kseeger@debevoise.com, mgetz@debevoise.com, and amckinnon@debevoise.com.

6. Para [2].
7. Para [42].