

SERIOUS FRAUD OFFICE TO RECOVER TAINTED DIVIDENDS FROM “INNOCENT” INVESTORS

20 January 2012

To Our Clients and Friends:

The UK’s Serious Fraud Office (“SFO”) last week obtained a landmark civil recovery order in the English court against the shareholder of a company previously convicted through criminal proceedings for bribery and breach of UN sanctions offences (the “Order”). The Order was obtained pursuant to Part 5 of the Proceeds of Crime Act 2002 (“POCA”) which enables the SFO (and other government agencies) to trace and recover criminal property obtained through unlawful means.

On Thursday, 12 January 2012, the High Court in London ordered Mabey Engineering (Holdings) Ltd (“Holdings”) to pay back £131,201 representing dividends it had received from its subsidiary, Mabey & Johnson Ltd (“M&J”), a modular bridge manufacturer that had been convicted of corruption offences and breaches of UN sanctions in 2009. The sum represents those dividends which Holdings received deriving from contracts won through the unlawful conduct of M&J and its directors and officers. Holdings was also ordered to pay costs of £2,440.

As we have previously reported, the SFO has successfully obtained much more financially significant civil recovery orders in the recent past, for example over £7 million against M W Kellogg on 16 February 2011.

The Order is nonetheless important as it demonstrates that the SFO will pursue civil recovery proceedings against a shareholder, even for relatively small sums, notwithstanding that: (a) the shareholder was totally unaware of the criminal behaviour in question; (b) the SFO had recovered significant sums from the underlying company in previous criminal proceedings; (c) the corporate group as a whole subsequently took steps to address the bribery and corruption issues; and (d) the underlying company had self-referred the irregularities to the SFO. In so doing, the SFO also appears to be sending a clear message that it will hold shareholders responsible for their investment decisions.

The origins of the civil proceedings in *Mabey* lie in 2008 when M&J self-reported irregularities to the SFO following an internal investigation. Criminal proceedings were initiated and, in September 2009, M&J was convicted by Southwark Crown Court of having sought to influence decision-makers in public contracts in Jamaica and Ghana between 1993 and 2001 and for

breaches of UN sanctions during 2001/02.¹ M&J was fined £6.6 million which included a confiscation order of £1.1 million. In February 2011, two of M&J's former company officers, David Mabey and Charles Forsyth, were convicted for their part in breaching the UN's sanctions. Another defendant, Richard Gledhill had pleaded guilty at an earlier hearing to the sanction offences.²

A notable feature of the case is that the SFO, for the first time in its history, decided to pursue civil proceedings against a company's shareholders for the recovery of relatively modest sums, in circumstances where it had previously obtained criminal convictions against the company itself and its management. Moreover, the shareholders were not in any way deemed culpable. As the SFO's Director, Richard Alderman, acknowledged in a press release:

*"In this particular case, however, the shareholder was totally unaware of any inappropriate behaviour. The company and the various stakeholders across the group have worked very constructively with the SFO to resolve the situation, and we are very happy to acknowledge this."*³

Mr. Alderman's further statement makes it clear that the SFO is through this decision sending a very clear message to the wider investment community:

"...shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. This is very important and we cannot emphasise it enough. It is particularly so for institutional investors who have the knowledge and expertise to do it. The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax in this respect."

While Mabey involved a privately held subsidiary, the decision has wider implications. Third-party investors and, in particular, institutional investors, must heed the warning that the SFO will not hesitate to use the full panoply of measures at its disposal under POCA to recover the benefits of unlawful conduct. Coupled with POCA's broad jurisdictional reach and the SFO's

¹ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2009/mabey-johnson-ltd-sentencing.aspx>

² <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2011/mabey-johnson-directors-made-illegal-payments-to-sadam-husseins-iraq-to-gain-contract.aspx>

³ <http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2012/shareholder-agrees-civil-recovery-by-sfo-in-mabey-johnson.aspx>

increased enforcement efforts in the field of international corruption, this may indeed be the first of many such civil recoveries.

In the absence of specific guidance from the SFO or other UK enforcement agencies, it is difficult to state with any precision what precautions an investor should take; but the recommendation to undertake a thorough compliance and anti-corruption risk analysis and appropriate due diligence based on such analysis at the acquisition phase remains good advice. Investors who identify potential bribery issues at the target level would also be well advised to consider whether the risk of a potential civil recovery order should be priced into the acquisition.

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Please feel free to contact any of the undersigned if you have any questions.

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