Young
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Association

Dear all,

Welcome to the YFLA Summer Newsletter 2019. Details of our upcoming events can be found on our website (www.yfla.com) and on our LinkedIn group (search for "Young Fraud Lawyers Association"). We hope you enjoy the Newsletter.

In this issue:

Absent-Mindedness - The Alstom Appeal and the Future of the Identification Principle

Though perhaps not a household name, Alstom SA is ubiquitous: the French transportation juggernaut is a dominant figure on our railway networks and is responsible for having built half the trains operating on the London Underground.

To those who subscribe to this newsletter, however, the first thing which likely comes to mind is the SFO's sprawling investigation into corruption within the company.

That investigation was opened a decade ago and various individuals have been charged and tried - but the focus of this article is the conviction and unsuccessful application for permission to appeal by Alstom Network UK Limited ("**Alstom UK**").[1]

The SFO investigation

The SFO investigation concerned alleged corruption in India, Poland and Tunisia (Phase 1); Lithuania (Phase 2);[2] and Hungary (Phase 3). Alstom UK was acquitted at the Phase 3 trial and on the first two counts of Phase 1. However, it was convicted on Count 3 of Phase 1, having been part of a conspiracy to secure a tram and infrastructure contract by paying €2,363,778, via a front company, to the brother-in-law of the then President of Tunisia.

During the trials a pattern emerged which formed one of the prongs of Alstom UK's appeal: whenever the directing mind and will ("**DMW**") was present and able to give evidence, Alstom UK was acquitted. However, the company's conviction on Count 3 followed a trial at which the DMW were neither named defendants nor available witnesses.

[1] *R v Alstom Network UK Limited* [2019] EWCA Crim 1318.

[2] Alstom Network UK Limited was not charged in relation to Phase 2. That investigation was into an alleged conspiracy to corrupt senior politicians and power station officials in Lithuania. In that phase, the SFO has secured guilty pleas from Alstom Power Limited, its Business Development Manager and the Regional Sales Director of a separate subsidiary, Alstom Power Sweden AB. Last December, following a trial at Blackfriars Crown Court, a former Global Sales Director at Alstom Power Limited was also convicted.

The Appeal

That pattern was, Alstom UK contended, a symptom of the unfairness inherent in the prosecution of a company which was built largely on inference rather than direct evidence and in the absence of its DMW, despite there being issues which only they could speak to.

The riposte by the SFO was that the company's "*bold*" submission had been rejected – albeit, in obiter – by the Court of Appeal in an earlier ruling in unrelated proceedings that hearsay evidence of the guilt of the DMW (in that case, diary entries by one of the directors) was admissible as direct evidence against the company even when that director was not, himself, on trial.

Sir Brian Leveson opined on that occasion:

> The presence or otherwise of a directing mind at the trial is irrelevant. Were it otherwise … had the directing mind died, become incapacitated (as well as one whose attendance at trial could not be secured, perhaps because he had deliberately absented himself), it would not be possible to prosecute the relevant corporation however egregious the conduct.[3]

The SFO also argued that the growth of extraterritorial corporate crime means that it is not always possible to put individual directors on trial but that there is, nevertheless, a strong public interest in trying corporations engaged in corrupt practices.

Judgment

Permission to appeal was refused and the SFO's arguments, in large part, were adopted. The court held that there is no general principle that it is unfair to try a corporation in the absence of its DMW. However, it added that Sir Brian Leveson went too far when he suggested that the absence of the DMW was "*irrelevant*", as that may well be a relevant factor (but only in a "*very rare case*" will it be determinative of whether the corporate can receive a fair trial).

Comment

This Alstom judgment is likely to energise the ongoing debate about the efficacy of the identification principle by throwing many of its contrivances into sharp relief. For example, the court found that the fact that a DMW is absent does not mean the company is itself absent. But, it is submitted, the company cannot be wholly present in those circumstances either: it is both unable to give evidence on its own behalf and its guilt often hinges on the culpability of the DMW.

While the SFO was plainly right to take the view that there is a strong public interest in pursuing corporate defendants, the means by which corporate liability is attributed is also important and should adequately reflect the nature of the criminality involved. Although corporates are legal persons, they are inherently not the same as individual defendants and the law should recognise and accommodate the key differences between them.

The jury is still out on the best way(s) in which to do that. One possibility would be the expansion of "*failure to prevent*" offences, which could render it less difficult to prosecute large corporations for economic crimes. Another option is the introduction of a form of vicarious liability. Those and other possibilities are currently being considered by the government following its January 2017 Call for Evidence on Corporate Criminal Liability for

[3] *A Ltd, X, Y* [2016] 4 WLR 176 (Sir Brian Leveson P) at [36].

Economic Crime.[4] The Ministry of Justice recently teased that its response "*will be issued shortly*"[5] – a proposed way forward may therefore be in sight.

Ryan Dowding
Three Raymond Buildings

A Q&A with *Neill Cooke*, Ethics and Compliance Counsel at Rolls Royce plc.

For the benefit of our readers, please could you provide us with a brief overview of your career prior to joining Rolls-Royce?

I did my training contract at DLA Piper in Birmingham and focused primarily on transactional seats; I worked in Corporate (M&A), Employment, Restructuring and Banking. I qualified in 2009 at the height of the financial crisis when transactional roles were very hard to come by. However, I had some great support from DLA Piper and stayed with them whilst I went out on secondment for six months to IMI plc to work in compliance. I had no regulatory experience at that time and the only thing I really knew about the FCPA was how to spell it! However, it was a brilliant experience. One of IMI's subsidiaries had had a significant bribery and corruption issue which led to the appointment of a DoJ Monitor for a period of three years. Our task was simple; we had to build an ethics and compliance programme from scratch. Some of the foundations were in place when I joined, such as a code of conduct, training and a whistleblowing hotline and we had a great leader who pushed me and supported my development. Within months I had come to the decision that this was what I wanted to do with my life, so I joined IMI as a "*proper employee*" in January 2010. I had five great years there where we did some hugely interesting and innovative work and I was fortunate to travel across the world delivering training, conducting investigations and completing audits.

I then joined Rolls-Royce in September 2014, which by that time was under investigation by the SFO, DoJ and others for alleged bribery and corruption offences. I am still there and find myself working for the same leader that I worked for when I was at IMI. Working here has been a huge learning experience for me. Rolls-Royce is a company like no other that I have worked for, in size, complexity and interest from the outside world. It's an incredible place to work and we do some amazing things. We of course entered into deferred prosecution agreements with the SFO and DoJ and a leniency agreement with the Brazilian authorities in January 2017. As the senior lawyer in our headquarters-based ethics and compliance team, I have had some great experience here and five years have flown by.

What does your current role as Ethics and Compliance Counsel involve on a day-to-day basis?

It could literally be anything. I know it is a cliché, but no two days are the same. I sit in our team of roughly 10 people and work directly for our Head of Ethics and Compliance. We also have compliance professionals embedded throughout Rolls-Royce who support particular businesses or regions. I work closely with them all day-to-day.

My team manages our whistleblowing hotline, so at any moment we could be sent a new whistleblowing complaint to deal with. We don't ordinarily investigate the complaints ourselves; our role is to get the issue to the right subject matter expert (typically someone in HR), oversee their investigation into the issue and manage the dialogue with whistleblowers. We had over 600 investigations that we oversaw last year with a team of four, so it can be a busy caseload! In addition, I provide support on a lot of M&A work (acquisitions, disposals and joint ventures). This typically entails due diligence to understand what business we are buying or who we are entering

[4] https://www.gov.uk/government/consultations/corporate-liability-for-economic-crime-call-for-evidence; the Select Committee report can be found here: https://publications.parliament.uk/pa/ld201719/ldselect/ldbribact/303/303.pdf

[5] Ministry of Justice, 'Government Response to the House of Lords Select Committee on the Bribery Act 2010' (May 2019) at [36] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/800930/govt-response-hol-select-committee-bribery-act-2010.pdf>

into joint ventures with. We also do a lot of work with acquisitions and joint ventures after deals have completed to ensure we are putting compliance programmes in place within them. I am the primary point of contact for ad-hoc advice on compliance issues and spend a lot of time providing advice to others members of our team or individuals throughout Rolls-Royce on a range of compliance issues. Due diligence forms a part of any compliance professional's role and I am no different. Whilst we have a separate sub-team that manages our due diligence processes, I have a lot of involvement with conducting due diligence, reviewing due diligence reports from external parties and completing due diligence interviews of our third parties. I am sometimes also involved with delivering training; right now we are rolling out confidential information training and I am delivering a number of sessions. The training side is something I am hugely interested in and I think it provides a great opportunity for us all to connect with our key stakeholders throughout Rolls-Royce. Throughout my time here and for the foreseeable future, I have also spent a lot of time focused on ensuring we are meeting the commitments we have under our deferred prosecution agreements and on implementing various recommendations of Lord Gold (the independent compliance adviser appointed by Rolls-Royce in January 2013). We write a lot of reports on our progress for Lord Gold and our prosecutors and this takes up a lot of my time too! Our main focus as a team is on anti-bribery and corruption, but the issues and queries connected to that subject matter can arise in a number of different areas: third parties, gifts and hospitality, sponsorships, conflicts of interest, facilitation payments, offset and industrial participation and confidential information - to name a few!

In your experience, what are the main differences between working in-house and in private practice?

I have found that working in-house you are exposed to individuals and issues that you may have been sheltered from as a junior lawyer in private practice. When I joined IMI as a newly qualified lawyer it really felt like "*sink or swim*" and it was a great learning experience. All of a sudden, from the security of being part of a large team in a large law firm, I found myself right at the coalface. When I joined IMI the compliance team was just me and my boss in the UK and one other colleague in China, so I was having to deal with problems and make decisions that I would never have been close to at that stage of my career in private practice. I was suddenly having meetings and providing advice to senior leaders and directors of a FTSE100 company (at that time). You soon realise in-house that people don't want to know the ins and outs of a legal position, they just want some practical advice that they can work with. Having a supportive leader really helps. My boss was always clear that she would never hang me out to dry in front of our stakeholders; if I made a mistake she might have a quiet word with me behind closed doors, but she would always back me in public. That is hugely empowering and gives you the confidence to do the job you need to do. Working in-house also gives you a great opportunity to work with, and learn from, professionals across a range of disciplines, something that you do not get in private practice surrounded by other lawyers!

To what extent does your role in compliance differ from those working within legal?

It's very different. I have worked with some incredible in-house and external lawyers who would embarrass me with their knowledge of bribery and corruption laws. However, by their own admission, that does not mean they would make good compliance officers. The role of a compliance officer is completely different. I think being a lawyer gives me a solid foundation for the job I do, but I have worked with a range of different professionals who have also been great compliance professionals, including accountants, risk professionals and people from commercial backgrounds. I provide a lot of legal advice still, but building an effective compliance programme is about bringing people with you. You have to develop good communication and influencing skills and you have to be solutions-focused. Lawyers are great at finding problems, but we need to help people find a way to get past those problems.

What are the main challenges that you encounter in the performance of your role?

Getting your voice heard can be a challenge. Rolls-Royce has roughly 50,000 employees spread across the world. We have had well-documented bribery and corruption issues, but that is not the only crisis we have faced. In the five short years that I have been here, we have had profit warnings, high profile product quality issues, rounds of redundancies and much more. All of this generates noise and getting your message across to employees when

they are being bombarded with a range of other issues (not to mention the day-to-day production challenges and the like) is difficult. We are fortunate in our team as we have great support from our leadership, but we need to stay relevant and interesting to our workforce so that they retain the messages we are trying to get across.

What skills do you think an individual needs in order to become an effective in-house counsel?

You need to be a good communicator and a problem solver. You need to be brave, too. I am often asked to provide advice on issues that I have limited experience of. Sometimes you can call on external counsel, but I cannot run to them every time I have a difficult query to deal with, so you need to develop an ability to make sound judgments on issues and back yourself with the advice you provide. That can feel uncomfortable at first, but it is essential. In-house lawyers need to be good listeners. We need to understand the challenges our internal stakeholders are facing, so that we can help them to get through those challenges. It doesn't always feel like it, but we ultimately want the same thing, for our business to prosper. It is important we really understand our business and our people, so that we can help them do the hugely important jobs they do. Most importantly, you need to be strong in the face of challenge. As an in-house lawyer, you will be tested. People will question your advice and you need to be strong enough to resist the pressure to back down, no matter who that comes from. This can be hugely difficult, but our job is to protect the company; if people are making bad decisions we have to be bold enough to challenge them and stand up to them, no matter how senior they are.

Finally, what advice would you give to any young fraud lawyers considering a move in-house?

Go for it, you will not regret it. I think there have historically been misconceptions that going in house is taking the easy option. Believe me, it is not. You will work hard and long hours at times, you will face difficult decisions and you will be tested, but it is hugely rewarding and you will learn a lot from it, whether you stay in it for the long term or go back to private practice.

Michael Roach
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The Serco DPA and Delayed Publication of its Statement of Facts

After a two year hiatus in corporate crime resolutions, the SFO secured its fifth DPA with Serco Geografix Limited (**Serco**) in July this year. While similar to other DPAs in certain respects, the Statement of Facts (**SoF**) was not published at the same time as the DPA. According to the judgment of Mr Justice William Davis, the SoF *"provides material by which individuals could be identified",* and an application was made by the SFO for publication to be delayed. It is not clear why it was necessary to delay publication, but trust in the system will be improved if SoFs are published at the same time as the corresponding DPAs.

Identification of individuals should not, in and of itself, be a reason to delay publication of the SoF. If the concern is prejudice in a later trial, there are steps available to keep matters from a jury. But if identification is a concern, one questions why it is necessary to draft SoFs with so much detail that they subsequently cause issues. Perhaps the Serco SoF suffers from the same issues that arose with the Tesco SoF, in that it contains "*admissions*" about the apparent state of mind of the individuals concerned. If the Serco SoF does indeed contain such admissions, one must also question the wisdom of this approach.

Admissions of wrongdoing are not required in a SoF. The same must be true of statements regarding the state of mind of any individuals involved. The DPA Code of Practice makes clear that the SoF must *"give particulars relating to each alleged offence",* and that "*it will be necessary for [the company] to admit the contents and meaning of key documents*". SoFs should therefore be high level and factual (e.g. "*a representative of the company paid £50,000 to an MP"*) and not contain a statement about the representative's state of mind at the relevant time. The state of mind of the individual is a matter to be addressed by the individual or to be determined at the trial of that individual; it is not a matter for the company to admit in a SoF.

The consultation paper published in connection with the introduction of DPAs in the UK does not provide any guidance on the level of detail required in a SoF, but states that the purpose of a SoF is "*to ensure openness and transparency*". In our view, that purpose may be satisfied through a purely factual and summary SoF. Individuals should not be named and particular representatives can be anonymised (like in FCA Final Notices or DOJ Statements of Fact). Where necessary, steps could be taken to generalise the role of someone like a CEO (e.g. as *"a member of executive management"* or similar), or, out of an abundance of caution, redacted. Admissions regarding the state of mind of an individual are not only unnecessary, but wholly unwarranted, in a document containing factual admissions by the company.

Some may argue that generalised and high level SoFs will not be fit for purpose and will make it difficult for the SFO to hold the company accountable in any subsequent prosecution, where it would need to rely on admissions of fact in the SoF (pursuant to section 10 of the Criminal Justice Act 1967). However, practically, in the event of a breach of a DPA the SoF is likely to be of limited value in a subsequent prosecution, as the underlying evidence should stand for itself. On balance, there is a greater public interest in the SoF being published at the same time as the DPA, and following the approach outlined above should remove the need to delay publication.

If the concern with the publication of the Serco SoF was indeed related to the risk of prejudice to any individuals the SFO subsequently decides to charge, then it will be interesting to see what defence counsel will make of the comments made by Mr Justice William Davis in the Serco judgment regarding the individuals identified, as he stated that his review of the evidence included in the SoF demonstrates that individuals within Serco "*who can properly be described as directing minds of the company were party to the scheme*".

The Serco SoF will be made public, at the earliest, in December this year. We wait with interest to see what it contains and whether the undesirable scenario in the Tesco case will be repeated (where publication occurred at the same time as individuals were exonerated).

Steve Melrose and Shruti Chandhok
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Marking 100 Years of Women in the Law

Last year we celebrated 'Vote 100', the centenary of the first women having the right to vote in parliamentary elections in the UK and Ireland. Statues were raised to the leaders of the suffrage movement – Millicent Fawcett in London, Emmeline Pankhurst in Manchester. This year marks another important centenary: 100 years since women's entry into the legal profession. The Sex Disqualification (Removal) Act 1919 allowed women to become solicitors, barristers, magistrates and jurors for the first time. It also enabled women to enter other professions, such as accountancy, and admitted women to the higher ranks of the civil service.

The act begins promisingly: "*A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial post, or from entering or assuming or carrying on any civil profession or vocation*".

Yet it has not been well remembered. This is because it removed barriers, rather than actively giving women rights, so its impact was limited. Women were still hampered by obstacles such as the bar on married women working in many professions. The act also had provisos which prevented women from entering the foreign and diplomatic service, and allowed judges to appoint all-male juries.

But how did it come to pass at all as early as 1919? It was only a year since the partial women's franchise. The war had barely ended, with the peace settlement ongoing, trouble in Ireland, returning soldiers – there were many other political priorities. In fact, the 1919 act was a government bill introduced to kill off a more radical Labour party private member's bill. The Women's Emancipation Bill would have not only allowed women into the professions, but also given women the vote on the same terms as men and enabled women to sit in the Lords. All these issues had been left outstanding after 1918, when the Representation of the People Act 1918 had given the vote to women over 30 who met a minimum property qualification. The Women's Emancipation Bill passed the

Commons but was killed off in the Lords. It was just too radical for the Conservative-dominated coalition government. Equal franchise had to wait until 1928 and women could not sit in the Lords until 1958.

However, the entry of women into the professions was no longer so controversial by 1919. This was thanks to campaigning women in previous decades such as Bertha Cave's unsuccessful application to Gray's Inn in 1903. Suffragette leader Christabel Pankhurst had a law degree but was unable to practise; she famously defended herself and other suffragettes in court in 1908 following their arrest for organising a 'rush' on parliament and called cabinet ministers as witnesses. The campaign for women to enter the legal profession culminated in the 1914 test case of *Bebb v The Law Society*, where it was found that women could not become solicitors as they had never been solicitors, and legislation in parliament was needed to change this situation.

Supporters of Gwyneth Bebb and her fellow campaigners took up the cause in parliament, including her legal counsel Lord Buckmaster in the Lords and Lord Robert Cecil in the Commons. Progress was initially slow, with opposition to women's suffrage still strong and war ongoing. However, after some women got the vote in 1918, the way was clear to move forward on other issues relating to women's rights, and in 1919 a Barristers and Solicitors (Qualification of Women) Bill passed through the Lords with almost no opposition. It was rendered unnecessary by the passage of the wider Sex Disqualification (Removal) Act. At the time, Lord Buckmaster reassured the House that: "*Nobody thinks that this bill is going to flood the legal profession with women. It will enable a few women, who are peculiarly qualified, to earn an honourable living*".

The issue of women in the professions was also discussed in the Commons during the passage of the Women's Emancipation Bill, where MPs from all parties supported the idea of women in the law, many arguing they would bring a new perspective, particularly in the magistrates' court. Coalition MP Captain Loseby, a schoolmaster and barrister, talked about his six "*shabby genteel*" sisters who had the options only of being governesses, nurses or schoolmistresses, which were honourable but "*underpaid, overworked and ill-fed professions… all other avenues were closed*". Parliamentary debate shows a sea change in attitudes since 1914.

Although not as radical as some hoped, the 1919 act was hugely significant. Previously women had no role in court other than as defendants or witnesses; now they could argue cases, preside from the bench or weigh up evidence in the jury box. The way was open for Ada Summers to become the first justice of the peace; for Carrie Morrison, Ivy Williams, Helena Normanton and other pioneers to enter the legal profession; and for women everywhere to serve on juries. The 1919 act was a major step forward. We should remember and celebrate it 100 years on.[6]

Dr Mari Takayanagi
Senior Archivist at the Houses of Parliament

The Reform of SARs – Less is More

SARs, or Suspicious Activity Reports, were effectively introduced as part of the Proceeds of Crime Act 2002 ("**POCA**") and the Terrorism Act 2000. As a result of the UK Financial Intelligence Unit's ("**UKFIU**") guidance and the Criminal Finances Act, both introduced in 2017, there has been a substantial increase in the number of SARs made in recent years.

For those in the regulated sector, as soon as a suspicion arises, a SAR should be made. The test for suspicion is "*more than merely a possibility*" or more than "*fanciful*", as defined in *R v Da Silva [2006]*. This low threshold, combined with the broad definition of "*Criminal Property*" contained within section 340 of POCA, has led to an increase of 10% in SARs filed from 2017 to 2018. This followed a 26% increase from 2016 to 2017. The UKFIU simply does not have the resources to manage this number of reports.

[6] This article first appeared in the Law Society Gazette on the Women In The Law page, where further history, opinion and news pieces on this topic can be found (https://www.lawgazette.co.uk/people/women-in-the-law). The YFLA is also going to host an educational marking 100 years of women in the law, which will be held on 16 September 2019 at Eversheds.

As it stands, the making of a SAR is a no-lose for the submitter. There is no downside to being overly cautious, which contrasts with the five year custodial sentence that can be received for the failure to disclose in the regulated sector offence under section 331 of POCA. This may be a factor that has led to 94% of SARs being made currently receiving consent (either explicitly or as a result of the 7-day consent period expiring). The position is also disproportionate in that the impact on the end client (i.e. the subject of the SAR) can be hugely detrimental and can include freezing their accounts and/or seeking restraint orders against them.

In light of these problems, the Law Commission produced a report on 18 June 2019 considering potential solutions. The Commission found that the key problem was as shown in the statistics - there are simply too many SARs being made. Furthermore, a number of those that were made did not meet the appropriate level for suspicion and were not appropriately drafted. For example, only 52% of the SARs submitted clearly stated the grounds for making the referral.

The core recommendation of the Commission is the need for further guidance and clarification, coupled with the introduction of an Advisory Board to guide this process. In particular, the need for a greater understanding of the *Da Silva* test has been mooted as an area requiring development. In my view, this is the crux of the problem, as shown by the fact that 15% of SARs sampled as part of the Commission's review were considered unnecessary as they did not meet the suspicion threshold. This equates to a staggering £5bn sum which is invested in core compliance by UK Finance Members per annum, much of which is done so unnecessarily.

The UKFIU has already introduced a standardised online form to increase the quality of SARs and give greater confidence to those reporting their suspicions. The Commission has urged the Secretary of State to prescribe the form, which I anticipate will reflect the existing online form. The Commission also recommended for a single SAR to be reported for multiple transactions on the same account or related transactions, such as those relating to the same customer, instead of requiring the submission of separate SARs for each separate suspicious transaction.

There were various measures considered to try and limit the scope of reporting, which were designed to enable the National Crime Agency ("**NCA**") to properly concentrate their resources. However, the Commission ultimately concluded that SARs should continue to be made for all crimes, which means that the problem of focus remains.

In respect of the end client, there are thankfully measures proposed. The proposal is to introduce the concept of ring-fencing under POCA, to give banks more proportionate powers (rather than simply the freezing of assets). This will enable the reporter to continue transacting with a client in respect of its 'clean' funds, while the funds suspected to be the proceeds of crime are segregated. The maker of the SAR will also benefit from this protection, reducing the risk of damages being claimed as they were in *HSBC v Shah [2012]*.

The sum of the reforms is that they do go some way to mitigate the problems with the current regime, in particular the financial loss caused to the subject of the SAR. However, the reforms do not deal with the main issues, namely the scope of referrals and the low threshold for making one. It may therefore fall to the Courts to move away from the *Da Silva* test, but that may take some time.

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We would like to extend our heartfelt appreciation to all our contributing authors.