CLARE SIBSON

SFO v OLYMPUS

A MISREPRESENTED RESULT

DECEMBER 2015
PUBLISHED BY

CLOTH FAIR CHAMBERS

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On 14 October 2011, the Japanese technology giant, Olympus Corporation ("**Olympus**"), unexpectedly parted company with its CEO, Michael Woodford. He had been in the position for a matter of weeks.

Over the following months, one of the largest corporate accounting scandals in history unraveled. It transpired that Olympus had incurred billions of dollars worth of losses on investments dating back to the mid-1980s. In the 1990s, accounting standards changed, requiring those bad investments to be marked-to-market. The resulting, accrued losses were taken off balance sheet, via a variety of devices, in a so-called Tobashi scheme. ("Tobashi" means "flying away" in Japanese.) The losses remained off balance sheet until they could eventually be brought back onto the books and eliminated.

Shortly after the scandal broke, Olympus commissioned an internal investigation and, by the end of 2011, had filed five years' worth of corrected accounts.[1] By the end of September 2012 – that is, within one year of the matter first hitting the headlines – the corporation itself, together with three of its former executives (including a former Chairman), had pleaded guilty to charges brought before the Tokyo District Court. The speed of resolution of the criminal proceedings in Japan reflects a pace of justice which English fraud lawyers can only envy.

Fast forward one additional year, to September 2013, and a connected criminal case, brought in the United States against a Singapore-based banker who was alleged to have helped Olympus manipulate its balance sheets, resulted in his pleading guilty pursuant to a cooperation agreement with the US Department of Justice.[2]

That same month – September 2013 – Olympus, together with a wholly owned UK subsidiary, Gyrus Group Ltd ("**GGL**"), made its first appearance at Southwark Crown Court charged with misleading GGL's auditors during its 2009 and 2010 audit process. The case against the two companies was brought by the SFO.

At their first appearance at Southwark, and throughout the UK proceedings, Olympus and GGL maintained the co-operation

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which had characterised their stance during the SFO's pre-charge investigation.[3] And yet, one trip to the Court of Appeal, multiple repeats of BBC4's "Storyville" documentary film about the original scandal and nearly 50 months later, on Tuesday 10 November 2015, Sweeney J entered verdicts of not guilty on all counts. What happened?

WHAT HAPPENED?

The *Financial Times*[4] has likened the collapse of the case against Olympus to the SFO's 2013 abandonment of its allegations of bribery against businessman Victor Dahdaleh halfway through his trial, and to the scrapping of its case against a Welsh mining company in 2014.

It has also been reported that the acquittal of Olympus came after a "string of procedural errors".[5] The SFO, on the other hand, in a press release issued shortly after the not-guilty verdicts were formally entered, has claimed that the case concluded after a Court of Appeal ruling which held, "The English law does not criminalise the misleading of auditors by the company under audit."[6]

Neither of these descriptions is an accurate summary of the reason why the case against Olympus ended as it did. Olympus and GGL were not acquitted because of any procedural error. In the arguments of law which decided the case, the defence took no procedural point against the prosecution and there was never even the slightest hint of judicial criticism of the SFO on that score.

More importantly, **the SFO's claim that the Court of Appeal has ever said that it is not a crime under English law for a company to mislead its own auditors is quite wrong.** The implications of the Court of Appeal's judgment, confirming the rulings of law made at first instance by Eder J, are nothing like as alarming as the SFO's press release might suggest. Neither are they as narrow in terms of the questions which they leave the SFO to answer.

WHY WAS THE SFO INVOLVED?

Before turning to the relevant legal argument, it is worth putting the SFO's allegations against Olympus into a little more context.

Not a British Fraud

The Olympus accounting scandal has been retold as something of a British story. This is perhaps inevitable given the central and dramatic role in the uncovering of the fraud played by Michael Woodford – British, and the first non-Japanese CEO of Olympus to boot.

But the story of the original Tobashi – the actual fraud – was not British at all. The Olympus Tobashi scheme was devised and implemented in Japan, in relation to a Japanese public company, listed on the Tokyo stock exchange. The concerns expressed around the world as a result of the scandal were about corporate culture and standards of governance in Japan.

It was, therefore, entirely sensible that it was in Japan that Olympus and three of its former executives faced criminal prosecution and were punished – in the case of the company, by way of fine.[7] Equally sensible, the only aspect of the Olympus accounting scandal to become the subject of investigation here in the UK was that limited aspect which was connected to this jurisdiction: Olympus's alleged use of a UK domiciled subsidiary – GGL – to eliminate losses hidden by the Tobashi.

Limited SFO Case

The SFO's case was as follows. Shortly after Olympus acquired GGL in 200[8], nearly 2 million preferential shares in

GGL were issued to a third-party entity in Cayman. Those shares were then re-purchased by another Olympus subsidiary for $620 million, creating a significant apparent loss. However, the monies paid out for the re-purchase of the shares were recycled back into the Olympus Group, enabling Olympus to use those sums to settle hidden losses.

Since GGL was a private company, wholly owned by Olympus, the SFO would probably have struggled to identify any specific loss or risk of loss to any party as a result of this specific conduct. To the extent that the device might have been said to give a false impression of Olympus's balance sheet, this was primarily a matter of concern to the Japanese markets and the business of Japanese prosecutors to pursue. As stated above, Olympus pleaded guilty in Japan within a year of the scandal breaking.

So instead, the SFO alighted on the fact that, in order for the circulation of funds around the issuing of preference shares in GGL to work as a loss-settling device for Olympus, it was necessary to mislead GGL's (English) auditors about the context in which the preference shares were issued: the auditors were not told that GGL's parent company was engaged in unwinding a twenty-year-old Tobashi scheme.

The SFO did not allege that misleading GGL's auditors caused direct loss to any party. Instead, when setting out the "significance" of the alleged offences, the SFO simply pointed to the self-evident facts that a) auditors are important to business integrity as a whole and b) if GGL's auditors had been told in 2009 or 2010 that Olympus was attempting to unwind a Tobashi scheme, then the scandal would have been brought into the open prior to October 2011, potentially reducing losses incurred by some shareholders.

Consistent with the limited nature of the UK aspect of the scandal, the charges which the SFO brought against Olympus and GGL were not general allegations of fraud or of misleading the UK financial markets. The particular charges the SFO attempted to prove were, instead, five highly specialised allegations of making misleading statements to an auditor contrary to section 501(1) of the Companies Act 2006.

Under subsection (2) of that provision, the maximum penalty on indictment for such an offence is a fine and/or two years' imprisonment. Whatever the financial penalty might have been had Olympus or GGL been convicted in the UK (itself quite a pertinent question in all the circumstances), it is worth observing that, both in the grand scheme of criminal offences which exist in English law, and in the more immediate context of the accounting fraud to which Olympus pleaded guilty in Japan, the section 501(1) charges brought by the SFO represented relatively minor allegations.

PUBLIC INTEREST IN THIS PROSECUTION?

It is a classic principle of English criminal law, and an important tenet of the basic doctrine of the separation of powers, that the assessment of the public interest in any criminal prosecution is the prerogative of the Crown.

There can be no doubt that, given that GGL was an English company which had been audited in the UK, the SFO was fully entitled to investigate its role in the Olympus scandal. And if the overall fraud to which Olympus pleaded guilty in Japan had taken place in the United Kingdom, and thus the major part of the suspected offending had fallen to be prosecuted here, the alleged use of GGL in the plan to unwind the Tobashi would undoubtedly have formed part of the prosecution's case against Olympus.

One would not, however, expect to see GGL separately charged. It is very unusual to prosecute two companies from one group in respect of the same criminal investigation. And on the facts alleged by the SFO, GGL was arguably a victim, having been used (immediately after acquisition) to sort out a long-standing problem which had absolutely nothing to do with it. Yet the major part of the SFO's case concerned GGL alone: four of the five allegations on the SFO's indictment charged GGL; only one charge was brought against Olympus.

What is more, had the entire case fallen to be prosecuted in the UK, one would not expect to see any counts on the indictment specifically charging the concealing of the Tobashi from any of the relevant auditors, for two reasons. First, unless the auditors are complicit, it is an inevitable feature of all corporate frauds that auditors are misled. Secondly, each of the five documents which were alleged by the SFO to contain the misleading statements reflected by counts 1 to 5 of its indictment were signed, in each instance, by a former Olympus executive, who was implicated in the wider fraud in any event (as his guilty plea in Japan well demonstrates).

One of the questions the SFO might need to address now that the case is over, and would have been required to answer had the case ended differently and proceeded to sentence, is how it expected an English court to set about the exercise of penalising these Defendants: in GGL's case, for being used by its parent; and in Olympus' case for concealing from its subsidiary's auditor a fraud to which it has pleaded guilty, and for which it has been punished, in Japan.

WHY WAS OLYMPUS ACQUITTED IN THE UK?

That said, it is important to stress that no part of the reasoning of Eder J at first instance or Pitchford LJ in the Court of Appeal had anything to do with the courts' perception of the public interest in the case. As is right, the public interest in the prosecution was never queried in court; neither was the likely penalty in the event of conviction ever discussed. Instead, the reasoning of both courts turned on careful construction of the particular provision under which the companies had been charged.

Section 501(1)

Section 501(1) of the Companies Act 2006 reads:

> **501 Auditor's rights to information: offences**
> (1) A person commits an offence who knowingly or recklessly makes to an auditor of a company a statement (oral or written) that –
> (a) conveys or purports to convey any information or explanations which the auditor requires, or is entitled to require, under section 499, and
> (b) is misleading, false or deceptive in a material particular.

Looking at this provision in isolation, it is easy to assume that "a person" in subsection (1) means "any person". More than one textbook touching on the section has made this very assumption.8 Add to this the fact that, as all good law students know, "person" includes a body of persons corporate or unincorporated[9] and it becomes very easy to imagine that any company (including the audited company itself and/or its parent) may be liable for the act of misleading an auditor, provided an individual who can be identified as that company is guilty of the same.

But what all good law students should know first and foremost about statutory interpretation is that looking at any provision in isolation is a hazardous thing to do. Context is everything. And section 501 of the Companies Act has a very particular context and history.

Section 499

In defining the criminal offence which it proscribes, section 501(1)(a) directly refers back to section 499 of the same Act.

Section 499 is the provision of the Companies Act that empowers an auditor to require information about a company. The relevant parts of section 499 read as follows:

> **499 Auditor's general right to information**
> (1) An auditor of a company–
> ...
> (b) may require any of the following persons to provide him with such information or explanations as he thinks necessary for the performance of his duties as auditor.
> (2) Those persons are–
> (a) any officer or employee of the company;
> (b) any person holding or accountable for any of the company's books, accounts or vouchers;
> (c) any subsidiary undertaking of the company which is a body corporate incorporated in the United Kingdom;
> (d) any officer, employee or auditor of any such subsidiary undertaking or any person holding or accountable for any books, accounts or vouchers of any such subsidiary undertaking;
> (e) any person who fell within any of paragraphs (a) to (d) at a time to which the information or explanations required by the auditor relates or relate.

Looking at sections 499 and 501 side-by-side, one can see that Parliament may well have intended the offence creating terms of section 501(1) to be parasitic on section 499. Looked at alongside section 499, section 501(1) begins to look like a criminal offence specifically designed to enforce the power given to the auditor by the terms of section 499(1)(b). That appears, not only from the proximity and terms of the two provisions, but also from their respective headings (in bold above). And when viewed in this way, one can identify the beginnings of an argument that the offence contained in section 501(1) was only intended to apply to – only intended to be capable of being committed by – those persons listed in section 499(2), from whom the auditor has the right to require information. If the auditor's compulsory power to require information is limited to a confined class of persons, why should the criminal offence designed to enforce that power extend to anyone outside it?

This argument would, if it succeeded, be fatal to the SFO's case against both companies charged since – on the facts – neither GGL (the audited company) nor Olympus (its parent) fell into the categories of persons in section 499(2) from whom an auditor has a right to require information.[10]

Looking only at the wording of sections 499 and 501, the argument's chances may have looked no better than even. However, that changed when two further factors, outside the immediate language of the relevant provisions, were brought into the equation. The first of these was the history and evolution of these two sections. The second was the scheme of the Companies Act as a whole.

HISTORY AND EVOLUTION OF SECTIONS 499 AND 501 [11]

There has been a specific criminal offence enforcing an auditor's right to information in successive Companies Acts since 1989. The current provisions are the third incarnation and are almost identical in wording to the second.

In their first incarnation, the provisions limited the class of persons from whom the auditor could require information to "the company's officers".[12] The related criminal provision was limited to the same class of persons: "An officer of the company."[13] In the second incarnation of the relevant offence (enacted in 2004, and almost identical to the current provisions),[14] the categories of persons from whom the auditor could require information were expanded to include not only officers but also other specific persons connected to the audited company, including the company's employees and UK subsidiaries.

This enlargement of the scope of the auditor's rights naturally necessitated a change to the language of the corresponding penal provision, so as no longer to limit criminal liability to "officers". As Eder J said when ruling with the Defendants at first instance, "It is difficult to accept that this change in the wording of the statutes was intended to disengage the specified offences from the earlier specified rights of the auditor and thereby introduce a radical change with regard to those persons who might be prosecuted." Rather, the change was simply to ensure that all persons within the newly expanded class from whom the auditors were entitled to require information would also carry liability for the associated criminal offence.

The Explanatory Notes to the Act[15] which effected the change of language from "an officer of a company" to "a person" explicitly supported the Defendants' contention that this change was intended to expand the categories of persons capable of committing the relevant offence to the same extent as the categories of persons from whom the auditor could require information, and no further. At paragraph 50, the Notes stated that the new subsection (1) (emphasis added):

> "re-enacts the previous offence ... of the Companies Act 1985 of providing false and misleading information of explanations to an auditor. <u>The section also applies this offence to the new categories of people from whom the auditor may require information under [the] new section.</u>"

Although Eder J held at first instance that he was not entitled to refer to this part of the Notes as an aid to construction, it remains the case that the Notes provided a powerful indication that the Defendants' interpretation of section 501(1) was correct, as the judge indeed found.

SCHEME OF THE 2006 ACT AS A WHOLE

Strong support for the Defendants' interpretation of section 501(1) was found by considering the overall scheme of the 2006 Act, and the language deployed consistently throughout it. This aspect of the argument was used by the Defendants, in particular, to counter the SFO's almost rhetorical question, "Why shouldn't an audited company, or its parent, be capable of committing this offence?" The following extract from the Defendants' skeleton argument at first instance was described by Eder J as "most compelling"[16] and was incorporated, almost verbatim, into his judgment,[17] which was later upheld on appeal:

> "The Companies Act 2006 is not a criminal statute. It is not concerned primarily with proscribing immoral or anti-social conduct. To state the obvious, it is a statute which is all about the company.

"It's not an accounting breakthrough, Sam. It's wrong."

In this case, the company is GGL. The Companies Act 2006 is the statute which allows for GGL's creation and existence as a legal person. It provides for certain functions necessary to the proper regulation of the company, such as the making and keeping of accounts and reports (Part 15) and the function of an audit (Part 16). It also apportions responsibility for each of these functions, as between GGL itself and other (often natural) persons.

Because apportionment of responsibility for the different functions necessary to the life and regulation of the company is one of the principal concerns of the Companies Act, it is hardly surprising that the Act specifies – with precision – who is liable for any failure to perform each function as required. This includes very clear distinctions between those liabilities which attach to the company itself (here GGL) and those which do not. These distinctions may, in some instances, appear to be artificial, but that is inevitable: the Act is concerned with the creation of the "legal fiction" of corporate personhood.

For example, the responsibility to keep a register of the company's secretaries lies with the company (see s275(1)). Consequently, the company itself (as well as every officer of the company who is in default) is liable explicitly for the criminal offence of defaulting on this responsibility (see s275(6)). Likewise, it is the company which is responsible for sending copies of its annual report and accounts to its members (see s423). Consequently, the company itself (as well as every officer in default) is criminally liable if this does not occur (see s425). On the other hand, it is the duty of the company's directors – and not the duty of the company – to file the company's annual accounts with the register (see s441). Consequently, criminal liability for failing to comply with this duty lies only with the directors and not with the company (see s451(1)). To take another example, it is the directors' duty to prepare a directors' report for each financial year of the company (see s415(1)). Consequently, criminal liability for failing to comply with this duty lies only with the directors, and not with the company (s415(4)). Criminal liability for any false statement contained in the directors' report also rests exclusively with the directors, and not with the company (see s418(5)).

It is in this context that the specification of particular categories of person within section 499 must be understood. The responsibility to provide information to the auditor of the company's accounts is not imposed upon all "persons"; the responsibility is defined with reference to specific categories of person in section 499(2). It is entirely consistent with the pattern established throughout the Act, that this responsibility is enforced with criminal sanctions which attach, not to the general population, but to the same, specified categories of persons with whom the duty rests. Since that duty did not rest with GGL or Olympus, neither Defendant was capable of committing an offence under section 501(1) in relation to the audit of GGL's accounts.

[Further, focusing on the position of GGL – the audited company], where the intention is to make this, the company which is the subject matter of the entire Act itself responsible for a particular obligation, this is explicitly stated. Where the intention is to impose criminal liability on the company for a default in compliance with those obligations, this is explicitly stated, too. The explicit statutory language typically deployed in the Companies Act 2006 to denote that the company is responsible for a particular function, or

> is criminally liable for default on that function, is absent from the wording of sections 499 and 501. Responsibility for meeting the auditor's requirements for information rests with the company's officers, employees and other persons listed in section 499(2). Criminal liability is imposed upon the same group.

For these, and other reasons, the Defendants argued that "a person" in section 501(1) could only sensibly be construed to mean a person listed in section 499(2)(b). They submitted that to argue (as the SFO did) that "a person" in section 501(1) meant any person whatsoever, was as misconceived as it would have been to argue in relation to the original offence contained in the 1985 Act that "an officer of a company" meant an officer of any company whatsoever. "An officer of a company" in the original provision clearly meant, "An officer of the company being audited pursuant to these provisions"; "a person" in section 501(1) clearly means, "A person from whom the auditor has a right to require information pursuant to these provision." Eder J and the Court of Appeal agreed.

ATTRIBUTION IS NO ANSWER

In response to all this, both at first instance and on appeal, the SFO relied on the law of attribution as derived from Tesco Supermarkets Ltd v Natrass.[18] Their case (on the facts) was that an individual who had been a director both of Olympus and of GGL was guilty of the offences charged. Therefore, they argued, the companies were guilty, too, since, "Conventional principles of attribution mean that where the requirement to provide information is placed upon an officer of the company ... assuming the principles governing attribution are satisfied ... liability for the offence accrues directly to the company."

This was a bad misstatement of the common law of attribution of corporate liability by the SFO. The common law rules do not establish that whenever a statute specifically provides for criminal liability of a director then the company is automatically liable too. The SFO's position here was circular. The logically prior question is whether the company itself is capable of committing the statutory offence: if the answer is no, then no question of attribution arises; if – and only if – the answer is yes, do the rules of attribution become relevant in order to identify which natural persons embody the company for the purpose of that statutory provision.

In any event, as the Defendants contended, the common law rules of attribution were irrelevant to this particular statutory context. As explained above, a major concern of the Companies Act 2006 is the question of the attribution of functions and liabilities as between the company and other persons. If a particular company falls outside the scope of the categories of person listed by Parliament in section 499(2), then it is not open to the courts to circumvent the clear will of Parliament by imposing criminal liability on that corporate person via the common law rules.

THE IMPLICATIONS OF THE CASE

Incorrect commentary on this case is easily forgiven in circumstances where the SFO itself opened public debate about the case with a misrepresentation of its implications. But the commentary has been confusing and it needs to be put straight.

Importantly **this case does not "make it more difficult to establish corporate liability."**[19] As explained immediately above, this case says nothing about the law of attribution. The law of attribution is irrelevant to a crime that it was impossible for the particular corporate persons charged to commit on the facts alleged.

Neither does the case mean that no company may ever be guilty of a section 501(1) offence. It is not correct to state, "The appeal decision could make pinning corporate liability using the same law difficult for similar cases in the future."[20] Indeed, there is one class of person identified in section 499(2) which can only be comprised of corporate entities: see paragraph c – any subsidiary undertaking of the company which is a body corporate incorporated in the United Kingdom. A corporate entity may also qualify under section 499(2)(a), if it is a director of the audited company.

And as stated at the beginning of this article, the case certainly did not establish that "English law does not criminalise the misleading of auditors by the company under audit". The SFO should not have said this in its press release following the Defendants' acquittal; it is not true.

It would be accurate to say that the Court of Appeal decided that a company under audit was not *capable* of misleading its auditors under section 501(1) because, in the context of the legal fiction in which the abstract and artificial construct of corporate personhood is (of necessity) deemed by statute to be capable of doing some things but not others, the provision of information about a company under audit to its auditor is a function that the company itself is not empowered to perform.[21] With the exception of a situation in which an auditor requires information about the company's overseas subsidiary (in which case onus is placed on the company to provide information – about that subsidiary),[22] the company is the passive subject-matter of the audit; it is the directors, employees, bookkeepers, subsidiaries and other persons listed in section 499(2) who must provide information to the auditor about it.

But even that would be an imperfect encapsulation of the point of law which the Defendants in this case carried. Quite apart from anything else, Olympus was not the company under audit in the instant case, GGL was; yet Olympus, too, was acquitted.

The simple, legal truth is that no person, be they real or imaginary, natural or corporate, is capable of committing the very particular offence of misleading an auditor under section 501(1) of Companies Act unless they happen to be a person obligated to provide information to the auditor under section 499. The arguments developed by the Defendants and accepted by the courts established this and nothing more.

HARDLY A SURPRISING RESULT

This is not an alarming – or even a particularly surprising – proposition. **It is no more alarming than the proposition that only a person whom the Director of the SFO has obliged to provide information under section 2(2) of the Criminal Justice Act 1987 may be guilty of misleading the SFO under section 2(14).** There are significant parallels between section 2 of the SFO's own statute of origin, and sections 499 and 501 of the Companies Act; even the maximum penalty of the respective criminal offences is the same (at 2 years).

What is more, the decision of the Court of Appeal does not give licence to everyone who falls outside the terms of section 499(2) to mislead auditors with impunity, any more than the limitation of section 2(14) of the CJA to persons subject to a section 2(2) requirement gives carte blanche to everyone else to mislead the SFO. Just as a person who misleads the SFO otherwise than in purported compliance with a section 2(2) order may nevertheless be liable for much more serious offences, including perverting the course of justice, so a person who misleads an auditor but falls outside the scope of section 499(2) of the Companies Act may be liable for much more serious offences, including false accounting and offences under the Fraud Act 2006. In certain situations, an audited company itself might be liable for fraud by reason of a lie told by its director to an auditor, provided all the elements of the offence were made out against it.

THEN WHY CHOOSE S501(1)?

The SFO has been criticised for its choice of charge in this case, for example by people quoted in the *Financial Times*.[23] According to these anonymous sources, section 501(1) is a "highly technical" offence and others, such as false accounting, should have been charged instead. This is incorrect, for two reasons.

First, section 501(1) is not a highly technical offence: the concept of misleading an auditor, intentionally or recklessly, is not complicated. It is merely a highly specific offence, which may only be committed by those persons from whom an auditor has the power to require information. Like section 2(14) of the CJA, it is a penal provision designed to enforce a compulsory power.

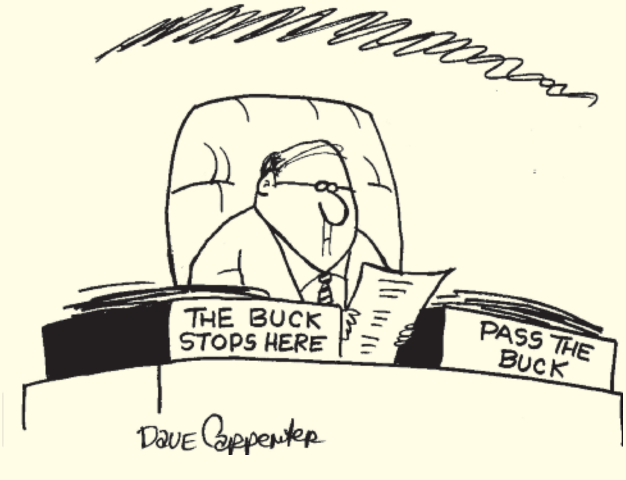
Secondly, it may reasonably be inferred that the SFO concluded that it could or should not charge false accounting. With a 7 year maximum, false accounting is much more serious than a section 501(1) offence; any prosecutor would naturally prefer it, if it were made out. But false accounting, like offences under the Fraud Act, has a "make a gain or cause a loss" element, which, in the case against Olympus, the SFO appears to have decided it either could not prove or should not pursue. This is also unsurprising, given the very limited aspect of the case which fell to be investigated in the UK: an aspect so incidental that, as argued above, it would not even have justified the inclusion of additional counts on the indictment had the actual Tobashi occurred – and been prosecuted – in this jurisdiction.

THE REAL QUESTIONS POSED

This leads to the genuine implications of the case, which are certainly not that there is any problem or anomaly in the English law. The real questions posed are not for the law to answer, but for the SFO.

If, after the prosecution in the principal jurisdiction concluded, the only charges available to the SFO were offences under section 501(1), why did it decide to bring a case at all? And why did it persist in this decision, even after the Defendants explained their position on the law (something which occurred prior to the first appearance in the Magistrates' Court, when the points of law were already on the record)? Finally, why did the SFO misrepresent both the Court of Appeal and the state of English law in its press release after the case had concluded?

The case represents a striking irony. At the heart of the Olympus accounting scandal was a Tobashi scheme that attempted to make true losses "fly away". The SFO must face the question whether it was, in this case, guilty of wishing it could do the same.



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END NOTES

1 Source, Reuters report by Antoni Slodkowski. http://uk.reuters.com/article/2012/09/25/uk-olympus-trial-idUKBRE88O03L20120925

2 Source, The United States Department of Justice. http://www.justice.gov/usao-sdny/pr/former-bank-executive-pleads-guilty-connection-accounting-fraud-olympus-corporation http://uk.reuters.com/article/2012/09-tridUKBRE88O03L 20120925

3 The companies made this assertion several times before the courts. The SFO never sought to contradict this claim and, indeed, it was accepted by Eder J at first instance and noted in is ruling on the law.

4 Jane Croft and Caroline Binham, 10 November 2015.

5 The *Financial Times*, 10 November 2015.

6 See SFO press release dated 10 November 2015. http://www.sfo.gov.uk/press-room/latest-press-releases.aspx

7 Fines were imposed both by the Japanese court and by the Japanese regulator.

8 See for example "Buckley on the Companies Acts".

9 In accordance with the terms of section 5 and schedule 1 of the Interpretation Act 1978.

10 The SFO was at one stage, after the commencement of the preparatory hearing, considering whether there was evidence to bring a case against Olympus on the basis that it was a person who fell into section 499(2), that is, a person holding or accountable for GGL's books, accounts or vouchers. However, this potential case was not pursued, for want of evidence.

11 This section is largely lifted from the Defendant's skeleton argument submitted to the Court of Appeal, drafted by the writer of this article, Clare Sibson.

12 S398A(1) of the Companies Act 1985 (as amended by the Companies Act 1989).

13 S398A(2) of the Companies Act (as amended by the Companies Act 1989).

14 S398A and s398B of the Companies Act 1985 (as amended by the Companies (Audit, Investigations and Community Enterprises) Act 2000).

15 The Companies (Audit, Investigations and Community Enterprises) Act 2004.

16 See paragraph 24.

17 See paragraph 23.

18 (1972) AC 153

19 A partner of a law firm, quoted in the *Financial Times*, 10 November 2015.

20 See the endnote immediately above.

21 Note that an audited company is empowered (and obligated) to provide information to its own auditor about its overseas subsidiaries: see section 500(1) of the Act. Consistent with the Defendants' interpretation of the relationship between the auditor's rights under this Part of the Act and the offences contained in section 501, an audited company that provides misleading information to its auditor about its overseas subsidiary under section 500(1) is liable for a criminal offence under section 501(4).

22 See the endnote immediately above.

23 See Caroline Binham and Jane Croft, 10 November 2015. http://www.ft.com/cms/s/0/8c57044e-87c9-11e5-90de-f44762bf9896.html#axzz3sumJ17lp

CLOTH FAIR CHAMBERS ANNOUNCES THE RETIREMENT OF TIMOTHY LANGDALE QC

Tim was one of the inspirational founder members of Cloth Fair and his career at the Bar has spanned almost 50 years.

Appointed as Treasury Counsel at the Central Criminal Court in 1979, Senior Treasury Counsel in 1987 and taking Silk in 1992, Tim appeared in a succession of significant and high profile cases throughout his career, prosecuting and defending in headline making trials.

His skilled cross-examination, astute tactical intuition and unflappable charm brought him success and admiration from professional and lay clients, opponents and the judiciary.

We look forward to frequent opportunities to welcome him back to Cloth Fair and to the prospect of tapping into his experience, sound advice and unerring ability to find solutions.

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John Kelsey-Fry QC
Ian Winter QC
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Jonathan Barnard
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Cloth Fair Chambers specialises in fraud and commercial crime, complex and organised crime, regulatory and disciplinary matters, defamation and in broader litigation areas where specialist advocacy and advisory skills are required.

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