JONATHAN BARNARD

THE AMERICAN WAY: PRAGMATISM, PRINCIPLE AND THE PURSUIT OF SETTLEMENTS

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Once in every episode of the American cartoon series "Roadrunner", Wile E. Coyote would be so fixed in pursuit of his eponymous prey that he would run off the edge of a cliff. There would follow a moment when through sheer will power Mr Coyote would continue the chase despite the road having disappeared from under him. Then, seconds before his body shot to the bottom of the ravine below, Mr Coyote would turn to camera with the realisation that he stood on nothing but thin air.

For decades, the enforcement authorities in the UK did not chase corporate corruption in foreign jurisdictions. As recently as 1999, a proposal for a Bill to create offences of international bribery and corruption was described in Parliament as *"fundamentally naïve ... about the way in which business is done in this country and around the world"* (See House of Commons Debates 25 February 1998 vol 307 cc373-5). It was not until February 2002 that the Anti-Terrorism, Crime and Security Act 2001 clarified that employing the services of a corrupt agent was indeed an offence.

But, for the Serious Fraud Office ("SFO"), it is not just the past which is another country, it is very much the present: the UK's lead agency on issues of international corruption and bribery has set its sights on corporates' overseas corruption, its appetite for the chase whetted by the remarkable success of its American enforcement cousins in the same field. Within a very short time period approaches that have previously been viewed with distaste as "too American" have been applied here with clear success. However, rumblings from the courts that things have gone too far too fast have become louder.

Has the SFO run out of road on "global settlements"? The case of the SFO v Innospec Ltd ("Innospec") presented the Crown Court with a plea agreement covering two jurisdictions that was highly pragmatic, completely unprecedented and significantly uncoupled from established principles of sentencing. In pulling the rug from the SFO's feet, Thomas LJ in sentencing described the policy which had produced a settlement with a specified agreed fine as commendable, while at the same time insisting that *"no such arrangements should be made again"*.

THE FACTS

Although Innospec Inc is incorporated in Delaware and trades on the NASDAQ, its headquarters and directors are located in Ellesmere Port, UK. It is from Ellesmere Port that one of its subsidiary companies (Innospec Ltd) operates a plant which is the sole remaining manufacturer of tetraethyl lead ("TEL"), an anti-knock compound used in leaded gasoline. The use of leaded gasoline has been phased out of use by most developed countries. Innospec's trade was therefore predominantly based in the developing world within an industry repeatedly identified as highly susceptible to corruption.

In 2005, Innospec Inc was identified as one of many corrupt companies in the report of the Independent Inquiry Commission into the United Nations Oil For Food Programme ("OFFP"). The investigation begun that year by the Securities and Exchange Commission ("SEC") established that from 2001 to 2008, Innospec paid or promised to pay more than $5.8 million in kickbacks to the Iraqi government and bribes to Iraqi officials to secure contracts to sell TEL to Iraq, earning the company more than $50million in profits on those contracts.

The same year that the SEC began its investigation into

I'm thinking of getting back into crime, Luigi, – legitimate business is too corrupt.

OFFP, the company disclosed to the Office of Foreign Assets Control ("OFAC") violations of the Trading with the Enemy Act in relation to trade with Cuba between 2001 and 2005.

In May 2008, the SFO opened its investigation into Innospec and the OFFP, followed by a second investigation in July 2008 into the company's systematic and large scale bribery in Indonesia. That Indonesian investigation established that from 2000 to 2005, Innospec paid about $8million in bribes to senior government officials to induce the purchase of higher levels of TEL than Indonesia required and to extend the life of TEL sales in Indonesia, thereby securing contracts which generated profits of over $21 million for the company. One explicit purpose of the corruption was to block legislative moves to ban TEL on environmental grounds in Indonesia. The offending was to be described by the sentencing judge as, *"the top end of serious criminal offending both in terms of culpability and harm"* (SFO v Innospec, sentencing remarks para 30).

THE IMPETUS FOR A GLOBAL SETTLEMENT

Innospec was keen to settle. From early 2008 the company cooperated fully with all investigations. It spent over £40million conducting a wide ranging internal investigation (including the appointment of KPMG), the product of which was the identification and full disclosure of the bribery matter in Indonesia. This marked degree of cooperation went hand in hand with the company seeking a "global settlement" encompassing all matters in both the UK and the USA in order to avoid any prospect of double jeopardy, draw a line under its past history and move forward as a trading entity.

The Americans were keen to settle. The US has far outpaced the rest of the world in fighting corruption. They have long had the right legislation for the job. The Department of Justice ("DOJ") and SEC have deployed the Foreign Corrupt Practices Act ("FCPA"), passed in 1977 after the Lockheed "slush funds" scandal, with shock and awe to make it one of the most widely feared statutes in boardrooms across the globe. Between 1977 and 2001, 21 companies were convicted for criminal violations of the FCPA. That record eclipses that of all other jurisdictions combined in the same time period.

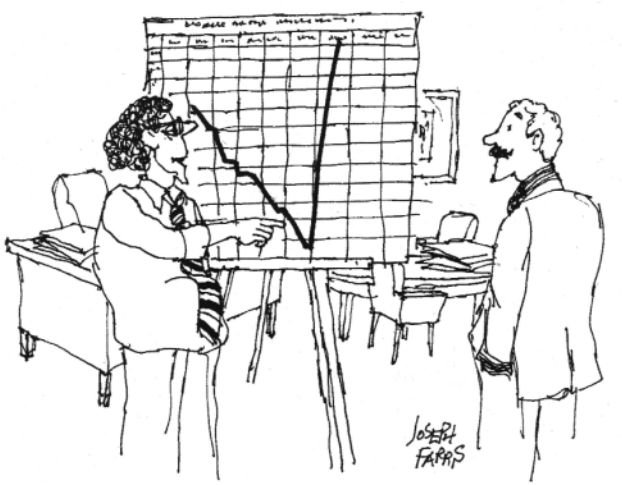
Yet since 2001, both the number of prosecutions and the level of penalty have only increased. In 2007 alone the SEC and DOJ investigated 29 corporations for corruption. In February 2009, Kellogg Brown and Root ("KBR"), a subsidiary of Halliburton, pleaded guilty to FCPA charges and agreed to pay the second largest fine in FCPA history at more than $400 million for bribing Nigerian Government Officials with $180m to obtain construction contracts to build liquefied natural gas facilities worth more than $6bn. The DOJ stated that it was determined to *"seek penalties that are commensurate with, and will deter, this kind of serious criminal misconduct"*.

A large measure of the success of the US authorities is also attributable to their system of plea bargaining. While elements of plea bargaining have long existed in the UK (clandestinely pre Turner and conspicuously in the discount for guilty pleas, for example) it is only in America where the system has been fully embraced and matured into a comprehensive system of operational transparency. The results are startling. 96% of convicted US federal defendants plead guilty as opposed to 71% in the Crown Courts of England and Wales (see United States Attorney's *Annual Statistical Report, Fiscal Year 2008* and US Sentencing Commission's *Sourcebook of Federal Sentencing Statistics 2008* and CPS, *Annual Report and Resource Accounts 2007-2008*, Annex A). Most of those defendants pleading guilty in the US do so on the basis of a written plea agreement with the prosecution. That document is the product of a mature process underpinned by legal principles and procedural rules that facilitates open negotiation between the prosecution and the defence.

The pivotal decision in a case of corporate corruption is almost always the decision to enter a guilty plea. The verdict of the jury is a matter of quaint nostalgia since proceedings rarely get that far. There are sound practical reasons for this: once an exposed thread of corporate corruption has been grasped by an investigator it can be followed back into a discernible web of decisions, payments and complex accounting systems embedded in the documented fabric of the company's activities. More importantly, a corporate is unconstrained by the human stain of a guilty plea and is therefore able to adopt a strategy which is purely concerned with the economy of profit and loss. The collateral for a guilty plea will be improvements in the company's position in relation to three areas: the facts, the charges and, pre-eminently, the sentence. Those improvements will all be pushed to attain the one overriding imperative for a company: its continued trading.

The decision of what to charge and whether to charge at all has proved to be a powerful negotiating tool in the hands of the US authorities. While the UK prosecuting authorities are constrained when deciding whether to institute and continue with criminal proceedings by the Code for Crown Prosecutors ("the Code") with its two stage test (evidential and public interest), that same decision is much more flexible in the US.

The deferred prosecution agreement ("DPA") is a central weapon in the American plea bargaining arsenal. The DPA's rather murky, extra-judicial existence combined with the demands of the Code has put it beyond the reach of UK enforcement bodies. But it is undoubtedly effective. The allegedly offending company agrees civil penalties and more often than not submits to a rigorous programme to eradicate corrupt practices from its trading culture. The quid pro quo is not having to enter pleas in criminal charges, which can make the difference between life and death for a corporate entity.



This is where the bribes kicked in

Companies with deep pockets can afford steep penalties. But the severe consequences they face in Europe and sometimes the US if they are found guilty of actual bribery might be insurmountable, giving the DOJ a strong hand in negotiations. In the European Union, public procurement rules forbid companies from receiving an EU contract if it has been found guilty or convicted of bribery.

In March 2009, Daimler, the German carmaker, held its hands up to an elaborate bribery scheme across 22 countries; yet, by agreeing to pay $185m under the terms of a deferred prosecution agreement with US prosecutors, the company was not required to plead guilty to any formal charge of bribery. That plea agreement therefore radically reduced any risk that Daimler would be shut out from European government contracts were it to have been convicted of such a charge.

Similarly, actual bribery charges can be avoided by use of the more dilute "books and records" charges, criticised for not reflecting the full scale of the alleged criminality but key to avoiding the debarring effect of a bribery charge.

The Americans have also proved highly imaginative in their drive to include other jurisdictions in settlements. After all, they have every reason to encourage other jurisdictions to follow their lead. If the US has an anti corruption policy harsher than anywhere else, then it will be US firms that suffer while multinationals will set about forum shopping and take their past corruption to jurisdictions offering more lenient outcomes. To this end, the US authorities have developed agreements which take account of an acceptable global result for a company without grappling directly with potentially messy cross jurisdictional decisions.

For example, in 2007 the DOJ entered a non-prosecution agreement with Akzo Nobel ("Akzo"), a Dutch Company, in which Akzo accepted that two of its subsidiaries had been involved in the OFFP scandal. Akzo entered an agreement with the US authorities whereby the company would pay $800,000 to the United States Treasury if it did not within 180 days pay a criminal fine of approximately €381,000 to the Dutch National Public Prosecutor's Office regarding its conduct under the OFFP.

In 2008, in connection with the cases brought by the DOJ, the SEC and the Munich Public Prosecutor's Office, Siemens AG ("Siemens") entered a plea agreement in which they agreed to pay a combined total in fines, penalties and disgorgement of profits of more than $1.6 billion (over €1½ billion of which was earmarked for the German authorities) for corrupt activities involving more than $1.4 billion in bribes to government officials across the globe stretching back to the mid 1990s. The US Attorney for the District of Columbia said that the coordinated efforts of US and German law enforcement authorities in this case had, *"set the standard for multi-national cooperation in the fight against corrupt business practices"*. The DOJ press release looked forward to continued efforts with *"our international colleagues ... to level the business playing field, making it free from corruption and fair to those who seek to participate in it"*.

The SFO was also keen to settle the Innospec case. The current Director has long been an ardent and vocal admirer of American-style fraud-fighting strategies and has sought to reinvent the SFO in that image. The traditional approach of handling just a few costly and lengthy investigations and prosecutions that run to several years and may not succeed has been left behind in favour of an increased number of more effective, swift and focused cases. Part of that overhaul has included the continued exploration of plea bargaining and the offer of alternatives to criminal

prosecution in which to encourage companies to own up to their own fraud and corruption and "clean themselves up". By mid 2008, by which time the Innospec case must have been in the throes of heavy negotiation, the Director stated, *"It is not about cutting deals — it's what the public interest requires"*. (see The Times 17 July 2008).

Yet the Innospec case was to be defined by the deal it cut. The policy which led to it was designed for innovation, not tradition for there was little tradition worth protecting: the UK's historical performance in the international anti-corruption arena had fallen far short of what the public interest required. The UK signed the Organisation for Economic Cooperation and Development ("OECD") Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("the Convention") on 17 December 1997, the purpose of which is to create a level playing field for international business through the eradication of corruption.

Just over a decade later, the OECD Working Group on Bribery (the "Working Group") which monitors the member states' implementation and effectiveness of anti-corruption legislation was *"disappointed and seriously concerned with the unsatisfactory implementation of the Convention by the UK"*. Those concerns were principally fuelled by the absence of appropriate legislation following the failed Corruption Bill (the intended remedy to which is the Bribery Bill) and the termination, on grounds of national security, in December 2006 of the "Al Yamamah" investigation, concerning the supply of arms to Saudi Arabia. That case brought a further black mark through the subsequent lack of mutual legal assistance provided by the UK to other parties to the Convention in relation to it.

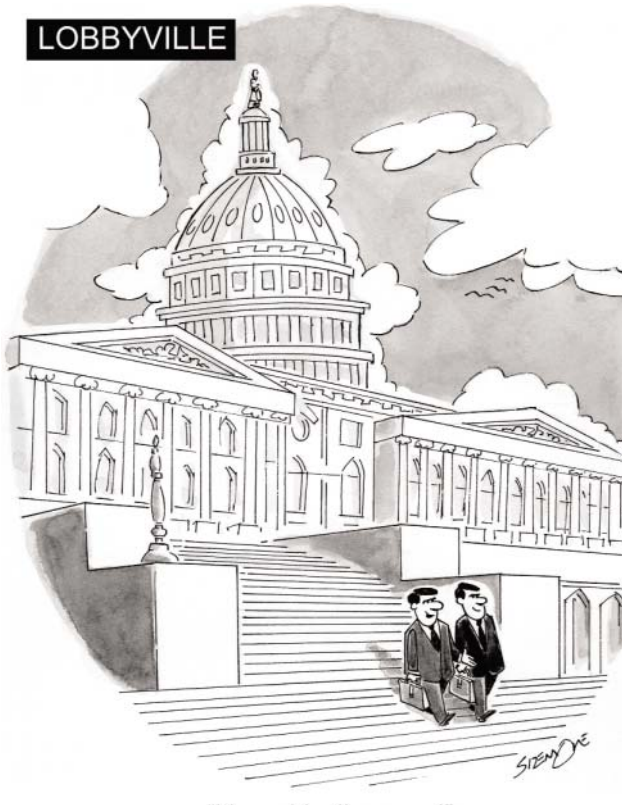
However, in the last 18 months, the new SFO direction has produced a clutch of much needed successful outcomes.

In October 2008 came the civil settlement in the Balfour Beatty case which bore many of the hallmarks of a DPA. No criminal conviction came about because the SFO took the twin decisions of using its civil recovery powers, while identifying the criminality not as bribery but as "books and records" offences, resulting in an agreed Order of £2.25m and the introduction of external monitoring for an agreed period. In its press release, the SFO linked the case as confirming its commitment, *"to combating improper corporate behaviour in line with similar efforts being made in other jurisdictions...the use of these new powers should be seen as an important example of how the SFO will use the new tools at its disposal to enhance the criminal justice process."*

Despite those successes, the Working Group stated that there were *"serious questions about the SFO's ability to investigate and prosecute foreign bribery cases effectively"* and specifically recommended that *"the UK make its system of plea bargaining more effective"*.

Soon after that came the Attorney General's "Guidelines on Plea Discussions in Cases of Serious or Complex Fraud", issued on 18 March 2009 and building on previous such guidance. Interestingly while the Director commented that *"I am keen to take what we usefully can from the American experience"*, the Attorney General warned that the new framework was *"careful to avoid a perception of plea bargaining associated with the US"* (see Attorney General's Office press release, "Criminal Justice Measures to Enhance Fraud Prosecutions to be Introduced", 18 March 2009). That potential dissonance between the framework's actual and perceived utility was to become clearly audible in Innospec.

Since then, Amec plc, an international engineering and project management firm agreed to pay a civil recovery order of almost £5 million having self-referred to the SFO



I love this dirty town

in March 2008 following an internal investigation into the receipt of irregular payments. Continuing to mimic American manoeuvres around the negotiating table, the Director followed the civil recovery order route but also linked the unlawful conduct to "books and records" offences rather than their more heavy weight cousins of bribery. The settlement again borrowed from "the American experience" through AMEC agreeing to appoint an independent consultant to review their improved compliance procedures.

In September 2009, the construction firm Mabey and Johnson was sentenced to a fine of £6.6m, prompting SFO Director Richard Alderman to say, *"this is a landmark outcome. The first conviction in this country of a company for overseas corruption and for breaking the UN Iraq sanctions and, satisfyingly, achieved quickly. The offences are serious ones but the company has played its part positively by recognising the unacceptability of those past business practices and by coming forward to report them and engage constructively with the SFO. I urge other companies who might see some parallels for them, to come and talk to us and have the matter dealt with quickly and fairly"*. An agreement was no longer seen as the mere resolution of one case but as the springboard for a continuing SFO policy to attract self-reported cases to come.

The key to the American and new SFO strategy was forging a deal with which all parties could live. But when the crime of business becomes the business of crime the driving motor to resolution runs the risk of allowing pragmatism to get the deal done to overtake the principles of the rule of law. The stage was therefore set. Liking the feel of their new American clothes, the SFO set about negotiating a global settlement in their first "concurrent jurisdiction case" to come before the courts of England and Wales for sentence.

THE INNOSPEC PROBLEM

The problem was that in both the Akzo and Siemens cases the combined total of commensurate penalties for offences in all jurisdictions did not exceed the offending company's resources. The sums were less convenient in Innospec. After careful, detailed and thorough analysis, all parties accepted that the pot available from Innospec amounted to

$40.2million. Yet both the SFO and the US authorities agreed that commensurate fines and penalties were over $400million in the US and $150million in the UK. A commensurate penalty in either jurisdiction would therefore have wiped out Innospec many times over.

It was in no one's interests to impose penalties that spelled financial ruin of the company. The SFO's guidelines to self-reporting, "Approach of the Serious Fraud Office to Dealing with Overseas Corruption", were published in 21 July 2009 and further clarified by Richard Alderman's open letter to Arnold & Porter dated 7 December 2009. The purpose of those guidelines was to set out to corporates the substantial advantages in self-reporting.

Since late 2008, Innospec had done all that it could to follow those guidelines. It had provided considerable cooperation to the authorities, including the funding of an internal investigation to the tune of £40million that had identified the bribery in Indonesia. It had purged itself of its corrupt practices by replacing all staff and agents involved and introduced enhanced compliance measures. And it had agreed to employ an independent compliance monitor. In short, it was critical to the continued success of the enforcement strategy that Innospec lived on *"pour encourager les autres"*.

THE PROPOSED SOLUTION

The SFO was left with an invidious decision. It could hardly refuse to enter negotiations to determine its slice of the pie. First, recalcitrance on the SFO's part could well have resulted in the US authorities simply gobbling up the lot. Secondly, any unresolved uncertainty as to Innospec's fate would leave it vulnerable to the financial markets, thus punishing the company not through criminal sentence itself but through uncertainty as to what that sentence may be, all at a time when the company's future needed to be secured to ensure the payment of any penalties.

Negotiations therefore began with Innospec, the SFO, DOJ, SEC and OFAC in 2008. By March 2010, all parties had reached a consensus. The SFO would have primacy in respect of the Indonesian corruption and the DOJ in respect of the Iraq corruption. The spoils would be divided three ways in roughly equal portions to the SFO, DOJ and SEC. The fundamental features of that agreement were:

i. A plea agreement under which Innospec would plead guilty, there would be joint submissions on sentencing in agreed terms and Innospec would enter into a monitoring agreement;
ii. An agreed case statement setting out the facts;
iii. A mitigation note prepared by Innospec and agreed by the SFO;
iv. An agreement in the form of draft undertakings with respect to compliance and monitoring and the appointment of a compliance monitor. Innospec

would pay the costs of the Monitor;

v. Innospec would pay:
   - $12.7m in relation to the SFO matters;
   - $11.2million in relation to the SEC matters;
   - $2.2million in relation to the OFAC matters;
   - $14.1 million in relation to the DOJ matters.

vi. A joint submission on the sentencing process. This made clear that of the $12.7million that would be available for the SFO:
   a) A confiscation penalty of $6.7m would be made in respect of the Indonesian corruption;
   b) There would be a civil recovery order of $6m of which $5m would be paid to the UN Development Fund for Iraq.

Critically, the structure of the deal allowed sentencing to take place simultaneously on both sides of the Atlantic to ensure minimum disruption to trading in Innospec shares.

A POINT OF PRINCIPLE

The equal division of the finite pot produced an exact number. It was the precision and insufficiency of the agreed fines which proved to be the stumbling block for the court. The DOJ and SEC were able to submit detailed submissions on sentence including the joint submission of all parties that the appropriate criminal fine was precisely $14,100,00. The fact that that figure was well below the sentencing guideline range of $101.5million to $203million and that if each of the DOJ, SEC, OFAC and the SFO sought appropriate penalties the total in criminal fines, civil penalties, disgorgement and pre-judgment interest would exceed $400million was presented together with Innospec's inability to pay. The reasoning behind the division of the fine and each payment among the four government authorities was laid out on a road of principle and legislation well trodden by the US authorities.

It was quite another story for the SFO: pragmatism (described as "laudable" by Thomas LJ) borrowed from the US clashed head-on with the sentencing principles of the Crown Court. There is simply no means by which a sentencing judge in the Crown Court can rubber stamp a carve-up between competing jurisdictions, however sensible it may be. In an effort specifically designed to resist the wholesale "Americanisation" of the plea negotiating process, the Crown Court judge retains specific discretion over sentence.

"A court must rigorously scrutinise in open court in the interest of transparency and good governance the basis of that plea and see whether it reflects the public interest", reminded Thomas LJ. A pre-determined, specific sentence stifled that duty. The Attorney General's Guidelines and the Consolidated Criminal Practice Direction reflect the constitutional principle in this country that the imposition of a sentence is a matter for the judiciary. The Attorney General's Guidelines states that the joint submissions of the prosecution and defence should be confined to the *"applicable sentencing range in the relevant guideline. The prosecutor must ensure that the submissions are realistic, taking full account of all relevant material and considerations"*. More restrictively, the Practice Direction para IV.45.24 makes specific reference to those Guidelines stating that *"sentencing submissions should not include a specific sentence or agreed range other than the ranges set out in sentencing guidelines or authorities"*.

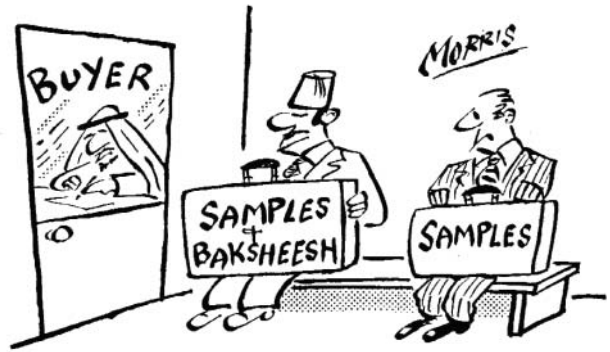
There was therefore no ground on which the SFO could enter an agreement under the laws of England and Wales as to the specific penalty to be imposed on an offender. Quite simply by entering the Innospec global settlement, the SFO had run straight off the edge of the cliff.

The courts had once before shown their unease at trotting down a route already mapped out for them by the US authorities. The Dunlop Three ([2008] EWCA Crim 2560) were charged in the US and the UK with cartel offences. The Three gave full cooperation to the US authorities and the Office of Fair Trading in the UK. Each entered into a formal plea bargain agreement with the US authorities, which included an agreement to plead guilty both in the US and the UK. They fell to be sentenced first in the USA. The plea agreement set out specific sentences for each of the defendants (2½ years for Whittle, 2 years for Allison and 20 months for Brammar). Having been sentenced in the USA, the Three were extradited to the UK for plea and sentence. The net effect of the plea agreement was that, provided the UK sentences were not shorter than the period specified in the plea agreement, the Three would not be expected to return to the US to serve any period in custody there. The US plea agreement with marked similarities to the Akzo agreement (see above) therefore sat behind proceedings in the UK as an elegantly pinned safety net to ensure the appropriate punishment.

The problem came when the Crown Court assessed the appropriate punishment as greater than that "set" by the US plea agreement. While the US plea agreement looked forward to the UK sentence, the UK proceedings were constitutionally blind to the US plea agreement. And while the safety net mechanism of the US plea agreement prevented any fall in sentence in the UK, it did not anticipate the Crown Court climbing higher.

The Court of Appeal voiced "considerable misgivings" in substituting for the sentences imposed by the judge at first instance sentences equivalent to those reflected in each of the US plea agreements while conceding that there was *"no alternative ... if we are to avoid injustice"*. Hallett LJ expressed particular concern for the way the US plea agreement may have fettered counsels' submissions before her. That concern was borne out of a constitutional imperative to arrive at the appropriate sentence in the UK proceedings in isolation because there were simply no means by which the court could properly and directly face the glare of the global settlement which acted as the practical driver for the US authorities and of course the Dunlop three.

The problem dodged in the Dunlop Three caused the collision in Innospec: how could the courts of England and Wales give direct recognition to a global settlement which, by its nature, sought to restrict their powers? It was not simply a rhetorical question from the Bench, for the benefits of the SFO's approach were clear. Thomas LJ took care to praise the Director of the SFO as having *"commendably adopted a vigorous policy of investigating corruption and other serious corporate crime whilst at the same time encouraging cooperation by companies and individuals in the investigation of such serious criminality and the provision of evidence against others. The investigation of the serious corruption by Innospec, the provision of their cooperation and the securing of clear evidence of serious corruption of foreign governments has been*



a welcome manifestation of vigorous prosecution by the SFO under his direction" (paragraph 22).

IRRESOLUTION

What then, is to be done? The answer for Innospec was relatively straightforward and could be decided on the basis that the company had clearly relied to their obvious prejudice on a legitimate expectation created by the SFO; the company had, after all, handed its own head on a platter to the SFO. The more complicated, and interesting, issue is what happens next.

Thomas LJ stated that the matter would have to be raised with the Lord Chief Justice to consider amendments to the Practice Direction or Rules of Criminal Procedure or decisions of the Court of Appeal. It is difficult to see any formalised dilution of the Crown Court's sentencing role resulting from that.

In the meantime, a number of related and highly important issues remain twisting in the wind. The case closes the gap in the level of fines imposed by the US and UK courts by significantly increasing the anticipated sentencing range in the UK for overseas corruption by corporate entities. Thomas LJ stated that:

- there was no reason for differentiating in financial penalties between the US and the UK;
- a uniform approach to sentence in corruption cases across jurisdictions was more effective;
- corruption was more serious than cartel offences.

This could be the most alarming legacy of Innospec for corporate directors wondering whether to have a closer look at their erstwhile relationships with foreign, strangely remunerated agents. Global settlements may bring resolution to calm the markets but the American influence could act as a significant multiplier on fines imposed by the Crown Court.

Could Innospec mark the demise of disposal through civil recovery orders? Without the possibility of a DPA, it was the next best alternative, much valued by the SFO and attractive to a company anxious to avoid the commercial death of having pleaded guilty to a bribery charge. But Thomas LJ stated that *"it will rarely be appropriate for criminal conduct by a company to be dealt with by means of civil recovery order...it is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction."* The only room for a civil order in such cases was *"as a means of compensation in addition to a fine"* [para 38]. The practice of charging "books and records" offences, because it holds the same attractions, is vulnerable to the same criticism.

The much touted technique whereby guilty corporations funded compliance monitors also took a judicial pounding: judges in both jurisdictions were critical of this emerging new cottage industry, described by Thomas LJ as "an expensive form of probation order" and by the Honorable Ellen Segal Huvelle variously as "an outrage", "a rip off" and more imaginatively "a boondoggle". After all, reasoned Thomas LJ, it was for the company to persuade the court that it genuinely had cast off its old ways to avoid being fined into insolvency and, once over that hurdle, auditors and directors in the post conviction period would be particularly careful to avoid any return to criminality. The American court added the thought that *"if [Innospec]*

were not paying the monitor, they would be paying fines, so it is our money really". In short the monitoring ticket so beloved in the US and readily adopted here was seen as an expensive waste of money.

These issues are of immediate importance. The global settlement in the long running bribery investigation into BAE Systems plc ("BAE") has yet to go before the Crown Court. On 5 February 2010 the SFO, DOJ and BAE announced that they had reached settlement agreements. The DOJ agreement involves BAE's business dealings in a number of countries, whilst the SFO agreement concentrates on the company's operations in Tanzania. The "pragmatic end" described by Mr Alderman now has a number of potentially frayed ends:

- BAE will not be pleading guilty to any bribery charges on either side of the Atlantic; the case has seen both the SFO and the DOJ continue the trend of selecting "books and records" offences, which has undoubtedly avoided the considerable debarment problems which BAE would have encountered with one of its major customers, the US Department of Defence, had it pleaded to bribery. While Thomas LJ's strong words were against translating bribery offences into civil settlements, it remains to be seen whether they will be applied by the courts in this manoeuvre designed to avoid bribery charges;
- The financial penalties flowing to the US ($400m) again eclipse those anticipated for the UK (£30m), but this is symptomatic of the entirely uneven division of the company's criminality between the jurisdictions; part, but not all, of the reason for that unevenness is that the US will address the company's "Al Yamamah" sales of Tornado aircraft and other defense materials to Saudi Arabia between the mid-1980's and early 2000's, picking up the baton dropped by the UK.

Kickbacks... kickbacks...

Without global settlements, formerly corrupt companies may find themselves in the unenviable position currently occupied by Halliburton, which faces a long, drawn-out and unpredictable series of isolated settlements as the enforcement authorities from the UK, Nigeria, France and Switzerland line up one behind the other. KBR (see above) was a Halliburton subsidiary but on 17 February 2010 Halliburton explained to US financial regulators that it was seeking plea negotiations with the SFO to settle its separate but linked investigation into the Nigerian bribery scheme. In a move designed to calm the markets, Halliburton publicly stated that it expects its remaining obligation to KBR to be $72 million as of the end of 2009. In light of Innospec, that anticipated exposure may need revisiting.

Thomas LJ's sentencing remarks criticised a panoply of enforcement options (in addition to highlighting some unattractive features of the confiscation regime, beyond the scope of this paper). The SFO welcomed the clarification those remarks brought. Although specified fines can now be

no more than a cloud of dust at the bottom of the ravine, we wait to see the impact of those remarks on:

- The availability of civil settlements,
- The availability of "books and records" charges,
- Proposing to a sentencing court a range of fines which is below "American par" and
- the insistence on monitoring systems.

Above all of that towers the threat that we are about to see a steep hike in the scale of fines for companies being sentenced for overseas corruption. Such turmoil makes the decision of whether to plead guilty (and, more importantly, in exchange for what) an ever more uncertain, sensitive and problematic series of issues.

The level of comfort in relation to those issues offered by a plea agreement may be diminishing. Discord between the SFO and the judiciary over the appropriate level of sentence seems only to be growing, even though plea agreements have only been utilised in a handful of cases. This may be because a guilty plea in an overseas corporate corruption case has a greater value to the SFO than to the courts. While the SFO's agreed pitch on sentence was disapproved by the court in Innospec, it was bypassed in R v Dougall.
Mr Dougall had been Vice President for Marketing for DePuy, a wholly owned subsidiary of Johnson and Johnson, which had made corrupt payments amounting to £4.5m to surgeons in Greece between 2002 and 2005 to secure £20m worth of sales of orthopaedic products. Mr Dougall self-reported, in full, his own and his company's wrongdoing at a time before the SFO had even started an investigation, engaging s73 of the Serious and Organised Crime Act 2005, for a reduction in sentence for his assistance following a guilty plea. The SFO recognised the value of Mr Dougall's cooperation, in particular because the case may not have seen the light of a court room without Mr Dougall's assistance. The SFO therefore jointly submitted with the defence that the appropriate sentence was a year's imprisonment, wholly suspended (no doubt a critical feature to Mr Dougall). On 14 April 2010, Bean J showed little hesitation in departing from that critical feature of the plea agreement, sending Mr Dougall straight to prison.
Mr Dougall is to appeal, but the case serves as a sharp reminder that the agreement of the SFO may be far from the bottom line sought by a corporate client. It falls to the defence practitioner to work out just what the agreement of the SFO on sentence is worth nowadays.

The one time that Wile E. Coyote caught the Roadrunner, he turned to camera and held up two placards. The first said, *"Alright, wise guys, you always wanted me to catch him"*; the second said, *"Now what do I do?"* Stay tuned for what the SFO, and perhaps more importantly the courts, will do next. Meanwhile, there remain some very pressing and difficult decisions to be made by directors looking at those strangely remunerated foreign agents.

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