

## **SFO targets big fish for Bribery Act prosecutions**

The Serious Fraud Office is here to stay. That is the message sent out loud and clear by Richard Alderman, the SFO director, and its most vocal champion over its twenty year history. The speed with which he has turned the tables on the Government to ensure its survival is extraordinary. In January this year, the UK government indicated that it was planning to merge the Serious Fraud Office into a National Crime Agency to create a new Economic Crime Agency (ECA) with which to tackle white-collar crime. Some six months later, and after a vigorous campaign by Alderman, the future of the Office is secure. Alderman says, 'The SFO is secure. We need to now get on and do our core job of fighting fraud and corruption - and also to help the government in its plans for this wider attack on economic crime, and setting up a National Crime Agency.'

The standard around which Alderman's campaign has mustered to save the SFO's life is the UK Bribery Act. This ground breaking legislation, a key aspect of the UK's bid to win international respectability after the Saudi Arabian crisis, has one key theme. It makes the company liable for bribery committed by its own employees, unless they are rogues who have acted on their own initiative. This piece of legislation, passed into law last year but only enforceable since July 1 this year, has served Alderman in two separate ways. First, it has given Alderman the opportunity to restructure the manpower of the SFO, and so transform the agency into a more flexible organisation. The SFO is struggling with a series of government cuts and its resources are severely strapped.

Second, the Act widens the scope for Alderman to push for greater powers to offer deals to corporations. The success of the American Department of Justice in extracting large sums from corporations in exchange for plea agreements is very attractive to Alderman and the Government. He says he wants to push for new powers to make these agreements legally enforceable.

The journey on which he is taking the SFO is clear. 'I say to Government that it is time to look at the tools that are available to organisations like the SFO, dealing with our type of top level crime. As can be seen from the judiciary in our recent cases, the criminal justice system has not yet fully adapted to some of the changes of these big corporate cases, where there are other jurisdictions also investigating. The US has had about 20 years' experience dealing with big corporate cases, and the judicial and criminal justice system there has developed very greatly over that period. We need to catch up, and fast. I am particularly interested in deferred prosecutions which are regarded as so successful in the US. I am also looking for a way to do global settlements - because big corporations want finality at the international level. Our courts have been critical of us when we ventured into global settlements. But we have to find a way of doing it that satisfies the judiciary. Global settlements are going to continue. So it is an important priority for us.'

Lawyers believe that Alderman has waged a successful campaign to show to government that these powers will enable prosecutors to rake more money into the UK exchequer from settlements of a monetary scale today adopted in the US. In one recent UK case against a company Innospec, a judge observed that the Home Office would gain 50% of the proceeds confiscated from the company, while the SFO would retain 37.5% of the funds. Alderman's demand for the power to offer Deferred Prosecution Agreements to companies that make financial settlements is likely to be accepted by Government, said one lawyer.

Early settlements are also attractive to government because they keep cases out of the courts. Government priorities are top of Alderman's agenda and he says that he has no wish to engage court time any longer than absolutely necessary. 'All of these cases are incredibly complicated. Money has been routed through vast numbers of jurisdictions and there is a raft of complicated offshore structures. So the question is: How do you dismantle them, where do you get your information from, what is it that you want to get before the criminal courts? I do not want a 12-15 months trial in front of a jury. I want the key criminality extracted and a three or four month trial before a jury, max.'

The resource issue is no less pressing for his own organisation, which has had to take some heavy budgetary cuts over the last year. It has been reported that the SFO's current budget was cut by 26%, to £39.5m since 2009. It is due to be further cut by another 25%, to £30.5m by 2014- 15. These cuts have taken place against a background where the agency has a growing number of cases in court and investigations underway. For Alderman, these restraints are more of a challenge than a threat. 'Nobody is ever going to say, I have enough resources! But realistically, in the current economic conditions, the onus is on each of us to get the most from our resource. And sometimes that means linking up. If we can get savings by working more closely with other organisations, working together, we should do that. That is why I want to work more closely with the City of London Police and the City Authorities. We aim to do more for less. We aim to provide more cases for the ever decreasing resource that we are allocated. There is no point complaining about it! This is the position we are in as a country; our position is not to resist the cuts, but to say they are there, so how do we get more results. What we found, no surprises, is that you have to get a lot sharper about what you have to do. You have to cut out unnecessary stuff. We have to decide what are the key things to do here, and let us forget what is peripheral. We have to be very disciplined about it.'

The SFO's structure has been streamlined under Alderman with many marginal departments cut out and jobs lost. The SFO's resources remain an issue for many lawyers. One was uncompromising. 'There is a desperate lack of resources. There is a deadening atmosphere at the SFO, it has no life, pulse, pace, energy, life, vitality. You've got to have a system where people are ambitious and able. There is an issue of morale, quality of people. Alderman has done as best as he can in the circumstances.'

While so much has been cut, one department that has been added to the SFO's structure. This deals with the fight against corruption. The SFO is the country's lead agency in the investigation and prosecution of the UK Bribery Act, and a significant (but unspecified) part of the SFO budget is now designated to that campaign. One lawyer said, 'the SFO lives or dies by the way it handles the Bribery Act. It is that crucial.' The amount of publicity effort the Director has put into promoting the Act to the City and government has impressed many lawyers and consultants. One consultant observed, 'He has a new tool at his disposal, and he can pursue things in a rather more weighty fashion. He is better armed; [formerly he had] only small arms - now he has some artillery. He has already won a few battles, but now that he has artillery, he needs to win some wars.'

The SFO's enforcement of the Bribery Act will be closely watched by lawyers and other agencies in the criminal justice system. Alderman is aware the subsequent actions taken by the SFO to police the Act must match the rhetoric. 'I certainly have made no secret of the fact that one of my priorities is going after the foreign companies within our jurisdiction that are doing their best to do down ethical UK companies. That is difficult. We are not looking for low hanging fruit. We are looking for the difficult cases. We don't want to find that people will think: Oh, those were the easy cases. Or, "they just knocked off a few small companies because they were easy". That is NOT what we want to do. We want to go for the difficult cases, the most difficult to bring before the criminal courts of this

country. When people see them, we want them to think: Yes, this is exactly the sort of cases we want the SFO to bring before the courts. If we brought a handful of small companies over facilitation payments, people would think: What on earth are they up to? That is not what we want to do. We want to [rather] go for the big bribes paid by the really corrupt companies. Now finding that is really difficult, but that is what we want to do. It means we can support the UK companies - because if a UK company has lost out, and has had to lay off employees in these difficult economic circumstances, it will make a big impact on families and communities. If we bring a case like that to the criminal courts, the jury will think, yes, this is the sort of case we expect to see from the SFO.'

The importance of support from the City's financial institutions is a regular refrain of Alderman. He frequently addresses audiences in law and accountancy firms, seeking to drum up interest in the Bribery Act in particular. Whenever he reads or hears that an industry body is concerned about an aspect of the Act, he arranges to meet the people or companies concerned. One lawyer observed, 'The SFO has changed out of all recognition from the old organisation. It is much more integrated with the business community. It is not a distant organisation, it seeks to engage, whether it be through round tables or dinners. Many boards have had direct contact either with him or Vivian Robinson, his adviser on the Bribery Act. He is much more engaged.'

The corollary of this is that Alderman has some particular targets in the City for his legislation. For example, he envisages the possibility of bringing anti-money laundering legislation to bear against shareholders of companies which are engaged in corruption. This may be used in cases where the UK Bribery Act is not relevant, but where the prosecutors can show that investors were party to the criminal activity. The Proceeds of Crime Act used for money laundering prosecutions allows prosecutors to order large confiscations. Alderman says, 'shareholders normally will not be criminally liable for bribery by a company about which they know nothing. Passive investors are not going to be the subject of criminal action under the Bribery Act. We will however want to see whether there was any money laundering, or whether or not you enjoyed through dividends or whatever, any of the proceeds of crime. We might want to start tracing that. I tell people, especially major shareholders: Society expects you to do your bit in ensuring proper governance in the companies you are involved in. So we tell investors: Society expects you to play a role here. There may be more we can do in legal terms, and we might see more on that in the course of the year.'

Investing institutions who challenge companies about their level of compliance will assist the SFO police the Bribery Act. Alderman warns, 'Bribery is something that could actually bring down that company. So it seems perfectly right for investing institutions to ask the management: What are you doing? Are you sure you have good procedures now, in terms of the Bribery Act? That is a perfectly legitimate question.' He deals specifically with the role of the passive investor such as the pension fund in overseeing its investments. 'The private equity fund who has invested in a company where bribery takes place is not guilty of failing to prevent bribery, because the bribery is not carried out by an associated person - unless some of the private equity people are on the board, and are closely associated with what is going on. They may have a deep knowledge. So they might have to look carefully there.'

'But in the normal type of case the big pension funds or other institutional investors won't be on the boards. They won't be involved in running the companies. So I don't think the employees in those cases are providing services to the pension fund. There are questions that we will be asking about these money flows. I don't think pension funds should be in a position where these questions are asked. Pensioners would be very unhappy to find that their fund had got themselves into this difficulty.'

Controversy has dogged the launch of the Bribery Act. This has been stirred by two sets of lobbying organisations. One represented companies engaged in hospitality who wanted to know the permitted limits to their ability to offer clients free jollies. The other came from foreign companies whose only link with the UK was a stock market listing. They argued that they were not subject to the Act, as it only applied to companies who did business in the UK. The first case was answered by Kenneth Clarke, the secretary of state for Justice, who said that hospitality should be proportionate, and companies who took clients to Wimbledon or the Grands Prix as a means of getting to know them acted within the law.

The Government's Guidance document, published on 30 March this year, upheld the concerns of the second lobby and said that companies with just a listing were exempt. However, Richard Alderman warns foreign companies - any of whom are from Russia and Former Soviet Union countries-- that the exemption might not be as comprehensive as they might have hoped. He says, 'There is some very fine detail about some very specialised circumstances, where the Ministry of Justice said this might have to go before the courts. In most cases those points are not likely to be relevant. If you have a company engaged with the UK then they are within our jurisdiction. They recognise that.

'I say to these companies: Please don't take a highly technical interpretation of the Bribery Act and persuade yourself that you are not within UK jurisdiction, and that you are free to go on bribing. The only safe way is to assume that, if you have that exposure, you need to build up the anti-corruption culture. I question how often a company has no more than stock exchange listing, because companies have to instruct bankers and lawyers; they have places of business here. That is not what the guidance says, i.e., that they are "not within our jurisdiction". The mere fact of a listing does not bring you within the jurisdiction; that is fine. But when you get more involved with bankers and lawyers in the UK that takes you beyond a listing. My view is that you are then carrying on business in the UK.'

Alderman's competence to understand and empathise with the business community that he also polices has undoubtedly won many supporters. Such backing was largely absent when he moved into the job, after a long and successful career at Customs and Excise, in April 2008. At that time, the country's lead investigative and prosecutorial agency involved in large scale financial crime was reeling from the failure of its BAe investigation. The then director of the SFO, Robert Wardle had summarily been told by Lord Goldsmith, the attorney general, to close down its long-running investigation of alleged bribes to Saudi Arabia amid much high-profile political controversy. The office was at its lowest ebb. Over three years, lawyers speak of someone who has surprised them by virtue of his competence at negotiating the choppy political waters of UK's Coalition government, his ability to express a vision of modern and technocratic law enforcement on City grandees and lawyers and his belief in the social duty of prosecutors to ensure that the City behaves responsibly.

The implementation of the Bribery Act over the coming year will pose Alderman with his toughest test. City lawyers expect the SFO to launch a slew of cases -- many are already thought to be under investigation-to show it means business. The size of the targets, the professionalism of the prosecution, and the shrewdness of the corruption charges levelled will be closely watched, to see if Alderman's actions are as powerful as his words. However, such complex cases take a long time in the investigation, let alone in the prosecution. It is perfectly possible that none will have come to court by the time the Director's contract ends next year.