

Time for a serious (SFO) rethink

Innospec represents a profound rejection of SFO corruption policy, says **David Corker**

The importance of Thomas LJ's sentencing remarks delivered in the *Innospec* case on 18 March in relation to the Serious Fraud Office (SFO) in particular and corporate criminality in general cannot be underestimated (*Regina v Innospec Limited* [2010] EW Misc 7 (EWCC)). It was not judicial hyperbole when the judge described the issues he wished to address as raising issues of "constitutional principle" and the rule of law.

It is ironic that this judgment was by a judge sitting in the Crown Court. Normally such first instance judgments carry little weight and are rarely reported. That an appellate judge who is also the deputy head of criminal justice decided to sit in the Crown Court strongly suggests that it was intended that his sentencing remarks should be widely broadcast and be seen as conveying the opinion of the senior judiciary. To underline this, the Lord Chief Justice took the first opportunity available to him to endorse them; in the Court of Appeal case of *Dougall* decided on 13 May, [2010] All ER (D) 113 (May).

A conspiracy to corrupt

The facts of *Innospec Ltd's* egregious foreign corruption are well known, as is the fact that this defendant pleaded guilty to the offence of conspiracy to corrupt. The entering of this plea was the culmination of negotiations the company had had with the US Department of Justice (DoJ) and the SFO as to its admissions concerning its corrupt acts. A narrative of these had been agreed and was provided to both the US and UK sentencing courts by the DoJ and SFO respectively. In this narrative in relation to what sentence should be imposed by a UK court, the SFO and the company jointly submitted that this should only consist of a confiscation order of \$6.7m. However, the narrative also revealed that the company would pay \$6m to the SFO by way of a civil recovery order. This was the deal which the SFO commended to the court.

This commendation conformed with the SFO's July 2009 guidance on how it would deal with cases of corporate foreign corruption. This guidance incentivised companies which self-reported their complicity in corruption with the emphasis being on the carrot not the stick. This leniency policy indicated to such companies that self-reporting would normally result in the SFO agreeing an out-of-court civil settlement. Or if a prosecution was in the SFO's opinion necessary this could be confined to a limited part of the suspected criminality and there would be potential for a joint submission on sentence to the court.

Novel assumptions

This new policy made a number of big assumptions novel to UK prosecutorial practice but common to US/DoJ practice.

- First, that the incidence of corruption is best reduced by a leniency programme which leads to most self-reporting companies achieving

there was no prosecution, the company agreed to an expensive form of SFO-imposed probation called monitoring.

Deals across the pond

In the US such deals between prosecutors and corporate defendants are widely used as a means of settling prosecutions. A policy of judicial acquiescence or self-restraint prevails. The recent New York case of *SEC v Bank of America* is the exception which proves the norm. The deal came before the US District Court in October 2009. However, the sentencing judge, Judge Rakoff, refused to countenance it as it was "a contrivance designed to provide the Securities and Exchange Commission [SEC] with a façade of enforcement and the management of the Bank with a quick resolution of an embarrassing enquiry... even under the most deferential view, this proposed Consent Judgment cannot remotely be called fair." In essence the judge found the deal was far too lenient in view of the scale of the bank's fraud on its shareholders.

The SEC returned to court in February with a fresh deal which the judge countenanced. Significantly in terms of explaining the role of the court in relation to such deals, the judge said in his February judgment that "the law requires the Court

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an immunity against prosecution in return for paying a civil "fine".

- Second, that if a prosecution of the company is partly or wholly necessary then the SFO and the defendant company are best placed to determine what the overall sanction should be.

The terms of the *Innospec* deal have already been outlined above. In the SFO-British Aerospace deal, the company pleaded guilty to a relatively trivial Companies Act offence for which a limited court-imposed fine is expected and it also agreed to make a substantial charitable donation. In other SFO-corporate deals such as *Balfour Beatty* and *AMEC* where

to give substantial deference to the SEC... the Court will fail in this duty if it did not give considerable weight to the SEC's position." Elsewhere in his judgment Judge Rakoff emphasised the duty of the court to acquiesce and not to interfere unless the proposed deal is plainly unfair or irrational.

Rejecting acquiescence

The judgment of Thomas LJ can be considered against this context; should the UK judiciary similarly acquiesce and allow the SFO primacy in deciding how corporate criminality should be sanctioned?

The judgment is a profound rejection of this SFO policy and of its ambitions to become a US-style prosecutor. In relation

to the SFO's presumption that it could elect to treat criminal conduct as a civil wrong Thomas LJ held that serious criminality should never be sanctioned merely via a civil settlement notwithstanding that such a settlement may disgorge millions of pounds from the company: "it will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a 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 the basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction."

Joint submissions

In relation to the SFO and the defendant making a joint submission on sentence Thomas LJ also roundly rejected the assertion that it was lawful for a prosecutor to do this; "the imposition of sentence is a matter for the judiciary". Furthermore, not only must the prosecutor never agree a deal on sentencing with the defendant, neither must it make submissions to the court as to what the sentence should be imposed. Echoing Thomas LJ in *Innospec*, the Lord Chief Justice in *Dougall* said that any "agreement or bargain between the prosecution and the defence in which they agree what the sentence should be, or present what is in effect an agreed package for the court's acquiescence is contrary to principle."

Realm of fantasy

It is implicit in Thomas LJ's judgment that he regarded the SFO's policy as an attempt to usurp the role of the court and that such an attempt needed to be repulsed in trenchant terms. Any ambition which the SFO director had of projecting the SFO into a DoJ equivalent doing deals across the spectrum of serious fraud offences with companies and determining where the public interest lies is now in the realm of fantasy.

This judgment is also remarkable in that such was the judge's antipathy to the notion of the SFO doing deals that it asserted that the sentencing court's jurisdiction extends much further in response to a guilty plea. Not only did the judge denounce the notion that a prosecutor could legitimately recommend a sentence to the court based on antecedent negotiations with the defendant it also held that the court should consider the terms of the deal itself: "A court must rigorously scrutinise in open court in the interests of transparency and good governance, the basis of that plea and to see whether it reflects public interest."

Accordingly this must encompass a power to supervise the decision of the prosecutor over what charges to prefer and more importantly, to enquire into why certain offences have not been charged.

This is a considerable enlargement of the court's supervisory function. Hitherto the two guiding principles have been that a court should be very reluctant to question a prosecutorial decision, especially where it has been reached on policy or public interest grounds, and second that once the prosecution has framed its indictment the trial judge has no power to "go behind" it and enquire why it is presented in the way that it is. Thomas LJ's judgment must be taken as disapplying both of these principles, at least in relation to any SFO-company deal. So for example when the BAe sentencing hearing is convened the stage is set for the judge, almost certainly, HHJ Rivlin, to demand from the SFO's counsel an explanation for why the company is not indicted for any corruption offence but only for the Companies Act offence for which only a small fine is payable (the alleged offence having been committed prior to the unlimited fining power becoming available, surely no coincidence). Furthermore, will the judge question why this seemingly extraordinarily lenient deal is in the public interest? Ultimately will he, like Judge Rakoff, reject the entire deal and tell the SFO to think again?

Recasting policy

Where does the *Innospec* judgment leave the SFO's policy on corruption? Plainly there is

a need for a substantial rewrite of it the tenor of which must be that the SFO can offer a far less enticing prospect to a would-be corporate self-reporter. The criminal courts cannot be bypassed and their sentencing discretion will not be fettered. Why then should companies ever feel inclined to self-report? The answer to this which Thomas LJ emphasised is that the penalties to be imposed upon a company which fails to self-report will be swingeing if not potentially ruinous. Corruption is "at the top end of serious corporate offending" and for a recalcitrant corporate defendant fines are likely to be measured in tens of millions. The sanction imposed on *Innospec* totalling \$12.7m was regarded by Thomas LJ as "wholly inadequate". Thus the stick gains ascendancy over the carrot.

When the SFO's director comes to recast his policy he would be wise to take account of the underlying significance of the *Innospec* and *Dougall* judgments. Both contain a warning that the SFO should be more vigilant about the risk of being seduced into an alliance with corporate defendants whereby public life is distorted to suit corporate interests. The allure of doing a deal (as opposed to having allegations tested in court with the risk of failure) must not distract the SFO from investigating and prosecuting serious criminality. This warning is perhaps most apparent from a passage in *Dougall* where the Lord Chief Justice said: "We need to take care, however, not to allow the issue of guidelines of prosecution of cases of fraud and corruption to suggest that they are rather more respectable forms of crime, or to be persuaded that somehow or other those who commit fraud or corruption should not be ordered to serve prison sentences. . . the administration of criminal justice does not treat those who commit offences of this kind as lesser criminals, there are no special rules which apply to the processes which apply when they come to be sentenced." In other words the SFO must ensure that it does not become the captive of the very persons it was set up to investigate and prosecute. NLJ

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