Hogan Lovells

Delusions of adequacy: The belated tale of adequate procedures

10 May 2018

It's been almost seven years since the UK Bribery Act (the Act) came into force. The Act's reach is extra-territorial but on the Act's home soil, on 21 February 2018, we saw the first contested case of "adequate procedures."

Before we go further, section 7 of the Act holds corporates strictly liable for failing to prevent bribery. "Adequate procedures" is a full defence to this offence of bribery under section 7(2) of the Act. If a commercial organization has in place anti-bribery and corruption (ABC) procedures to prevent persons from committing bribery, despite an occurrence of bribery, the corporate will be acquitted.

The case of *R v Skansen Interiors Limited*[1] speaks to cooperation, self-reporting, the compliance procedures even small businesses need to attend to, and the caveat emptor alert that investors in South-East Asia must be mindful of when acquiring UK companies or businesses that have a UK presence.

Skan-dal!

Skansen Interiors Limited (Skansen), a British interior design company employed 30 people in an open-plan 300 sq. metre office in London. This was no corporate behemoth. Until 2014, the company's anti-bribery policy was a collection of separate honesty, integrity, transparency, and ethics policies. These policies did not reference the Act but articulated a need for staff to be open, and honest. One policy was clearly laminated and affixed to the company's wall.

As part of a tender process, Skansen's former managing director Stephen Banks paid bribes to Graham Deakin, a former project manager at real estate company DTZ Debenham Tie Leung in order to secure office refurbishment contracts in London worth £6 million. The bribes were not huge sums: two payments adding up to £10,000 and a further payment of £29,000 which was intercepted before it was paid. What is of import is the policies and procedures in place before and after the bribery took place.

Skansen's defence made reference to these before policies as mitigation at trial. It was common sense that a specific Act-compliant policy was not necessary. This was a small company, operating in a local area with contractual clauses preventing bribery. It was clear: bribery was not permitted.

[1] *Regina v Skansen Interiors Limited*, Southwark Crown Court, Case Number: T20170224, 21 February 2018

How was the bribery identified?

In January 2014, Skansen had appointed a new CEO. It was this new CEO, concerned about the arrangement with DTZ, who initiated an internal investigation, implemented a specific ABC policy, and thus spotted and caught the final £29,000 payment, stopping it before it was paid. Stephen Banks was fired, another commercial director dismissed and Skansen submitted a suspicious activity report and reported the findings of the internal investigation to the police.

As part of the police investigation, Skansen provided company reports, offered up legally privileged advice, and provided considerable assistance. The trial convened for two days and the jury, not convinced Skansen had adequate procedures, returned a guilty verdict. But as Skansen had been dormant since mid-2014 with no assets, the judge was only able to impose an "absolute discharge."

Our review of the sentencing remarks from Taylor HHJ states that as Skansen was a dormant company with no assets, and as the only penalty would have been financial, no penalty imposed could be met. However, Her Honour Judge Taylor added, "had the company been in funds, the situation would have been different, and a substantial financial penalty would have been imposed."

Under the Rehabilitation of Offenders Act 1974, this sentence imposed on Skansen automatically became spent. On 23 April 2018, the individuals involved - Stephen Banks and Graham Deakin - were sentenced. Both had pleaded guilty to bribery in an earlier hearing. Banks was imprisoned for 12 months and disqualified as a director for six years. Meanwhile, Deakin, the bribe recipient, was sentenced to 20 months' imprisonment, disqualified as a director for seven years, and ordered to pay £10,697 representing the value of the bribes adjusted for inflation.

Self-report, cooperate… prosecute? Target practice

So what, we hear you cry: a diminutive design firm awarded a guilty verdict for failing to prevent bribery with no actual effect – no worry. Not quite. Skansen had cooperated, and despite initially lacking a specific ABC policy, had rooted out bribery and self-reported it. Despite its efforts, Skansen was prosecuted. Had Skansen not transferred out assets leaving a shell company, it would have faced a "substantial financial penalty." The deliberate transfer of assets to a parent company is no disguise or defence to proceedings. Taylor HHJ concluded that the transfer of assets from Skansen occurred "when there was no contemplation of the proceedings" demonstrating "no ulterior motive". Had the company been active, debarment from public contracts, in addition to fines, would have possibly followed which would cripple many businesses.

It appears Crown Prosecution Service (CPS) prosecutors wanted to send a message: bribery at whatever level of the corporate food chain will be prosecuted. Taylor HHJ echoed this: "there is a public utility of the public good in prosecuting cases of this kind to send a message about the necessity for companies to introduce policies and monitor policies which lead to the prevention of bribery and corruption." However, such a message is disjointed to that of the Serious Fraud Office (SFO). Cooperation and self-reporting are mantras of the SFO, especially since the advent of U.S.-style Deferred Prosecution Agreements (DPAs). Since its inception in the UK in late 2015, the SFO has only entered into four DPAs. In the U.S., there have been countless more.

Skansen was not afforded a DPA as the company had been dormant since mid-2014 and had no assets to pay a fine. But, it is difficult to ascertain how despite these actions a "substantial financial penalty" or even a prosecution should follow, regardless of the public utility argument. Skansen had dismissed individuals involved, conferred over legally privileged advice, and self-

reported to the police. “The police wouldn't even have known about it," said the former CEO, who implemented the changes.

Be specific, be (Act) compliant

What do we tell our corporate friends in the region? The case against Skansen doesn't change our advice dramatically, especially as there was no judicial commentary by the court on what constitutes adequate procedures. The Act, the FCPA, and the authorities that investigate under these powers are reaching around the world to cooperate with other agencies to combat bribery and corruption. With Skansen, we have a case of introspection. The CPS saw an opportunity to combat clear, undeniable bribery. The fact that in January 2014 new, specific policies were implemented at the company only further indicated the before policies were inadequate, the CPS argued. Small businesses, prospective small-business buyers, and those operating or doing business in the UK, beware. Specific policies attuned to the Guidance under the Act are the only way to avoid prosecution. It's their standard, not yours.

Contacts

Maurice Burke
Regional Head of Dispute Resolution, Singapore
T +65 6302 2558
maurice.burke@hoganlovells.com

Crispin Rapinet
Global Head of the Investigations and White Collar Fraud Practice, London
T +44 20 7296 2000
crispin.rapinet@hoganlovells.com

Khushaal Ved
Associate, Singapore
T +65 6302 7137
khushaal.ved@hoganlovells.com

“Hogan Lovells” or the “firm” is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.
The word “partner” is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.
For more information about Hogan Lovells, the partners and their qualifications, see www. hoganlovells.com.
Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.
© Hogan Lovells 2018. All rights reserved.