

Cross-Jurisdictional Bribery Law – Maintaining the “Special Relationship”?

2011 saw a significant rise in bribery cases and investigations in the UK, with estimates that the Serious Fraud Office is currently undertaking some 50 bribery related investigations. But just as large businesses in defence, construction and pharmaceuticals are often global in reach, such fraud investigations can also sweep across jurisdictions, multiplying the challenges for the fraud lawyer.

Nick Johnson, criminal barrister based at Exchange Chambers’ Leeds office, knows all too well of the complexities of such cross- jurisdictional issues. He is currently instructed in a case concerning a joint UK Serious Fraud Office and US Department of Justice investigation into alleged overseas bribery of surgeons by pharmaceutical giant Johnson & Johnson. He is sole counsel for a UK citizen, a former executive associated with the company, which itself has already paid approximately \$80 million in fines in both countries. Inquiries are now turning to individual executives, with one man having faced prison in the UK already. Similar investigations are now being undertaken into at least a dozen other major drug and device makers.

Commenting on the case, Nick, who is one of only seven Band 1 Leading Juniors for Criminal Fraud in the UK according to the 2012 Chambers UK legal directory, said:-

“Having advised at a pre-charge stage in relation to the SFO inquiry here, I am now actively involved in negotiations in New York with the Department of Justice, with input from the FBI and the Securities and Exchange Commission. My solicitor and I work here and in the US, in tandem with Manhattan based lawyers, which is a fascinating challenge when facing the varying legal, procedural and commercial issues that apply. The aim is to provide the best possible representation which necessarily requires a blend of experience across both jurisdictions.”

That solicitor is Colin Byrne of Legal 500 firm Howard & Byrne Solicitors in York, himself a former LAG Legal Aid Lawyer of the Year and member of Exchange Chambers’ Fraud Forum. Colin was quick to spot the vast differences that apply across the Atlantic Ocean:-

“In the US, there is a much less rigorous regime for pre-trial disclosure of material relied upon. In the UK, it would be commonplace for me to demand disclosure from the investigating officers at an early stage, so I could properly advise and take instructions prior to interview. There is no similar obligation in the US and often the US defence counsel is in possession of incomplete or no material until shortly before trial.”

Up until recently, another difference was that the provisions invoked in the US for fraudulent or corrupt behaviour were not outlined in UK law. However, the recent Bribery Act 2010, which came into effect on 1 July 2011, contains offences such as offering an advantage, bribery of a foreign public official, a new offence of failure by a commercial organisation to prevent a bribe being paid and extra-territorial jurisdiction for offences committed by UK individuals and corporations abroad.

Nick believes that all of this makes the definition of bribery, and the consequences of it, much clearer: “Even in financially difficult times, there is clear potential for prosecutors to use these new provisions to pursue alleged corruption and bribery in a similar manner to the US, and to recover large corporate fines, which would be consistent with the political will to keep large corporations in check and ensure fair competition. So it is likely that the UK will see much more of the work that I am involved in in the US right now.”

When suspecting corruption or fraudulent behaviour, the US Department of Justice has historically pursued the companies for recompense: “However, the only people company fines directly hurt are the current shareholders, who are innocent of any wrongdoing,” said Nick, “In response, recently there has

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been a move by prosecutors towards holding specific individuals within those companies to account instead, when it is vital to ensure a fair approach and not just the creation of scapegoats.”

With possibilities for private funding, and the emphasis on a large amount of pre-charge negotiation in the US system, there is plenty of potential for UK solicitors and barristers to increasingly work in tandem with US lawyers on cross-jurisdictional issues, believes Nick: “With US investigations continuing and the likely impact of our Bribery Act here, there is clear scope for a “special relationship” to continue.”