‘Justice deferred is Justice denied? Not necessarily’

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Introduction

At long last, the Serious Fraud Office has received a major boost in its prosecution of bribery. Serious Fraud Office v Standard Bank PLC is a landmark case because it is not only the first case where the SFO has looked to prosecute a commercial organisation for failure to prevent bribery under Bribery Act 2010, but the first occasion where it has sought to enter a Deferred Prosecution Agreement under Crime and Courts Act 2013.

Background to Deferred prosecution Agreements in the United Kingdom

In the United States of America, the prosecution authorities, the Department of Justice and the Securities and Exchange Commission, have deployed DPAs for

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2 Hereinafter ‘SFO’.
3 Serious Fraud Office v Standard Bank PLC Preliminary Judgment U20150854 Southwark Crown Court 30 November 2015.
4 Bribery Act 2010, s. 7.
5 Hereinafter ‘DPA’.
6 Crime and Courts Act 2013, s. 45.
7 Hereinafter ‘US’.
8 Hereinafter ‘DoJ’.
9 Hereinafter ‘SEC’.
many years and obtained significant income from fines.\textsuperscript{10} In essence, this involved a process of ‘plea bargaining’. In the US, because of the high probability of conviction on indictment, most cases are dealt with by the defendant ‘pleading guilty at an early stage of the process in exchange for a reduced sentence.’ This conserves resources for cases which merit a full trial.\textsuperscript{11} The attractions of utilising DPAs were not lost on the SFO and, indeed, it was a key recommendation of a review into the SFO’s operations.\textsuperscript{12} With the same objective in mind of expeditiousness and \textit{cost-effectiveness} [authors emphasis], and in parallel with its policy to engage with corporates through self-referral, the SFO endeavoured to respond to exhortations to adopt a more modern, or transatlantic, approach. It is important to briefly mention the cost-effectiveness of the DPA process and how this relates to the SFO since a series of harsh budget restraints that have been imposed since 2010. For example, since the creation of the Coalition government in 2010, the SFO, like many other government departments and agencies, has had its budget cut as part of a glut of extensive austerity measures. For example, the annual budget of the SFO in was £43.3m, in

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\item \textsuperscript{12} Ibid.
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2008/2009 it was £53.2m, in 2009/2010 the figure reduced to £40.1m, in 2010/2011 it was £35.5m, in 2011/2012 the annual budget of the SFO was £31.5m and this will reduce to £34.8m in 2012/2013, £32.1m in 2013/2014 and £30.8m in 2014/2015.\(^{13}\) The decision to reduce the budget of the SFO, at a time where white collar crime has increased and the duties of the SFO have been expanded to incorporate the enforcement of the Bribery Act 2010, has been questioned and criticised.\(^{14}\) However, it is important to note that fraud is an extremely difficult criminal offence to detect, prosecute and expensive to enforce.\(^{15}\) This was clearly illustrated by the 1994 SFO prosecution of Virani, in which 50% of the trial costs was associated with accountants who assisted with the prosecution.\(^{16}\)

\(^{13}\) Serious Fraud Office *Serious Fraud Office Annual Report and Accounts 2011-2012* (Serious Fraud Office: London, 2012) at 7.


This entailed changing tack to negotiate outcomes with defendants in order to realise the advantages of cost savings and certainty, which has not been without difficulty. In two cases the SFO plea with defendants caused tensions with the judiciary. Firstly, in *Innospec*, the Court of Appeal criticised the SFO for ‘usurping’ the Judge’s authority by agreeing punishment. Secondly, in *Dougall* the Judge rejected SFO claims for leniency. Since these cases would appear to be part of a “programme (...) instituted to encourage whistleblowing by city insiders, lawyers and accountants and to expand the SFO’s role in public anti-fraud initiatives”, judicial antipathy was of clear concern.

Shortly after his appointment as Director of the SFO, David Green outlined his vision and stated that “I am keen on maximising the set of tools available to SFO as an investigation and prosecuting agency, and DPAs represent a new and imaginative tool to deal with serious economic crime committed by commercial organisations”. Green considered that “[four] very important principles need to be observed: firstly that “sentencing in this jurisdiction is for the judge not the prosecution ( )”, and [secondly] “corporates cannot be seen to be allowed some special kid glove treatment ( ) individuals will be prosecuted where that is the appropriate course of action ( ) [lastly] admissions as to conduct must be realistic, factual and not fanciful”.

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18 *R v Dougall* [2010 EWCA Crim 1048.
Some eighteen months later, DPA’s became available to the SFO by virtue of the Crime and Courts Act 2013.\textsuperscript{21} A DPA, which is a discretionary tool,\textsuperscript{22} is subject to court approval.\textsuperscript{23} The prosecutors are either the Director of Public Prosecutions or the Director of the SFO, with the Act making it clear that powers to enter into a DPA must be exercised personally by the designated prosecutor.\textsuperscript{24} The Act specifies the “persons who may enter into a DPA with a prosecutor”, which are in three categories: “P may be a body corporate, a partnership or an unincorporated association, but may not be an individual”.\textsuperscript{25} This latter provision differs from the US so that in the UK, ‘DPA’s will not be available for individuals, whether for individual crimes or for action undertaken on behalf of an organisation.\textsuperscript{26}

The expectation was that a DPA would be likely to be available to companies which “self-report suspected criminal misconduct to SFO”.\textsuperscript{27} In such circumstances, the SFO would launch a formal criminal investigation to test the evidence and scale of offending. The SFO’s position is that:

“The available evidence may well pass the evidential test. But if the company has taken appropriate disciplinary action against those responsible, made appropriate amendments to its compliance regime, compensated victims, and genuinely and proactively cooperated with the

\textsuperscript{21} Ibid.


\textsuperscript{23} See above n 20.

\textsuperscript{24} Crime and Courts Act 2013, s. 45 Schedule, 17. 3.

\textsuperscript{25} See Crime and Courts Act 2013, s. 45, Schedule 17. 4.

\textsuperscript{26} Polly Dyer, ‘Time to agree terms?’, (2013) 163 NLJ 11, 12.

SFO investigation, it is hard to see how it would be in the public interest to prosecute the company, as opposed to individuals”.\textsuperscript{28}

The SFO warn that “if the corporate chooses to bury the misconduct rather than self-report, the risks attendant on discovery are truly unquantifiable”.\textsuperscript{29} The expectation has been that the first DPA, subject to judicial supervision, would signal the future use of this mechanism and “as experience is built up by all parties, this will generate consistency and therefore predictability around the likelihood of achieving a DPA”.\textsuperscript{30} The reasoning for this is that “the most likely candidate for the first DPA will be the type of case that would attract the lowest level of fine on a plea of guilty if proceedings were to take place”.\textsuperscript{31} The clear issue for the SFO is that although it might well wish to avail itself of the new facility, given the history of judicial opprobrium, the SFO would not wish to risk an adverse outcome and the attendant publicity, of its first DPA presentation to court. Thus, it may be that the first cases of significance are still more distant.

**Serious Fraud Office v Standard Bank PLC**

This case involved Standard Bank PLC, a UK bank and a subsidiary of Standard Bank Group Ltd, a South African public company.\textsuperscript{32} The Group was also the ultimate parent of Stanbic Bank Tanzania Ltd (Stanbic), a Tanzanian company. The Government of Tanzania wished to raise funds and Stanbic, which was not

\textsuperscript{28} Ibid.

\textsuperscript{29} Serious Fraud Office above, n 27.

\textsuperscript{30} Ibid.

\textsuperscript{31} *The Times*, 27 February 2014. ‘Doing deals to avoid prosecution: which company will be first?’ [http://www.thetimes.co.uk/tto/law/article4017176.ece](http://www.thetimes.co.uk/tto/law/article4017176.ece) accessed 3 March 2014.

\textsuperscript{32} Now called ICBC Standard Bank plc.

licensed to undertake this type of transaction, engaged Standard Bank which was licensed. Originally in February 2012, Standard Bank / Stanbic quoted a fee of 1.4% of gross proceeds raised, later Stanbic increased the proposed fee to 2.4%, because 1% would be paid to a local Tanzanian partner, Enterprise Growth Market Advisors Limited (EGMA). Two of EGMA’s three directors and shareholders was Commissioner of Tanzania Revenue Authority and, as such, a serving member of the Tanzania Government. A second director was formerly Chief Executive of Tanzanian Capital Markets and Securities Authority. The case was heard by a senior judge (Leveson P) who noted that the potential for conflict and risk was evident but not addressed by Stanbic. In November 2012, Standard Bank/ Stanbic were formally appointed by the Government of Tanzania to raise funds which, when completed in March 2013, amounted to $600m. Stanbic paid $6m to EGMA, most of which was withdrawn in cash within 10 days.

Stanbic staff raised concerns about these withdrawals, escalated their concerns to Standard Bank Group in South Africa, which commenced an investigation on April 2 2013. Standard Bank in London, without carrying out an investigation, instructed its law firm on April 17 to report the matter to the authorities, which it did within seven days to the Serious and Organised Crime Agency and the SFO.33

The issue facing the SFO was consideration of the conduct of Standard Bank. The judgment makes clear that the predicate bribery offence was allegedly committed by two senior executives of Stanbic, involved the intention to bribe a

33 See above n 3. Hereinafter ‘SOCA’.
foreign public official, use of public funds to make the bribe payment and could have compromised the integrity of the financial market. However, that was not Standard Bank’s conduct, because Stanbic was a sister company of Standard Bank within the South African Standard Bank Group. The SFO had concluded that there was insufficient evidence to suggest that any of Standard Bank’s employees had committed an offence or knew that two senior executives of Stanbic intended the payment to constitute a bribe.34

The SFO, having reached the conclusion that there was insufficient evidence against employees of Standard Bank in relation to the bribe payment, with the consequence that the Bribery Act 2010 offence of “bribery of foreign public officials” 35 was not available, considered whether Standard Bank could have prevented the bribery.36 The “failure of commercial organisations to prevent bribery” is an offence under the Bribery Act 2010:37

“A relevant commercial organisation… is guilty of an offence under this section if a person… associated with [the organisation] bribes another person intending—

(a) to obtain or retain business for [the organisation], or

(b) to obtain or retain an advantage in the conduct of business for [the organisation].” 38

A complete defence to this offence is for a commercial organisation to have had in place adequate procedures designed to prevent persons associate with the commercial organisation from undertaking such conduct.39

34 Ibid.
35 Bribery Act 2010, s. 6.
36 See above n 3.
37 Bribery Act 2010, s. 7.
38 Bribery Act 2010, s. 7(1).
The offence of failure of commercial organisations to prevent bribery and the defence of having adequate procedures had not prior to this case been tested in court and, as such, represent a significant development in the field of anti-bribery and corruption. In this case, Stanbic is an associate of Standard Bank and they had different management. In order for Standard Bank to avail themselves of the “adequate procedures” defence, they would have to demonstrate a clear policy. However, the judgment found that the policy was unclear, was not re-enforced effectively through to the team dealing with the fundraising through communication and training. The failure to provide sufficient guidance on relevant obligation and procedures where two group companies were involved, led to a transaction with a government of a high risk country with checks on a third party undertaken by a sister company where Standard Bank had no interest, oversight, control or involvement. Standard Bank did not undertake enhanced due diligence processes, did not identify the presence of politically exposed persons not the change in arrangements with the introduction of a third party charging a substantial fee. The judgment concludes that an anti-corruption culture was not effectively demonstrated within Standard Bank as regards the transaction at issue.

The outcome of this consideration whereby the SFO found that Standard Bank had failed to prevent bribery in circumstances where it could not avail itself of the defence of ‘adequate procedures’, is the indictment in the final judgment:

39 Bribery Act 2010, s. 7(2).
40 See above n 3.
“Standard Bank PLC, now known as ICBC Standard Bank PLC, between 1st day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Stanbic Bank Tanzania Limited and / or Bashir Awale and / or Shose Sinare, from committing bribery in circumstances which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by:

(i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank PLC and Standard Bank Tanzania Limited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and

(ii) Intending thereby to induce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank PLC and Stanbic Bank Tanzania in the process of appointing or retaining them in order to raise the said monies”.

The next consideration is whether the interests of justice would be served by entering a DPA as opposed to prosecution. The SFO has to demonstrate to the court that the proposed DPA is in the interests of justice and the proposed terms of the agreement are fair, reasonable and proportionate. The reason for this is that the prosecutor has to approach the court after negotiations have commenced. A critical element of the UK DPA procedures is the requirement that the court examines the proposed agreement in detail. This is different from the US. The first hearing is held in private, in this case on November 4 2015, with the preliminary judgment published, if approved, with the final judgment.

The key issues for Standard Bank are: the seriousness of the conduct which, in this case, is that of Stanbic rather than Standard Bank; the immediate self-report to SOCA and SFO; co-operation with the SFO; and history of similar conduct.

41 Ibid.
42 Criminal Procedure Rules 2015, 11.3(3)(i).
43 See above n 3.
involving prior criminal, civil and regulatory enforcement actions. Standard Bank did immediately report to SFO and instructed its solicitors to investigate and disclose its finding to SFO, which it did on 21 July 2014. The SFO gave credit for self-reporting a matter which might otherwise have remained unknown to it and, bearing in mind the report came from Stanbic via Standard Bank Group, the conduct might not otherwise have come to the attention of the SFO. However, the judge makes plain that mere self-reporting is not sufficient: the organisation must not withhold material which would jeopardise an effective investigation and prosecution. In this case, Standard Bank conducted a detailed internal investigation, sanctioned by and reported to SFO. This information appears in the published Statement of Facts.44

The question of previous conduct is of interest: has Standard Bank been subject to prior criminal, civil or regulatory enforcement action? Here, Standard Bank has not been convicted for bribery and corruption nor has it previously been investigated by SFO. However, it has been subject to enforcement action by the Financial Conduct Authority for failing in its anti-money laundering procedures.45 The judgment confirms that by April 2014, the FCA had accepted a report that Standard Bank had taken extensive steps to remediate pre-existing failures.

This step-by-step approach, with the additional consideration that the entity of Standard Bank had changed, allowed the court to agree that the conduct of

44 See above n. 32.
45 See above n 3. Hereinafter ‘FCA’.
Standard Bank could be dealt with by a DPA, subject to terms. This is of particular interest because at the time DPAs became available, commentators thought that “the most likely candidate for the first DPA will be the type of case that would attract the lowest level of fine on a plea of guilty if proceedings were to take place”. Standard Bank is not such a case. In this instance, the court stated that:

“the requirements falling upon Standard Bank which the court declared were likely to be in the interests of justice and were fair, reasonable and proportionate are as follows:

I. payment of compensation of US $6 million plus interest in US $1,046,196.58;
II. Disgorgement of profit on the transaction of US $8.4m;
III. Payment of a financial penalty of US $16.8 m;
IV. Past and future co-operation with the relevant authorities (as further described) in all matters relating to the conduct arising out of the circumstances of the draft Indictment;
V. At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws (as further described); and
VI. Payment of the costs incurred by the SFO”.

46 See above n 31.
47 See above n 3.
The preliminary judgment provides a detailed explanation of the rationale for the various terms. The Government of Tanzania is to receive compensation for the additional 1% fee paid to EGMA, together with interest and with the 1.4% fee which Stanbic and Standard Bank received for arranging the transaction.\(^{48}\) In addition, the SFO’s costs of £330,000 are to be covered. The major financial element, though, is the payment of a financial penalty of $16.8m to HM Treasury (Consolidated Fund).\(^{49}\) The judge described this as the most difficult assessment and referred to the requirements of the Crime and Courts Act 2013 which states that the financial penalty should be “broadly comparable to the fine that a court would have imposed” following conviction after a guilty plea. The detailed analysis commences with the gross profit earned on the transaction of $8.4m and applied the Sentencing Council Guidelines in respect of Fraud, Bribery and Money Laundering Offences,\(^{50}\) with a greater than medium level assessment of harm leading to a multiplication of 300%, reduced by one third to reflect the early guilty plea.

The financial provisions of the DPA could have been dealt with by a guilty plea in court but the purpose of the DPA, which will expire on November 30 2018, is for the other conditions of cooperation with the authorities and commissioning and

\(^{48}\) Ibid.
\(^{49}\) Crime and Courts Act 2013, s. 45 Schedule, 17 (14).
submitting to an independent review of its existing internal anti-bribery and corruption controls as contemplated in the Crime and Courts Act 2013.\textsuperscript{51}

\section*{Conclusion}

The SFO has achieved a double first in \textit{Serious Fraud Office v Standard Bank PLC}.\textsuperscript{52} This is the first occasion the SFO has prosecuted a commercial organisation for failure to prevent bribery in a case which has provided the first opportunity to enter into a DPA. The facts are such that the SFO was only able to investigate that failure, rather than the bribery itself which falls within the purview of the Government of Tanzania which, the judge was told, has opened its own investigation into Stanbic. The key element of this case was the promptness of the self-report, the fully disclosed internal investigation and co-operation of Standard Bank, upon which the judge and SFO commented approvingly.\textsuperscript{53} The question of ‘justice being delayed is justice denied’ is not the case in this matter. The agreement between the parties was held by the court to be in the interests of justice, the terms and supporting documents have been published so that the entirety of the process is open to public scrutiny, and the Respondent, Standard Bank, has had to make immediate payments totalling $32.6m, and a further $4.2m to US authorities.\textsuperscript{54} Furthermore, Standard Bank has given undertakings

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\item \textsuperscript{51} Crime and Courts Act 2013, Schedule 17 (5)(3)(e).
\item \textsuperscript{52} See above n 3.
\item \textsuperscript{54} Another feature of this case is the involvement of the US authorities. The $600m Sovereign Debt securities was marketed as a private placement in the U.S. pursuant to Securities and
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to the SFO relating to its corporate compliance programme in the DPA.\textsuperscript{55} A particular benefit to Standard Bank is that this matter, which commenced in 2012, where the transaction took place in March 2013, reporting to SFO in April 2013, investigation report in July 2014, did not enter the public domain until 30 November 2015. Thus, by self-reporting and working with the SFO, Standard Bank was able to ensure the matter remained confidential, rather than being subject to publicity because of an announcement by SFO that had accepted a case for formal investigation. This is the first DPA which the SFO believes will serve as a template for future agreements.\textsuperscript{56} There will, thus, be much interest in the next case.

Exchange Commission Regulations. By offering the Tanzanian sovereign bonds, Standard Bank had a duty to disclose to investors material facts that it knew or should have known concerning the transaction. It did not disclose the involvement of EGMA and the fee EGMA was to receive. As a result of the conduct in failing to disclose the material facts, Standard Bank committed violations of Sections 17(a)(2) of the Securities Act 1933. ‘The SEC’s order requires Standard to cease and desist from committing or causing any violations and any future violations of Section 17(a)(2) of the Securities Act of 1933 that prohibits obtaining money by any materially untrue statement or omission, and to pay a $4.2m civil penalty.’ U S Securities and Exchange Commission, ‘Standard Bank to Pay $4.2m to Settle SEC Charges’ \textit{http://www.sec.gov/news/pressrelease/2015-268.html} \textit{http://www.sec.gov/litigation/admin/2015/33-9981.pdf} accessed 4 December 2015.


\textsuperscript{56} See above n 53.