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BANKING AND FINANCE DISPUTE RESOLUTION
LITIGATION, ARBITRATION, INVESTIGATIONS AND FINANCIAL CRIME

A DOUBLE FIRST: DEFERRED PROSECUTION AGREEMENT PUBLISHED IN RELATION TO FAILURE TO PREVENT BRIBERY UNDER SECTION 7 OF THE BRIBERY ACT 2010

THE FACTS

In early 2012, Standard Bank Plc (as it then was) (SB) and its former sister company Stanbic Bank Tanzania Limited (ST), with branches in Tanzania, began to negotiate a mandate to arrange a US$600m sovereign note private placement for the Government of Tanzania (GOT), for a proposed fee of 1.4 per cent of the amount raised. The transaction was ultimately handled under a joint mandate between SB and ST as "lead manager". During the protracted negotiation of the transaction, an adviser or "local partner", EGMA (E), was introduced to facilitate the deal. An increased arrangement fee for SB and ST of 2.4 per cent was eventually agreed to be shared with E. SB conducted KYC and due diligence checks on GOT, but relied on ST to perform KYC checks on E, which it did when opening a bank account for E.

In September 2012, a Collaboration Agreement was entered into between ST and E - SB was not a party - under which E was said to be appointed by ST (and affiliates) to act on its behalf as co-ordinator in respect of the terms and conditions set out in the proposed joint mandate. E's role was said to include the provision of advice as well as facilitation in respect of regulatory approvals. E's fee was agreed at 1 per cent. According to the SFO, both the CEO and the Head of Investment Banking at ST knew of E's connection, through one of its directors, with GOT. The joint mandate was eventually signed in November 2012; it did not refer to a local partner, but the separate fee letter issued by GOT stated that ST and SB were acting "in collaboration with" an unnamed partner.

Following the success of the private placement in March 2013, the total fee of 2.4 per cent was split between SB (0.70 per cent), ST (0.70 per cent) and E (1 per cent). E's fee (US$6m) was paid by ST to E's account at ST. Over a 10 day period, substantial cash withdrawals were made at the relevant branch of ST, with the vast majority of the US$6m fee being withdrawn.

Staff at ST raised concerns about the withdrawals which were immediately escalated within ST, and referred to the ultimate parent of SB and ST (SB Group). SB Group immediately launched an internal investigation, and within three weeks the matter had been reported by SB Group to both the Serious Organised Crime Agency (as it then was) and the SFO.

THE OFFENCE

Following its own investigation, the SFO was satisfied that there was sufficient evidence to provide a realistic prospect of conviction against SB under the Bribery Act 2010. A draft indictment was, therefore, preferred (and then suspended) charging SB with the offence of failure by a commercial organisation (CO) to prevent bribery, due to inadequate systems, contrary to Section 7 of the Bribery Act 2010. Section 7, which is not a substantive bribery offence, is engaged where a person associated with CO bribes another person intending either to obtain or retain business for CO, or to obtain or retain an advantage in the conduct of business for CO. At the same time, the associated person bribes another if, and only if, he is or would be guilty of bribing another person under Section 1, or bribing a foreign public official under Section 6, whether or not he has been prosecuted for such an offence.

Section 7 affords extra-territorial application in relation to the conduct of associated persons overseas by providing an exception to the need for offenders under Section 1 and Section 6, in the context of Section 7, to have a close connection with the UK.

Therefore, assuming that the SFO could satisfy the Court on the facts that the relevant associated person would be guilty of bribery under Section 1 or Section 6, if he were to be prosecuted in the UK, the elements of the Section 7 offence would potentially be satisfied.

In this case, the SFO alleged that the associated person was ST and/or its CEO and Head of Investment Banking, and that they would be guilty of bribery under Section 1 of the Bribery Act 2010.

Section 1 of the Bribery Act 2010 requires the briber to offer, promise or give a financial or other advantage to another person. The briber must intend the financial or other advantage to induce a person to perform improperly a relevant function or activity (whether public or business related), or to reward such improper performance. To be improper, the performance by the relevant person must be in breach of the expectation that a reasonable person in the UK would have that it would ordinarily be performed in good faith, impartially, or in accordance with a position of trust.

According to the SFO, ST and/or its CEO and Head of Investment Banking promised or gave a financial advantage to E (i.e. the US$6m fee), for which E did not apparently provide any services, intending that advantage to induce a representative of GOT improperly to show favour to SB and ST in appointing or retaining them for the purposes of the transaction. In other words, the fee was an inducement to ensure that SB and ST were awarded the joint mandate for the private placement. The SFO alleged that ST/CEO/Head of Investment Banking permitted US$6m to be paid to E from the sum raised on behalf of GOT intending it to be used to reward

those public officials they believed had been induced to act improperly. They committed that offence intending to obtain or retain business for SB (or advantage in the same).

THE DEFENCE

Under Section 7(2) of the Bribery Act 2010, it is a defence for CO to have had in place adequate procedures designed to prevent associated persons from undertaking bribery. On the basis of the material disclosed, the Director of the SFO concluded that SB did not have a realistic prospect of raising the defence. The SFO alleged that the applicable policy was unclear, such as in not requiring due diligence on E, and was not reinforced effectively to the SB deal team through communication and/or training. In particular, SB's training was said to lack sufficient guidance about relevant obligations and procedures where two entities within the SB Group were involved in a transaction and the other SB Group entity engaged an introducer or consultant such as E.

THE TERMS OF THE DPA

After negotiation with SB, which co-operated completely with the SFO throughout the process, a provisional agreement was reached as to a DPA which the SFO considered to be in the interests of justice, and the terms of which it considered to be fair, reasonable and proportionate. Upon the proposed DPA being presented to the Court, a declaration was made approving the following terms:

- Payment of compensation of US$6m plus interest
- Disgorgement of profit in the amount of the total fee paid to SB and ST (US$8.4m) under the joint mandate
- Payment of a financial penalty of US$16.8m
- Future co-operation
- An independent review at SB's expense of existing anti-bribery and corruption controls, policies, and procedures
- Payment of the SFO's costs

The duration of the DPA for implementation purposes was set at three years, although the first three amounts payable above were to be paid within seven days.

COMMENT

In July, the Director of the SFO stated that he expected to conclude a DPA before the year end. This first published DPA not only provides an enormous amount of guidance in relation to the DPA process as a whole, but also provides considerable insight into the way in which Section 7 of the Bribery Act 2010, combined with Section 1, may be applied in cases where the associated person is based overseas and is out of reach of the UK criminal authorities. In particular, it is clear on one interpretation that a distinction has been made between the person who is offered, promised or given the financial advantage under Section 1, and the person who then improperly performs a relevant function. Whilst the fee in question was offered to and subsequently paid to E, it appears that the person who was intended to be induced to perform improperly was one or more GOT officials in awarding the joint mandate. At the same time, on the facts of this case, given that at least one of E's directors was a member of GOT within whose jurisdiction the transaction fell, it is possible that E itself was regarded in the alternative as being both the recipient of the offer, promise, or gift, and the person who improperly performed a relevant public function.

This case also highlights the fact that under Section 7, whether or not the CO in question had any knowledge about the conduct of the associated person is irrelevant, in the sense that the commercial organisation does not have to have intent in order to fall foul of the section. No allegation of knowing participation in bribery was made against SB or any of its employees.

The Court stressed that it had assumed a pivotal role in the assessment of the DPA terms, and that there was no question of the parties having reached a private compromise without independent judicial consideration of the public interest.

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