Lessons From Across the Ocean: SFO Director's Speech in Washington Provides Insight Into the Future of UK Investigations

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On 28 November 2018, Lisa Osofsky, Head of the UK Serious Fraud Office ("**SFO**"), delivered the keynote address at the 35th International Conference on the Foreign Corrupt Practices Act ("**FCPA**") in Washington DC[1] . After a nostalgic canter through the FCPA's 40-year history, Ms Osofsky turned to the state of bribery and corruption prosecutions in the UK.

Three areas of the speech were particularly illuminating: Ms Osofsky's views on (1) international co-operation, (2) the UK Bribery Act, and (3) corporate co-operation in the context of an SFO investigation.

International co-operation

The subject of international co-operation has been front and centre of every speech Ms Osofsky has delivered as Director. She has made no secret of her desire for even closer ties between global prosecutors[2], a sentiment that was recently echoed by the SFO's Joint Head of Bribery and Corruption Matthew Wagstaff[3]. She restated her aim in the clearest terms in this speech: "*[i]f there is only one thing that you take away from this conference, take this away: prosecutors, regulators and law enforcement around the world are working more closely together than we ever have before…[p]rosecutors from different jurisdictions are learning how we do our work under different systems of law, and we are sharing best practices*".

What does this mean for the UK? In terms of the UK/US relationship, the practical examples she gave are more suggestive of incremental Americanisation at the SFO than an entirely mutual exchange of best practices. Ms Osofsky mentioned the DOJ prosecutor currently stationed inside the SFO, who is "*learning our British ways, and he is teaching our prosecutors DOJ's ways*". You might think there is more of the latter going on than the former, given the lack of any reference to a reciprocal arrangement for an SFO investigator at the DOJ. She promised that she has heard "*loud and clear*" from US colleagues the value of co-operators in white collar cases. Her comments on corporate co-operation (discussed in more detail below) certainly pointed towards a preference for the US model of investigation and prosecution.

From a UK perspective, this could be viewed as a worrying trend. Some aspects of the US model may be unwelcome imports. In particular, the disparity in bargaining power between the US investigator and its target, and a general reluctance on all sides to pursue matters to trial. That being said, closer international ties, and even a more "American" style of investigation and prosecution in the UK, is not necessarily all bad. Provided appropriate safeguards are put in place, the UK could stand to benefit from, for example, the more decisive case management, and the allocation of proper prosecutorial resources, that are often seen in the US.

The UK Bribery Act

Ms Osofsky recognised that the 2010 Bribery Act changed the landscape for UK prosecutors. Before its enactment in 2011, the UK was using "*outdated bribery laws from the late 1800's and early 1900's*" to prosecute bribery and corruption. Under the new framework, the SFO has secured three convictions, including a corporate conviction, and individuals are awaiting trial.

However, Ms Osofsky failed to mention that the Bribery Act will only apply to conduct that took place after the date of enactment, in 2011. Any allegation of bribery taking place before that date will therefore be prosecuted using those same "*outdated bribery laws*" that prosecutors were stuck with pre-2011.

It would be a stretch to say that the SFO are focussing their current efforts on cases that fall within the Bribery Act regime. As Ms Osofsky herself noted, the lack of a statute of limitations in UK bribery cases is a "*powerful tool*" for prosecutors, and spurred an enthusiastic spate of historical bribery cases in the years leading up to her directorship. Many of these are yet to come to trial; some have yet to be charged. Without efforts to clear this backlog of cases, freeing up the SFO to focus on post-2011 conduct, we are unlikely to see the end of "*outdated bribery laws*", or the full potential of the 2011 Act as a prosecutorial tool, for some time.

Corporate co-operation

Ms Osofsky addressed the question of what it means for a company to co-operate with the SFO in candid and practical terms. The headline as far as she is concerned is: "*tell me something I don't know*". Unsurprisingly, co-operation does not, by Ms Osofsky's definition, involve responding only to compelled requests for assistance or information, "*burying bad news*", protecting executives, or playing prosecutors off against each other. Instead, it involves "*making the path to admissible evidence easier*". The steps to achieving this are worth quoting in full:

"This is not rocket science. It is documents. It is financial records. It is witnesses.

- *Make them available – promptly.*
- *Point us to the evidence that is most important – both inculpatory and exculpatory. In other words, give us the "hot" documents. Don't just bury us in a document dump.*
- *Make the evidence available in a way that comports with our laws.*
- *Make it available in a way useful to us so that we can do our job – which we will do. We will not, of course, simply take your word for it. We will use what you give us as a starting point, not an end point. We will test, we will probe.*

- *Do not do things that create proof issues for us or create procedural barriers."*

The focus on "*admissible evidence*" and "*proof issues*" is telling. Co-operation under Ms Osofsky's SFO clearly means more than just assisting the SFO in its investigative efforts, no matter how proactive you are. It means assisting in a way that allows the SFO to build a case that could hold up at trial. On the subject of interviews and "first witness accounts" in internal investigations, Ms Osofsky reiterated a now familiar message. If you conduct first account interviews with individuals who are later charged, don't be "*distressed and offended if* [the SFO] *seek those interviews*" later down the line, whether you believe them to be privileged or not. Ostensibly, this is to provide a defendant in a criminal trial with his first account of his evidence, as a matter of procedural fairness. However, the secondary benefits to the SFO in getting hold of these accounts are obvious. In the absence of a long history of corporate co-operation in the UK, and a clear definition of what co-operation actually means, Ms Osofsky seems to be borrowing heavily from the American model.

It is easy to simply point to Ms Osofsky's background as a US prosecutor and make the rather lazy assumption that the SFO, under her stewardship, will move closer to a US-style model of investigation and prosecution. However, the tone and content of this most recent speech would suggest all the signs are there.

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[1] Lisa Osofsky, "*Keynote address at the FCPA Conference, Washington DC*" (4 December 2018) www.sfo.gov.uk/2018/12/04/keynote-address-fcpa-conference-washington-dc/

[2] See for example: www.wilmerhale.com/en/insights/blogs/WilmerHale-W-I-R-E-UK/20180914-i-will-be-a-different-kind-of-director-lisa-osofsky-outlines-her-priorities-as-new-director-of-the-serious-fraud-office

[3] See www.wilmerhale.com/en/insights/blogs/WilmerHale-W-I-R-E-UK/20181206-the-serious-fraud-office-where-next-in-2019