IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Respondent

-and-

INFINITY S.A.

Appellant

APPELLANT'S BUNDLE

Contents	**Page**
Moot Problem	2
Skeleton Argument	7
List of Authorities	16
Bribery Act 2010.	17
Ministry of Justice, *'The Bribery Act 2010: Guidance to help commercial organisations prevent bribery'* (March 2011).	22
Akzo Nobel NV v Competition Commission & Others [2014] EWCA Civ 482.	24
Tesco Supermarkets Ltd v Nattrass [1972] AC 153.	29
Select Committee on the Bribery Act 2010, *The Bribery Act 2010: post-legislative scrutiny* (HL 2017-19, 103).	33

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Respondent

-and-

INFINITY S.A.

Appellant

MOOT PROBLEM

Rosamund Smith Mooting Competition 2021, Semi-Final (2)

28 June 2021

---

1. Infinity S.A is a company registered in France, which provides English language tutoring services. Infinity conducts the bulk of its activities in France and other French-speaking countries but conducts some of its meetings in London.

2. One of Infinity's employees, David, had a meeting in London in March 2019 with a French politician. During the meeting, David gave the French politician £1,500 in cash in an envelope. David hoped that the payment would ensure that any tutoring being offered by the schools in her district would be given to Infinity, and, in particular, to him.

3. Both David and the company were charged with offences in the UK contrary to the Bribery Act 2010 ("BA 2010"):

a. David was charged with an offence of bribery of a foreign public official, contrary to s.6 BA 2010.
b. Infinity S.A. was charged with the offence of failing to prevent bribery, contrary to s.7 BA 2010.

4. David entered a guilty plea at the first opportunity. He received a suspended sentence because of his personal mitigation.

5. Infinity fought the matter to trial.

6. Evidence was heard about the activities of the company, and the following facts are, for the purposes of the appeal, agreed:

a. Infinity is incorporated in France, and has offices in Boulogne, Paris, Marseille, Lyon and Toulouse.
b. Infinity provides face-to-face tutoring in schools and colleges, teaching students English. One of Infinity's selling points is that many of its tutors are native English speakers.
c. Infinity has about 80 employees, some full time, some part-time. They all work in France, although some of them have homes in the UK.
d. There are four directors, who hold board meetings once a month.
e. Two of the directors live in the UK. As a result, it is convenient to hold the Board and management meetings in the UK for 6 months of the year.
f. Those board meetings which are held in the UK are held in a serviced office block outside St Pancras station, rented just for the meeting.
g. That serviced office block is also rented for six-monthly recruitment sessions, in which potential British employees are interviewed for jobs.
h. Infinity has the following policies, last updated in November 2018:

i. An Anti-Bribery policy, which prohibits any payments of bribes or 'sweeteners';
ii. A strict policy prohibiting corporate hospitality or gifts;
iii. A 'Whistle-blowing policy' which provides routes for employees to raise concerns about anything going on in the company.

i. It is accepted that those policies meet the prevailing industry standards.
j. The contracts of each employee include a term indicating that bribery is a matter of gross misconduct, and grounds for immediate dismissal.
k. The staff are reminded of the policies each year when the entire company gets together for a 'working weekend'.

7. At the close of the Prosecution case, Counsel for Infinity made a submission of no case to answer, on the basis that the Prosecution could not show that Infinity was a 'relevant commercial organisation' for the purposes of s.7(5) BA 2010. The judge rejected that submission, ruling that the Prosecution had sufficient evidence, from the facts set out above, to demonstrate that the company met the test re the definition of a 'relevant commercial organisation' in 7(5)(b).

8. Infinity conceded at trial, and for the purpose of the Appeal, that David was a person 'associated with' Infinity for the purposes of s.7 BA 2010. Infinity also conceded that David's acts had constituted a s.6 offence, and there was, therefore, no dispute that the requirements of s.7(3) BA 2010 were met.

9. Infinity did raise the defence of 'adequate procedures' at trial. It argued that it had in place adequate procedures designed to prevent persons associated with it from undertaking bribery, providing it with a defence under s.7(2) BA 2010.

10. The judge’s direction to the jury, so far as it was relevant to ‘adequate procedures’ was in the following terms:

> It is a defence for Infinity to prove that they had in place adequate procedures designed to prevent persons associated with the company from undertaking such conduct. ‘Adequate’ is a normal word in regular usage. You have heard much about the procedures in place at Infinity. You have heard about their Anti Bribery policy, which the witnesses, from both prosecution and defence, told you was standard in the industry. You have heard from both sides that their training regime was also, give or take a few particular features which do not matter, standard in the industry. The defence say that more could not reasonably have been done. The Prosecution say that those procedures plainly were not adequate; if they were, the bribery would not have occurred. You are entitled to take into account the fact that a bribe undeniably was paid in this case, and to use that information in your assessment of whether the procedures in place at Infinity were “adequate”.

11. Infinity were duly convicted by the jury and now appeal against that conviction on the following grounds:

Ground 1: In light of the case of Akzo Nobel NV v Competition Commission & Others [2014] EWCA Civ 482, and on a “common sense” interpretation, the judge erred in concluding that the facts of this case could constitute ‘carrying on a business or part of a business in any part of the UK’.

Ground 2: The judge’s direction as to what constitutes adequate procedures rendered the defence illusory, in the manner described in Tesco Supermarkets Ltd v Nattrass [1972] AC 153 at page 181. Following the comments of the

House of Lords Select Committee on the Bribery Act in 2018, the jury should have been directed that the test was whether the procedures were reasonable in all the circumstances.

Moot problem set by:

Jennifer Carter-Manning QC

7 Bedford Row

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Respondent

-and-

INFINITY S.A.

Appellant

SKELETON ARGUMENT ON BEHALF OF

THE APPELLANT

Introduction

1. The Appellant was at all material times a company registered in France, which provided English language tutoring services.

2. This appeal arises from an incident in which one of the appellants employees, David, gave a French politician £1,500 in cash in an envelope upon having a meeting in London in March 2019. David hoped that the payment would ensure that any tutoring being offered by the schools in her district would be given to Infinity, and, in particular, to him.

3. In the court below, the Appellant was convicted of an offence of failing to prevent bribery, contrary to Section 7 of the Bribery Act 2010.

4. The appellant concedes that David was a person 'associated with' Infinity for the purposes of Section 7 of the Bribery Act 2010 and acknowledges that

David's acts constituted an offence contrary to Section 6 of the Bribery Act 2020.

5. However, it is argued that the appellant company is not a 'relevant commercial organisation' for the purposes of Section 7(5) Bribery Act 2010 and that, in any event, it had in place adequate procedures designed to prevent persons associated with it from undertaking bribery, providing it with a defence under Section 7(2) Bribery Act 2010.

6. Therefore, the appellant appeals against their conviction on the following grounds:

   1) In light of the case of ***Akzo Nobel NV v Competition Commission & Others*** [2014] EWCA Civ 482, and on a "common sense" interpretation, the judge erred in concluding that the facts of this case could constitute 'carrying on a business or part of a business in any part of the UK'.
   2) The judge's direction as to what constitutes adequate procedures rendered the defence illusory, in the manner described in ***Tesco Supermarkets Ltd v Nattrass*** [1972] AC 153 at page 181. Following the comments of the House of Lords Select Committee on the Bribery Act in 2018, the jury should have been directed that the test was whether the procedures were reasonable in all the circumstances.

7. Submissions regarding each ground are made in paragraphs **9-21** and **22-29** respectively.

The Offence

8. **Section 7 of the Bribery Act 2010** ("section 7") provides:

“7. Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—

“partnership” means—

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

“relevant commercial organisation” means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

> (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
>
> (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
>
> (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
>
> and, for the purposes of this section, a trade or profession is a business."

The First Ground of Appeal: The judge erred in concluding that the facts of this case could constitute 'carrying on a business or part of a business in any part of the UK'.

The Legal principles

9. The Bribery Act 2010's scope is limited to 'relevant commercial organisations' (RCO) – s7(1) BA 2010.

10. Is Infinity S.A a RCO for the purposes of the BA 2010?

11. The BA 2010 defines a RCO as "any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom," - s7(5) BA 2010.

12. The court has two questions to answer:

    i. What is meant by "carries on a business"?

    ii. Does Infinity S.A "carry on a business" in the United Kingdom?

What is meant by "carries on a business"?

13. The Ministry of Justice guidance published on 30 March 2011 calls for a "common sense approach" at paragraph [36], referring to a "demonstrable business presence in the United Kingdom".

14. The issue was considered in Akzo Nobel NV v Competition Commission & Others [2014] EWCA Civ 482 (in the context of the Enterprise Act 2002). Briggs LJ gives the following guidance:

    i. [20] - The phrase should be read in context of both the general purposes of the legislation and the specific purpose for the section's inclusion in the statute.
    ii. [34] – "What does or does not amount to carrying it on in any particular case will be a fact-intensive question."

15. This is an opportunity to provide further guidance for businesses to create certainty. Businesses like Infinity S.A need to know when they might need to comply with UK bribery law.

16. It is submitted that a degree of permanence should be necessary to satisfy the "carries on a business" requirement. This could encompass both a physical and digital business presence. (Akzo Nobel NV [31])

Does Infinity S.A "carry on a business" in the United Kingdom?

17. The purpose of the BA 20210 is to prevent bribery.

18. The purpose of s7(5) is to set boundaries on the potential targets of the legislation. In line with the principle of comity, the legislation exists to target only those businesses that operate in the UK.

    I. Giving too wide an interpretation to s7(5) would undermine the purpose of the limitation.

19. Infinity S.A does not have more than the barest foothold in the UK. The three core elements of the business are situated in France.

    I. The legal formation - It is incorporated in France.

    II. Company management - Its five offices are in France. It has no permanent offices in the UK.

    III. Its output - Infinity S.A's tutoring services are provided outside of the UK (All employees work in France).

    IV. Infinity's links to the UK:

        i. Two out of four board members live in the UK.
        ii. Board and management meetings are held in the UK for 6 months of the year, for the sake of convenience.
        iii. The office block is rented just for the meetings.
        iv. The office block is outside St Pancras station, presumably to minimise the distance from Paris.
        v. The office block is rented for six-monthly recruitment sessions.

Conclusion

20. Infinity S.A's links to the UK are tenuous and lack permanence. Therefore, the Appellant cannot be said to be carrying on a business in the United Kingdom.

21. The Court is therefore respectfully invited to find in favour of the Appellant and hold that Infinity S.A is not a relevant commercial organisation and falls outside the scope of the BA 2010.

The Second Ground of Appeal: The judge's direction as to what constitutes adequate procedures rendered the defence illusory. The jury should have been directed that the test was whether the procedures were reasonable in all the circumstances.

22. Section 7(2) of the Bribery Act 2010 affords the appellant with a defence. It provides that:

> *"it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct."*

23. Section 9(1) of the Bribery Act 2010 goes further and states that:

> *"The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)".*

24. The Guidance, published by the Ministry of Justice in 2011, sets out six principles which the Government considers should guide commercial organisations when putting in place "adequate procedures" to prevent bribery. These are:

1. Proportionate procedures
2. Top-level commitment
3. Risk assessment
4. Due diligence

5. Communication (including training)
6. Monitoring and review

25. Applying the six principles to the instant case, it is submitted that the appellant's anti-bribery policies are all that could be reasonably expected to discharge their duty under the Bribery Act 2010 – they represent "adequate procedures".

25. Furthermore, there is no substantive requirement for the appellant to have anti-bribery procedures. It is not an offence to have no such procedures in place, but it was very much in their interest to do so; if it did not have adequate procedures in place, the appellant would have had no defence when Dave (the associated person) bribed another person on behalf of the company.

26. Therefore, the judge's direction as to what constituted adequate procedures in the instant case rendered the defence illusory, in the manner described in *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. Lord Morris of Borth-y-Gest, at page 181, said:

> *"If the company had taken all reasonable pre-cautions and exercised all due diligence to ensure that the machine could and should run effectively then some breakdown due to some action or failure on the part of "another person" ought not to be attributed to the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible. The defence provided by section 24 (1) would otherwise be illusory."*

27. Relying on *Tesco Supermarkets Ltd*, it is submitted that the appellant should not be liable for a serious offence, such as failure to prevent bribery, on the basis of a single instance of carelessness on the part of another person if it can show that it had robust management systems in place to prevent bribery

taking place. Parliament did not intend, by its use of the word "adequate", to deprive a company of a defence solely because a person associated with the company bribed another person in order to obtain business for the company.

28. Therefore, the judge was mistaken in directing the jury that they were entitled to consider the fact that a bribe had occurred as evidence that the appellant's procedures were inadequate. It is argued that the direction given undermines the purpose of there being a defence in the first place.

29. As a result, it is submitted that the jury should have been directed that the test was whether the procedures were reasonable in all the circumstances. Following the comments of the House of Lords Select Committee on the Bribery Act in 2018, "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances". Having policies that meet the prevailing industry standard is all that could reasonably be asked of the appellant and was ultimately adequate.

<u>Conclusion</u>

30. In light of the reasons set out above, the court is respectfully invited to allow the appeal and quash the appellant's conviction.

Christopher Fry Senior for the Appellant

Maya Hanson Junior for the Appellant

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Respondent

-and-

INFINITY S.A.

Appellant

LIST OF AUTHORITIES

Bribery Act 2010.

Akzo Nobel NV v Competition Commission & Others [2014] EWCA Civ 482.

Ministry of Justice, *'The Bribery Act 2010: Guidance to help commercial organisations prevent bribery'* (March 2011).

Tesco Supermarkets Ltd v Nattrass [1972] AC 153.

Select Committee on the Bribery Act 2010, *The Bribery Act 2010: post-legislative scrutiny* (HL 2017-19, 103).

Bribery Act 2010

CONTENTS

General bribery offences

1 Offences of bribing another person
2 Offences relating to being bribed
3 Function or activity to which bribe relates
4 Improper performance to which bribe relates
5 Expectation test

Bribery of foreign public officials

6 Bribery of foreign public officials

Failure of commercial organisations to prevent bribery

7 Failure of commercial organisations to prevent bribery
8 Meaning of associated person
9 Guidance about commercial organisations preventing bribery

Prosecution and penalties

10 Consent to prosecution
11 Penalties

Other provisions about offences

12 Offences under this Act: territorial application
13 Defence for certain bribery offences etc.
14 Offences under sections 1, 2 and 6 by bodies corporate etc.
15 Offences under section 7 by partnerships

Supplementary and final provisions

16 Application to Crown

17 Consequential provision
18 Extent
19 Commencement and transitional provision etc.
20 Short title

Schedule 1 — Consequential amendments
Schedule 2 — Repeals and revocations

Bribery of foreign public officials

6 Bribery of foreign public officials

(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.

(2) P must also intend to obtain or retain—
(a) business, or
(b) an advantage in the conduct of business.

(3) P bribes F if, and only if—
(a) directly or through a third party, P offers, promises or gives any financial or other advantage—
(i) to F, or
(ii) to another person at F's request or with F's assent or acquiescence, and
(b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes—
(a) any omission to exercise those functions, and
(b) any use of F's position as such an official, even if not within F's authority.

(5) "Foreign public official" means an individual who—
(a) holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),
(b) exercises a public function—
(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or
(ii) for any public agency or public enterprise of that country or territory (or subdivision), or
(c) is an official or agent of a public international organisation.

(6) "Public international organisation" means an organisation whose members are any of the following—
(a) countries or territories,
(b) governments of countries or territories,
(c) other public international organisations,
(d) a mixture of any of the above.

(7) For the purposes of subsection (3)(b), the written law applicable to F is—
(a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,
(b) where paragraph (a) does not apply and F is an official or agent of a public international organisation, the applicable written rules of that organisation,

(c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—
(i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or
(ii) any judicial decision which is so applicable and is evidenced in published written sources.

(8) For the purposes of this section, a trade or profession is a business.

Failure of commercial organisations to prevent bribery

7 Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending—
(a) to obtain or retain business for C, or
(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—
(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or
(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—
"partnership" means—
(a) a partnership within the Partnership Act 1890, or
(b) a limited partnership registered under the Limited Partnerships Act 1907,
or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,
"relevant commercial organisation" means—
(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),
(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,
(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or
(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,
and, for the purposes of this section, a trade or profession is a business.

8 Meaning of associated person

(1) For the purposes of section 7, a person (“A”) is associated with C if (disregarding any bribe under consideration) A is a person who performs services for or on behalf of C.

(2) The capacity in which A performs services for or on behalf of C does not matter.

(3) Accordingly A may (for example) be C’s employee, agent or subsidiary.

(4) Whether or not A is a person who performs services for or on behalf of C is to be determined by reference to all the relevant circumstances and not merely by reference to the nature of the relationship between A and C.

(5) But if A is an employee of C, it is to be presumed unless the contrary is shown that A is a person who performs services for or on behalf of C.

9 Guidance about commercial organisations preventing bribery

(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).

(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.

(3) The Secretary of State must consult the Scottish Ministers before publishing anything under this section.

(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.

(5) Expressions used in this section have the same meaning as in section 7.

Prosecution and penalties

10 Consent to prosecution

(1) No proceedings for an offence under this Act may be instituted in England and Wales except by or with the consent of—
- (a) the Director of Public Prosecutions,
- (b) the Director of the Serious Fraud Office, or
- (c) the Director of Revenue and Customs Prosecutions.

(2) No proceedings for an offence under this Act may be instituted in Northern Ireland except by or with the consent of—
- (a) the Director of Public Prosecutions for Northern Ireland, or
- (b) the Director of the Serious Fraud Office.

(3) No proceedings for an offence under this Act may be instituted in England and Wales or Northern Ireland by a person—
- (a) who is acting—
  - (i) under the direction or instruction of the Director of Public Prosecutions, the Director of the Serious Fraud Office or the Director of Revenue and Customs Prosecutions, or
  - (ii) on behalf of such a Director, or

Ministry of JUSTICE

THE BRIBERY ACT 2010

Guidance

about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)

Section 7: Failure of commercial organisations to prevent bribery

33 A commercial organisation will be liable to prosecution if a person associated with it bribes another person intending to obtain or retain business or an advantage in the conduct of business for that organisation. As set out above, the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities.

Commercial organisation

34 Only a 'relevant commercial organisation' can commit an offence under section 7 of the Bribery Act. A 'relevant commercial organisation' is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership which carries on a business or part of a business in the UK irrespective of the place of incorporation or formation. The key concept here is that of an organisation which 'carries on a business'. The courts will be the final arbiter as to whether an organisation 'carries on a business' in the UK taking into account the particular facts in individual cases. However, the following paragraphs set out the Government's intention as regards the application of the phrase.

35 As regards bodies incorporated, or partnerships formed, in the UK, despite the fact that there are many ways in which a body corporate or a partnership can pursue business objectives, the Government expects that whether such a body or partnership can be said to be carrying on a business will be answered by applying a common sense approach. So long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

36 As regards bodies incorporated, or partnerships formed, outside the United Kingdom, whether such bodies can properly be regarded as carrying on a business or part of a business 'in any part of the United Kingdom' will again be answered by applying a common sense approach. Where there is a particular dispute as to whether a business presence in the United Kingdom satisfies the test in the Act, the final arbiter, in any particular case, will be the courts as set out above. However, the Government anticipates that applying a common sense approach would mean that organisations that do not have a demonstrable business presence in the United Kingdom would not be caught. The Government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the

Neutral Citation Number: [2014] EWCA Civ 482

Case No: C3/2013/2403

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
The Hon Mr Justice Norris, William Allan, Prof Gavin Reid
1204/4/813

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 14th April 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE BEATSON
and
LORD JUSTICE BRIGGS

- -

Between :

AKZO NOBEL N.V.	**Appellant**
- and -	
COMPETITION COMMISSION & ORS	**Respondent**
METLAC HOLDING S.R.L.	**Intervener**

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

TIM WARD QC and ALISTAIR LINDSAY
(instructed by **SLAUGHTER AND MAY**) for the **APPELLANT**
DANIEL BEARD QC and ROB WILLIAMS
(instructed by **THE TREASURY SOLICITOR**) for the **RESPONDENT**
ROMANO SUBIOTTO QC and MARIO SIRAGUSA
(instructed by **CLEARY GOTTLIEB STEEN & HAMILTON LLP**) for the **INTERVENER**

Hearing dates : Tuesday 25th March 2014

Judgment
As Approved by the Court

Crown copyright©

appointment of directors of their choice, who are themselves charged with the management of the company's business. Although a departure from tradition, there is nothing at all unusual about the centralised group management structure which I have described. As the Commission noted, it is how most modern international corporate groups are managed.

19. In his excellent and concise submissions on this appeal, Mr. Tim Ward QC sought to characterise the management structure found to have existed by the Commission as limited to "monitoring and directing" activities and decisions carried out by other entities in the Akzo Nobel Group, leaving the substance of management to other entities in the Group, including the UK subsidiaries. While it is true that the Commission used the phrase "centrally monitored and directed" (in paragraph 11.98 of its Report), a reading of the Report as a whole and in particular the passages which I have quoted from it, make it clear that responsibility for management of the group's business together with actual strategic and operational management were all vested in and carried out by ExCo, and that the residual responsibility of individual subsidiaries consisted of such relatively low-level matters as ExCo permitted, by way of delegation, together with each subsidiary's audit and accounts. This is particularly apparent from the confidential Authority Schedule issued by ExCo, available both to the Commission, the Tribunal and to this court during the hearing of the appeal, but from which it would be inappropriate for me to quote. It is also apparent from the Commission's specific rejection of Akzo Nobel's submission that its involvement in directing strategy for the UK businesses was only peripheral: see paragraphs 11.95 and 11.97 quoted above.

Section 86 in its Context

20. The innocent-sounding phrase "carrying on business in the United Kingdom" has been much used in UK legislation and, indeed, by the English courts as an analytical tool. The industry of Mr. Ward and his team suggested that it appeared no less than 135 times in UK legislation going back as far as 1854. It has been in use within competition legislation since the 1940s, having originally appeared in the Monopolies and Restrictive Practices Act 1948. Like any phrase in a statute or other legal document, it must be read in context, having regard both to the general purposes of the legislation in question, and to the specific purpose for its inclusion, so far as that can be ascertained. A phrase may have a natural or ordinary meaning which admits of no ambiguity. Sometimes, as in the present case, ambiguity only appears when an apparently simple phrase has to be applied to particular facts.

21. The phrase "carrying on business in the UK" is not specifically defined in the Act, but some assistance is obtainable from the definitions in section 129. In section 129(1):

> ""Business" includes a professional practice and includes any other undertaking which is carried on for gain or reward or which is an undertaking in the course of which goods or services are supplied otherwise than free of charge;"

Section 129(3):

essential, and one which it is always more difficult to satisfy, is that the corporation must be 'here' by a person who carries on business for the corporation in this country. It is not enough to show that the corporation has an agent here; he must be an agent who does the corporation's business for the corporation in this country. This involves the still more difficult question, what is meant exactly by the expression 'doing business?'"

Slade LJ continued:

> "It is clear that (special statutory provision apart) a minimum requirement which must be satisfied if a foreign trading corporation is to be amenable at common law to service within the jurisdiction is that it must carry on business at a place within the jurisdiction: see *The Theodohos* [1977] 2 Lloyd's Rep. 428, 430, *per* Brandon J."

28. Mr. Ward submitted that, by parity of reasoning, the use of a 'carry on business in the UK' test for the Commission's jurisdiction should at least require it to be shown that the target company was itself present within the UK and carrying out some business activity here. That could not, he said, be achieved simply by attributing to a foreign parent the business activities of its UK subsidiaries. That much was also established in *Adams v Cape Industries*, accepted by the Tribunal and is common ground in this court. Nor could it be established if the only participation of the parent company in the English business consisted of acts of supervision and management carried out abroad.

29. Mr. Ward sought to bolster his submission by reference first to *The San Paulo (Brazilian) Railway Company Limited v Carter (Surveyor of Taxes)* [1896] AC 31, a case about the statutory test for corporate liability to income tax, and secondly to *SSL International PLC v TTK LIG Limited* [2012] 1WLR 1842, a case about whether a company had established a sufficient presence within England to enable service to be effected on one of its directors while temporarily within the jurisdiction. It fell squarely within the *Okura* line of cases. He submitted that, in both of them, the concept of carrying on business within the jurisdiction was treated as synonymous with presence here.

30. In my judgment, none of those cases lead to or even support the conclusion for which Mr. Ward contends. I agree with the Tribunal that the starting point is that Parliament could have, but did not, specify a 'presence' test in Section 86(1)(c) of the Act. It could have used one or more of the principles relating to 'presence' set out by Slade LJ at page 530-1 in the *Adams* case, which are firmly focussed upon the requirement that the foreign company has established and maintained a fixed place of business of its own within the jurisdiction, and carried on its own business from such premises. Instead, Section 86(1)(c) imposes a simple carrying on business requirement which, neither expressly nor by necessary implication, requires it to be shown that the target company's participation in the carrying on of that business is itself carried out within the UK.

31. Secondly, the attempt to show by reference to the *Okura* line of cases that presence here is a necessary characteristic of carrying on business here strikes me as an

illegitimate form of reverse engineering. While it may be that carrying on business here is a characteristic of corporate presence here, the opposite does not follow. Presence requires the additional element of a permanent place of business here from which the business is carried on.

32. Thirdly, Lord Davey's analysis of the facts in the *San Paulo Railway* case illustrates that a corporation may carry on a business in one country even though its management of it takes place entirely from another. The railway company was registered in England and its central management and control was exercised entirely from England, but its trading activities consisted of the running of a railway in Brazil. He said:

> "It is clear to my mind that the direction and supreme control of the appellant company's business is vested in the board of directors in London, who appoint the agents and officials abroad, and either by general orders or by particular directions control or may control their duties, remuneration, and conduct, and to whom any question of policy or any contract or other matter may, and if deemed of sufficient importance I suppose would, be referred for their decision. The business is therefore in very truth carried on, in, and from the United Kingdom, although the actual operations of the company are in Brazil, and in that sense the business is also carried on in that country."
> (*my underlining*)

33. Applying that analogy to Akzo Nobel, its central management activity is carried on in the Netherlands, but a substantial part of the managed business is transacted in the UK. It may fairly be described as carrying on business both in the Netherlands and in the UK.

34. For present purposes, the critical question is whether the exercise of the strategic and operational management and control of a manufacturing and sales business, a substantial part of which is unmistakably carried on within the UK, amounts to carrying on business in the UK, where that management and control itself takes place elsewhere. I have in that context found Section 129(1) and (3) of the Act to be of significant assistance. Section 129(1) defines business as including a money making undertaking, rather than merely an activity other than pleasure. The effect of section 129(3) is that every partner is to be treated as carrying on a partnership business. Suppose that the business of an unincorporated partnership is or includes manufacturing and trading in the UK, and that responsibility for strategic and operational management of the business lies with a partner who (or which) carries out those activities entirely abroad. In my judgment that managing partner would be carrying on business within the UK even if he, she or it never entered the UK or established a presence here. Taken together, those definitions show that it is legitimate to approach Section 86(1)(c) by asking (i) is there a business being carried on in (or partly in) the UK? (ii) is the target person sufficiently involved in that business that it can be said to be carrying it on, whether alone or with others? If the answers to those two questions are affirmative, then the target falls within Section 86(1)(c). I agree again with the Tribunal that it would cast the net too wide to say that any involvement in such a business, such as the supply of goods to it from abroad,

amounts to carrying it on. What does or does not amount to carrying it on in any particular case will be a fact-intensive question.

35. That approach seems to me to give proper effect to the purposes both of the Act as a whole and of Section 86(1) in particular. In enables the Commission to regulate the behaviour abroad of a person engaged in the carrying on a business here. I consider that conducting strategic and operational management of a business carried on here clearly amounts to carrying it on, because it supplies an appropriate connecting factor between the manager and the UK to justify the exercise of jurisdiction over it, even if that manager performs its role offshore. Were that not so, modern methods of communication would permit effortless evasion of the Commission's regulatory jurisdiction, which Parliament is unlikely to have intended.

36. In the present case, the substantial UK manufacturing and trading business of the Akzo Nobel group may well be carried on in premises owned or leased by one or more UK-incorporated subsidiaries, and the manufacturing and trading processes may be undertaken by employees of one or more of those subsidiaries. The profits of the UK business may be accounted for as profits of one or more of those subsidiaries. In all those respects the UK subsidiaries are themselves engaged in the carrying on of that business. But the business is nonetheless managed both strategically and operationally by Akzo Nobel, so that, like the offshore managing partner, it is also carrying on business in the UK.

37. This is not to attribute the activities of Akzo Nobel's UK incorporated subsidiaries as its activities. That would be, as the Tribunal held, and as is common ground, an inappropriate departure from principles of separate corporate identity, flowing from *Salomon v Salomon* [1897] AC 22, and applied in this context in *Adams v Cape Industries*. It is simply the consequence of the Commission's careful focus on the nature and extent of the Akzo Nobel parent company's involvement in the conduct of the UK business, through its organ ExCo, as set out in the passages from the Report which I have summarised and from which I have quoted. By contrast, if all that the parent company of a subsidiary carrying on business in the UK did was to exercise its rights as shareholder in the traditional fashion, leaving the entire management of the business to the subsidiary's directors, the parent would not solely on that account be carrying on the business at all.

38. It follows that neither the Commission nor the Tribunal made any error of law in its analysis of the question whether Akzo Nobel NV carried on business in the UK, so that the first limb of Akzo Nobel's grounds of appeal must be rejected.

Did the Tribunal depart from the Commission's findings of fact?

39. I can take this second limb of the grounds of appeal shortly, and it did not occupy much time during argument. Mr. Ward's submission that the Tribunal had departed from the Commission's findings of fact was focussed on paragraphs 113 and 114 of the Tribunal's judgment, from which I have extracted the passages criticised:

> "113. …The Commission's central conclusion was that the organisational and decision-making structure of the AN

A Lord Morris of Borth-y-Gest and I agree with all that he says about this transaction.

I would dismiss both appeals.

Appeals dismissed with costs.

Solicitors: *Slaughter & May; Solicitor of Inland Revenue.*

B

M. G.

C

[HOUSE OF LORDS]

TESCO SUPERMARKETS LTD. . . . . . . APPELLANTS

AND

NATTRASS . . . . RESPONDENT

D 1971 Feb. 3, 4, 8, 9; March 31 — Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Pearson and Lord Diplock

Trade Description—" Act or default of another person "—Manager of supermarket—Offence at store due to manager's failure to supervise properly—System of supervision set up—Manager E *instructed on operation of system—Ladder of responsibility to ensure carrying out of system—Whether store manager " another person "—Whether " all reasonable precautions and . . . due diligence " exercised by company—Trade Descriptions Act* 1968 (*c.* 29), *ss.* 20 (1), 24 (1) (*a*) (*b*)

Company—Psyche—Intention—" Brains of company "—Responsible officer test—Criteria for determining responsibility of company for act or default of its servants

F

The defendants, a body corporate owning supermarket stores, were charged with an offence under the Trade Descriptions Act 1968.[1] They sought to raise a defence under section 24 (1) on the grounds that the commission of the offence was due to the act or default of another person, namely, the manager of the store at which it was committed, and that they had taken all reasonable precautions and exercised all G due diligence to avoid the commission of such an offence. The manager was not a person within section 20 carrying out functions as a director, manager, secretary or other similar

[1] Trade Descriptions Act 1968, s. 20 (1): " Where an offence under this Act which has been committed by a body corporate is proved to have been committed with the consent and connivance of, . . . any director, manager, secretary or other similar officer of the body corporate, . . . he as well as the body corporate shall be guilty of that offence . . ."

H S. 24 (1): " In any proceedings for an offence under this Act it shall, . . . be a defence for the person charged to prove—(*a*) that the commission of the offence was due to . . . the act or default of another person, . . . and (*b*) that he took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence. . . ."

officer of the defendants, and they had properly instructed him in the operation at the store of a system for the avoidance of offences under the Act and had provided adequate and proper supervision to see that the system was followed and their instructions observed. The justices found that the defendants had set up a proper system so that they had complied with section 24 (1) (*b*), and that the manager had failed properly to carry out his part in the operation of the system, the commission of the offence being due to his act or default in failing in his duty of supervision. However, the justices were of the opinion that the defence failed because the manager could not be "another person" within section 24 (1) (*a*), and they convicted the defendants.

On appeal, the Divisional Court dismissed the appeal on the grounds that although the manager was "another person" within section 24 (1) (*a*) the defendants had not complied in the circumstances with the requirements of section 24 (1) (*b*).

The defendants appealed:—

Held, (1) that the manager was "another person" within section 24 (1) (*a*) since any person could come within that description in paragraph (*a*) provided that, where the defendant was an individual, the other person was someone apart from the defendant, and, where the defendant was a body corporate, he was not a person within section 20 carrying out functions as such a person.

(2) That the taking of precautions and exercise of due diligence by the defendants under section 24 (1) (*b*) involved the duty of setting up an efficient system for the avoidance of offences under the Act, and a proper operation of the system; that the defendants had adequately performed that duty and had not delegated to their store managers the functions of ensuring that the system was carried out, and that accordingly the defendants in the circumstances had satisfied the requirements of section 24 (1) (*b*) and the appeal would be allowed.

Observations of Viscount Haldane L.C. in *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] A.C. 705, 713, 714, H.L.(E.) and of Denning L.J. in *H. L. Bolton (Engineering) Co. Ltd.* v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159, 172, C.A. considered.

R. C. Hammett Ltd. v. *London County Council* (1933) 49 T.L.R. 209; 97 J.P. 105, D.C. and *Series* v. *Poole* [1969] 1 Q.B. 676, D.C. overruled.

Decision of the Divisional Court [1971] 1 Q.B. 133; [1970] 3 W.L.R. 572; [1970] 3 All E.R. 357 reversed.

The following cases are referred to in their Lordships' opinions:

Beckett v. *Kingston Bros. (Butchers) Ltd.* [1970] 1 Q.B. 606; [1970] 2 W.L.R. 558; [1970] 1 All E.R. 715, D.C.

Bolton (H. L.) (Engineering) Co. Ltd. v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159; [1956] 3 W.L.R. 804; [1956] 3 All E.R. 624, C.A.

Coppen v. *Moore (No. 2)* [1898] 2 Q.B. 306, D.C.

Director of Public Prosecutions v. *Kent and Sussex Contractors Ltd.* [1944] K.B. 146; [1944] 1 All E.R. 119, D.C.

Dumfries and Maxwelltown Co-operative Society v. *Williamson*, 1950 S.C.(J.) 76.

Hammett (R. C.) Ltd. v. *Crabb* (1931) 47 T.L.R. 623; 95 J.P. 180, D.C.

Hammett (R. C.) Ltd. v. *London County Council* (1933) 49 T.L.R. 209; 97 J.P. 105, D.C.

A B C D E F G H

In *Lennard's Carrying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] A.C. 705 Viscount Haldane L.C. said, at p. 713: A

> "My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation. That person may be under the direction B of the shareholders in general meeting; that person may be the board of directors itself, or it may be, and in some companies it is so, that that person has an authority co-ordinate with the board of directors given to him under the articles of association, and is appointed by the general meeting of the company, and can only be removed by the general meeting of the company." C

Within the scheme of the Act now being considered an indication is given (which need not necessarily be an all-embracing indication) of those who may personify "the directing mind and will" of the company. The question in the present case becomes a question whether the company as a company took all reasonable precautions and exercised all due diligence. The magistrates so found and so held. The magistrates found and held D that "they" (i.e. the company) had satisfied the provisions of section 24 (1) (*b*). The reason why the Divisional Court felt that they could not accept that finding was that they considered that the company had delegated its duty to the manager of the shop. The manager was, they thought, "a person whom the appellants had delegated in respect of that particular shop their duty to take all reasonable precautions and exercise all due diligence to avoid the commission" of an offence. Though the magistrates E were satisfied that the company had set up an efficient system there had been "a failure by someone to whom the duty of carrying out the system was delegated properly to carry out that function."

My Lords, with respect I do not think that there was any feature of delegation in the present case. The company had its responsibilities in regard to taking all reasonable precautions and exercising all due diligence. F The careful and effective discharge of those responsibilities required the directing mind and will of the company. A system had to be created which could rationally be said to be so designed that the commission of offences would be avoided. There was no delegation of the duty of taking precautions and exercising diligence. There was no such delegation to the manager of a particular store. He did not function as the directing mind or will of the company. His duties as the manager of one store did G not involve managing the company. He was one who was being directed. He was one who was employed but he was not a delegate to whom the company passed on its responsibilities. He had certain duties which were the result of the taking by the company of all reasonable precautions and of the exercising by the company of all due diligence. He was a person under the control of the company and on the assumption that there H could be proceedings against him, the company would by section 24 (1) (*b*) be absolved if the company had taken all proper steps to avoid the commission of an offence by him. To make the company automatically liable

A for an offence committed by him would be to ignore the subsection. He was, so to speak, a cog in the machine which was devised: it was not left to him to devise it. Nor was he within what has been called the "brain area" of the company. If the company had taken all reasonable precautions and exercised all due diligence to ensure that the machine could and should run effectively then some breakdown due to some action or failure on the part of "another person" ought not to be attributed to B the company or to be regarded as the action or failure of the company itself for which the company was to be criminally responsible. The defence provided by section 24 (1) would otherwise be illusory.

In reaching their conclusion, the Divisional Court placed reliance on and followed the decision in *Series* v. *Poole* [1969] 1 Q.B. 676. In that case the holder of a carrier's licence was charged with failing, contrary to C section 186 of the Road Traffic Act 1960, properly to keep current records. The records were in fact defective but the licence holder had employed someone to check the records. He had instructed such employee as to the method of checking the records: he had supervised the work of such employee until he was satisfied that the system was working well. The justices found that he had used all due diligence to secure compliance with the relevant statutory provisions. Provided that this finding could D on the facts be supported I see no reason why the Divisional Court should have denied to him the defence which by section 20 of the Road Traffic Act 1962 was made available. On the justices' finding I consider that the acquittal should have been allowed to stand. The licence holder had not washed his hands of his responsibilities: he had used all due diligence to see that they were discharged so that there should be compliance with the provisions of the statute.

E In *R. C. Hammett Ltd.* v. *London County Council,* 97 J.P. 105, employers were denied the defence available under section 12 (5) of the Sale of Food (Weights and Measures) Act 1926 on the ground that the manager of a shop had not shown due diligence though the employers themselves had in all other respects used due diligence. I do not think that that case was rightly decided.

F On the facts as found and by the application of section 24 (1) I consider that the company should have been absolved from criminal liability.

Accordingly, I would allow the appeal.

VISCOUNT DILHORNE. My Lords, on February 3, 1970, the appellants were convicted at the magistrates' court at Northwich of an offence under G section 11 (2) of the Trade Descriptions Act 1968, which reads as follows:

> "If any person offering to supply goods gives, by whatever means, any indication likely to be taken as an indication that the goods are being offered at a price less than that at which they are in fact being offered he shall, subject to the provisions of this Act, be guilty of an offence."

H On September 26, 1969, the appellants had a poster attached to the window of their supermarket in Northwich bearing the words "Radiant 1s. off Giant Size 2s. 11d." This meant, and could only have been

HOUSE OF LORDS

Select Committee on the Bribery Act 2010

Report of Session 2017–19

The Bribery Act 2010: post-legislative scrutiny

Ordered to be printed 4 March 2019 and published 14 March 2019

Published by the Authority of the House of Lords

HL Paper 303

Select Committee on the Bribery Act 2010

The Select Committee on the Bribery Act 2010 was appointed by the House of Lords on 17 May 2018 to consider and report on the Bribery Act 2010.

Membership

The Members of the Select Committee on the Bribery Act 2010 were:

Lord Empey
Baroness Fookes
Lord Gold
Lord Grabiner
Lord Haskel
Lord Hodgson of Astley Abbotts
Lord Hutton of Furness
Lord Plant of Highfield
Baroness Primarolo
Lord Saville of Newdigate (Chairman)
Lord Stunell
Lord Thomas of Gresford

Declarations of interests

See Appendix 1.

A full list of Members' interests can be found in the Register of Lords' Interests: http://www.parliament.uk/mps-lords-and-offices/standards-and-interests/register-of-lords-interests

Publications

All publications of the Committee are available at: https://www.parliament.uk/bribery-act-2010

Parliament Live

Live coverage of debates and public sessions of the Committee's meetings are available at: http://www.parliamentlive.tv

Further information

Further information about the House of Lords and its Committees, including guidance to witnesses, details of current inquiries and forthcoming meetings is available at: https://www.parliament.uk/business/lords

Committee staff

The staff who worked on this inquiry were Michael Collon (Clerk), Ben Taylor (Policy Analyst), Alasdair Love (Clerk) and Rebecca Pickavance (Committee Assistant).

Contact details

All correspondence should be addressed to the Select Committee on the Bribery Act 2010, Committee Office, House of Lords, London SW1A 0PW. Telephone 020 7219 4878. Email HLBriberyAct@parliament.uk

show that it had robust management systems in place to prevent bribery taking place. Clause 7(6) of the draft Bill makes it a defence to show that there were such systems in place.” [236]

174. Clause 7(6) of the draft Bill annexed to the Report read:

> “Except as provided in subsection (7), it is a defence to a charge under this section to prove that C had in place adequate procedures designed to prevent persons performing services for or on behalf of C from committing offences under section 2 or 4.”

175. The wording of the provision in the draft Bill presented to Parliament in March 2009 for consideration by the Joint Committee was almost identical,[237] but (like the remainder of section 7) this subsection was re-drafted for the Bill introduced in November 2009, and was not further amended during the passage of the Bill. Section 7(2) now provides:

> “But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.”

176. Under the Bribery Act there is no substantive requirement for commercial organisations to have anti-bribery procedures. It is not an offence to have no such procedures in place, but it is very much in a company’s interest to do so; if it does not have adequate procedures in place, it will have no defence when an associated person bribes another person on behalf of the company. Companies which might previously have been unconcerned at being involved with bribery (even if at one remove) which assisted their business, now have every incentive to put in place procedures to prevent this happening.

177. By contrast, as PwC pointed out,

> “ … in some other jurisdictions a positive obligation has been imposed. France’s Sapin II law is perhaps the most closely scrutinised example of this from a UK perspective. This came into force on 1 June 2017 and establishes a strict positive obligation on French companies to ‘prevent corruption.’ Companies with over 500 employees or an annual turnover in excess of EUR 100m are expected to implement an appropriate internal ABC risk management framework, with the company and its directors held accountable by the newly created Agence Française Anticorruption (AFA). Ultimate sanctions for breach include fines for a legal person of up to EUR 1m and for individuals up to EUR 200,000 and the right for the authorities to publicise both the failure and fine.”[238]

The Guidance

178. Section 9(1) of the Bribery Act provides: “The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1)”. The Guidance published by the Ministry of Justice in March 2011 goes wider than this, giving the Government’s views

236 *Ibid*, para 6.106

237 Ministry of Justice, *Bribery: Draft Legislation*, Cm 7570, March 2009, clause 5(4): https://www.gov.uk/government/publications/ministry-of-justice-bribery-draft-legislation-march-2009 [accessed 17 January 2019]

238 Written evidence from PwC (BRI0031)

on the offences created by sections 1, 2 and 6, on hospitality and facilitation payments, on what constitutes a "relevant commercial organisation" and what is an "associated person".

179. The Guidance then sets out Six Principles which the Government considers should guide commercial organisations when putting in place procedures to prevent bribery.

Box 3: The Six Principles for the prevention of bribery

Proportionate procedures: A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Top-level commitment: The top-level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Risk Assessment: The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Due diligence: The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Communication (including training): The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Monitoring and review: The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

180. Each of these Six Principles is explained in some detail, and they are followed by case studies explaining how the principles might apply in different hypothetical situations. Throughout the Guidance there is emphasis on proportionality: what is necessary for a large company will not necessarily be essential for a smaller company. What is needed by a company exporting to countries with poor corruption records will not necessarily be needed by companies doing little or no exporting. Iskander Fernandez, who spoke to us about the Skansen case which we discuss below, was emphatic that:

> "you need to have a bespoke policy in place. You cannot have a generic policy that you simply pull off the internet and say, 'This is it.' … If that generic policy does not cover off specifics in your organisation, if a company were to be investigated that could be its downfall, simply because it was not sufficient for the business activity it was carrying out."[239]

239 Q 205 (Iskander Fernandez)

Bribery Bill, make this clear, as does the subsequent Guidance issued by the Ministry of Justice, which states:

> "… the commercial organisation will have a full defence if it can show that despite a particular case of bribery it nevertheless had adequate procedures in place to prevent persons associated with it from bribing. In accordance with established case law, the standard of proof which the commercial organisation would need to discharge in order to prove the defence, in the event it was prosecuted, is the balance of probabilities."[273]

210. We therefore have to decide whether, notwithstanding what was intended, there is a danger that "adequate" in the Bribery Act will be interpreted too strictly, so that a company which had in place anti-bribery procedures which were reasonable in all the circumstances but did not in fact prevent bribery taking place might be unable to avail itself of this defence. We think such an interpretation is very unlikely, and that it is equally unlikely that a judge, in directing a jury which has to decide on a balance of probabilities whether the procedures which a company had in place were "adequate", would give them such a strict direction; any judge would surely instruct the jury to take the surrounding circumstances into account. We are accordingly not minded to recommend amendment of the Act, but we believe that the Guidance, which of course pre-dates the 2017 Act and the HMRC Guidance, should be amended.

211. **We believe that it is unnecessary to amend the wording of section 7 of the Act, but that the statutory Guidance should be amended to draw attention to the different wording in the Criminal Finances Act 2017 and in the HMRC Guidance to that Act, and to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in all the circumstances".**

An opinion on proposed conduct?

212. In the United States there is a procedure under which companies may formally request from the Department of Justice (DoJ) an opinion about "whether certain specified, prospective—not hypothetical—conduct conforms with the Department's present enforcement policy regarding the antibribery provisions of the [Foreign Corrupt Practices Act]". The procedure has never been much used. There were 61 Opinion Procedure Releases between 1980 and 2014, with only four in 2004, the busiest year.[274] There have been none since 2014.

213. The question nevertheless arises as to whether it would be appropriate to have a similar procedure in the UK. Should UK companies be allowed to ask, for example, the SFO for an opinion as to whether the practices and procedures they propose to adopt are "adequate" for the purposes of a section 7 defence? One person who thought so was Monty Raphael QC. He argued in written evidence that the DoJ's opinion procedure was "a valuable mechanism for companies and individuals to determine whether proposed conduct would be prosecuted by the DOJ under the FCPA", and that "while it may be true that large corporations have ready and timely access to reliable advice and can afford to pay for it, many SMEs would doubtless value the creation of a state resource by which they could, if need be and for a modest fixed fee,

---

273 Ministry of Justice, *The Bribery Act 2010 Guidance*, para 33

274 The FCPA Blog, Richard L. Cassin, 'Are DOJ opinion procedure releases headed for extinction?' (28 December 2015): http://www.fcpablog.com/blog/2015/12/28/are-doj-opinion-procedure-releases-headed-for-extinction.html [accessed 5 February 2019]