

Insight: White Collar

January 2012

Confiscation of Dividends by the SFO: Implications for investors

Investing in companies embroiled in corruption may pose more risks than previously identified in light of recent developments in the SFO proceedings against Mabey & Johnson.

On 12 January 2012, the UK courts allowed the Serious Fraud Office (SFO) to confiscate shareholder dividends paid out by Mabey & Johnson which, in 2009, had been convicted of corruption and sanction breaches with respect to the UN Oil-for-Food Programme in Iraq. The case has been hailed as a "landmark victory" for the SFO, but what are the wider implications of this case?

Background

The SFO was successful in recovering dividend payments of £131,201 to Mabey & Johnson's principal shareholder, Mabey Engineering Holding, which represented the benefit received by Mabey Engineering Holding as a result of contracts gained illegally by Mabey & Johnson in Iraq in 2001 and 2002. Mabey & Johnson has been at the centre of one of the SFO's most high profile corruption cases, having been subjected to substantial penalties and the imprisonment of two of its directors for its role in making illegal payments to the Iraqi government in breach of the UN Oil-for-Food programme. The case is not the first time that the SFO has sought to use its powers of financial recovery to target dividends payments in the UK. In February 2011, the SFO obtained an order to recover just over £7 million from M.W. Kellogg Limited in recognition of dividend payments it had received on the basis that they represented revenues generated by contracts obtained illegally by its group companies.

The SFO's powers are derived from the UK Proceeds of Crime Act 2002 (POCA) which, broadly, provides that when seeking financial recovery, the prosecutor can apply to the courts for confiscation orders (or civil recovery orders) against any property which represents, or is obtained as a result of or in connection with any criminal conduct, not just bribery. Importantly, subject to certain limitations, POCA allows such orders to be realised against third parties who were not themselves involved in the criminal conduct but who are mere recipients of such property, as was the case with Mabey Engineering Holdings which was, as the SFO accepts, totally unaware of any inappropriate behaviour, as indeed was the case with the £7 million confiscation order from M.W. Kellogg.



For more information please contact:

Alistair Graham

Partner, London

+ 44 20 7532 1800

agraham@whitecase.com

Allan Taylor

Partner, London

+ 44 20 7532 2126

ataylor@whitecase.com

Charlie Monteith

Counsel, London

+ 44 20 7532 1819

cmonteith@whitecase.com

Sona Ganatra

Associate, London

+ 44 20 7532 1813

sganatra@whitecase.com

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
Tel: + 44 20 7532 1000
Fax: + 44 20 7532 1001

What are the implications of such a ruling?

Whilst the present case involved a privately held company and its corporate parent, Richard Alderman, Director of the SFO, has warned that the SFO intends to use such powers more widely in the future, saying that “shareholders who receive the proceeds of crime can expect civil action against them to recover the money. The SFO will pursue this approach vigorously” and that “The SFO intends to use the civil recovery process to pursue investors who have benefitted from illegal activity. Where issues arise, we will be much less sympathetic to institutional investors whose due diligence has clearly been lax.”

Given the broad scope of the powers granted to the SFO under POCA, there is no doubt that the SFO could potentially also target investors in publicly listed companies. However, POCA contains certain important protections for investors, namely that the UK courts will not grant an order against a third party who obtained the property in question in good faith, where that third party also took subsequent steps in relation to the property and where recovery against a third party would be detrimental to him and would not be just and equitable. Moreover, the SFO is likely to face substantial hurdles when pursuing investors in publicly listed companies given that such investors, in contrast to private investors, have far less opportunity to conduct detailed due diligence outside what is available publicly or be otherwise able to control or influence the activities of the company in which they have invested.

Nevertheless, the SFO is sending a clear message that it is not afraid to push boundaries and utilise all the tools at its disposal to recover property which represents the proceeds of crime. Accordingly, all investors should seek to ensure that they thoroughly assess the corruption risks facing businesses in which they propose to invest. Before investing, potential acquirers should satisfy themselves that adequate procedures exist to prevent bribery.