THE SERIOUS FRAUD OFFICE: WAYS TO DEAL WITH IT

7 Aug 2017 Azizur Rahman.

The fact that a Serious Fraud Office (SFO) investigation found no evidence of criminality in how the Bank of England operated in the financial crisis will be a relief to those involved.

But it is also an indicator that the SFO does sometimes have to concede that it has not obtained the evidence to gain a prosecution or, even if it has, that a prosecution may not be the best option.

It must be emphasised that the SFO's actions can depend on the response it receives from those under investigation.

SFO investigators had initially believed that something was not right about the Bank of England's auctioning of central bank funds in return for collateral. But the case showed that assumptions can always be challenged. In the case of SFO investigations, this is done by producing material that counters the allegations and by legal argument.

Negotiation

Robust defence is often vital when facing SFO allegations. But shrewd negotiating skills and an ability to look at "the bigger picture" can be just as important; especially where wrongdoing has been found.

London Office
36 Whitefriars Street
London
EC4Y 8BQ
+44 (0)203 947 1539
enquiries@rahmanravelli.co.uk

Midlands Office
3 Brindley Place
Birmingham, West Midlands
B1 2JB
+44 (0) 121 827 7985

Northern Office
Roma House, 59 Pellon Lane
Halifax, West Yorkshire
HX1 5BE
+44 (0)1422 346 666

Rapid Response Team
24 Hour Emergency Contact
0800 559 3500

Fax +44 (0)1422 430 526
DX16001 HX1

A number of high-profile cases from this year illustrate this point. Rolls-Royce admitted huge bribery in a number of countries over a number of years and yet was not prosecuted. Tesco did not challenge the allegations it faced over its accounting scandal. It was also not prosecuted.

Barclays, however, has been charged over its financial dealings with Qatar. Both the company and senior figures within it are being prosecuted. Unlike Rolls-Royce and Tesco, it has not admitted any wrongdoing, has not accepted it is liable for punishment and has not actively cooperated with the SFO.

Only time will tell if Barclays' non-negotiation was worthwhile – or costly short-sightedness.

Process

All three cases indicate the importance of knowing the SFO's investigation process and how to manage a defence if you are put under its scrutiny.

The SFO receives information from many sources, which it assesses to see if it is worthy of investigation. If the SFO believes the situation undermines UK financial and corporate interests, it will accept it for investigation; involving the unique range of powers it has under Section 2 of the Criminal Justice Act 1987.

This involves SFO teams of skilled experts investigating and, where necessary, using Section 2 to compel any individual or organisation to provide the SFO with information or documents that it believes are relevant to its investigation. The SFO has even told lawyers that they are not guaranteed a right to accompany a client that is compelled to go in for interview under Section 2. If a lawyer wants to attend a Section 2 interview with their client, they must argue why they should be allowed to attend and even agree to certain restrictions on their role in it – an approach the Law Society has called "inappropriate".

With its own range of powers and its ability to ask for extra "blockbuster" funding for major investigations, the SFO has all the resources for a thorough investigation. But that is not to say the SFO cannot be successfully challenged.

Expertise

A defence lawyer can make representations and arguments to challenge SFO allegations and do everything possible to make the SFO doubt the strength of its case at the investigation stage. This can mean the SFO deciding to end an investigation with no charges being brought.

After a 17-month investigation, the SFO abandoned its bribery investigation into Soma Oil and Gas late last year, as it said it had failed to find enough evidence to prosecute. No one has the power to force the SFO to abandon an investigation. But challenging the allegations, as we do in all such cases, can influence the SFO's decision on whether to prosecute; as happened with Soma.

It must be emphasised that the chances of successfully challenging the SFO are highest if such legal help is sought at the earliest opportunity.

Such help can, for example, involve challenges to search warrants obtained by the SFO: whether they were obtained lawfully and if the searches were conducted appropriately. A defence team can seek to have a warrant quashed and any seized material returned.

A high-profile example of how the SFO can get it wrong is the case of Robert and Vincent Tchenguiz. The brothers' premises were searched and arrests were made but the defence then showed that the SFO had failed to check the credibility of information it presented to the court when applying for the search warrants. The case ended with the SFO apologising to the brothers and paying them £4.5 million.

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B1 2JB
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Evidence

The SFO can also be challenged at all stages of an investigation regarding the reliability of information and material it intends to use as evidence. Section 21 of the Police and Criminal Evidence Act (PACE) gives people the right of access to any material of theirs that has been seized by the SFO, while the Attorney General's Guidance on Disclosure (December 2013) laid down guidelines on dealing with the seizure and search of digital material; to prevent anyone under investigation being disadvantaged.

If an investigation leads to the SFO obtaining what it believes is enough evidence to give it a realistic chance of a conviction, charges will be brought. If they are brought, a shrewd defence team can also use the law of disclosure to gain access to material gathered by the SFO which does not support its case but which may help the defence.

Investigation

Earlier in this article, however, we touched on the importance of negotiation. Such negotiation with the SFO is only really possible if you know the extent of any wrongdoing that may have been committed by the company or people working for it.

Any suspicions of wrongdoing have to be investigated immediately; ideally by someone experienced in following the evidence trail in such circumstances.

This allows you to establish the true situation and may give you the chance of a deferred prosecution agreement (DPA). A DPA involves a company admitting criminal behaviour and agreeing to meet certain conditions.

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B1 2JB
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These conditions can involve changing working practices, removing certain staff, paying fines or introducing measures to prevent any repeat of the criminal behaviour. Under a DPA, if the company meets these conditions for an agreed period of time, it is not prosecuted. But it is prosecuted if it fails to meet them.

The negotiating skills we talked about are important both when seeking a DPA and, if that is successful, in agreeing the terms of it.

Rolls-Royce secured a DPA with the SFO largely due to the cooperation it offered the SFO and efforts it made to put right the wrongs. But it also emphasised how a prosecution would damage its wellbeing, the UK aircraft industry and tens of thousands of jobs in its supply chain. Such an approach has to be seen as a negotiating tactic: Rolls-Royce was happier to pay the £497M DPA fine and acted accordingly.

Similarly, Tesco made changes to its personnel and working methods and agreed a £129M fine as part of securing a DPA. It considered this preferable to prosecution and tailored negotiations with the SFO towards such an outcome.

Both cases show the value of negotiation.

Azizur Rahman
Senior Partner
aziz.rahman@rahmanravelli.co.uk
+44 (0)203 911 9339

Aziz Rahman is Senior Partner at Rahman Ravelli and its founder. His ability to coordinate national, international and multi-agency defences has led to success in some of the most significant corporate crime cases of this century and top rankings in international legal guides. He is recognised worldwide as one of the most capable legal experts regarding top-level, high-value commercial and financial disputes.

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