Case No: U20150856

IN THE CROWN COURT AT SOUTHWARK
IN THE MATTER OF s. 45 OF THE CRIME AND COURTS ACT 2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2016

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(THE RT. HON. SIR BRIAN LEVESON)

- -

Between :

SERIOUS FRAUD OFFICE	**Applicant**
- and -	
SARCLAD LIMITED	**Respondent**

- -
- -

Zoe Johnson Q.C. and **Paul Raudnitz**
(instructed by the Serious Fraud Office) for the Applicant
Vivian Robinson Q.C. (of **McGuireWoods London LLP**) for the Respondent

Hearing dates: 20 April 2016, 24 June 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE PRESIDENT OF THE QUEEN'S BENCH DIVISON (SIR BRIAN LEVESON)

Sir Brian Leveson P :

1. This is the second application made by the Serious Fraud Office for approval of a Deferred Prosecution Agreement. For the sake of completeness, it is worth introducing and explaining the statutory scheme by repeating what I said in the preliminary judgment in *SFO v. Standard Bank*(U20150854) 4 November 2015, which was the first application. I put it in this way:

> 1. The traditional approach to the resolution of alleged criminal conduct is for a prosecution authority to commence proceedings by summons or charge which then proceeds in court to trial and, if a conviction follows, to the imposition of a sentence determined by the court. By s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act"), a new mechanism of deferred prosecution agreement ("DPA") was introduced into the law whereby an agreement may be reached between a designated prosecutor and an organisation facing prosecution for certain economic or financial offences. The effect of such an agreement is that proceedings are instituted by preferring a bill of indictment, but then deferred on terms: these terms can include the payment of a financial penalty, compensation, payment to charity and disgorgement of profit along with implementation of a compliance programme, co-operation with the investigation and payment of costs. If, within the specified time, the terms of the agreement are met, proceedings are discontinued; a breach of the terms of the agreement can lead to the suspension being lifted and the prosecution pursued.
>
> 2. By para. 7-8 of Schedule 17 to the 2013 Act, after negotiations have commenced between a prosecutor and relevant organisation, the prosecutor must apply to the court, in private, for a declaration that entering into a deferred prosecution agreement in the circumstances which obtain is likely to be in the interests of justice and that the proposed terms are "fair, reasonable and proportionate". Reasons must be given for the conclusion expressed by the court and in the event of such a declaration (either initially or following further negotiation and review), formal agreement can then be reached between the parties. In that event, a further hearing is necessary for the court to declare that the agreement is, in fact, in the interests of justice and that the terms (no longer proposed, but agreed) are fair, reasonable and proportionate.
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> 3. If a DPA is reached and finally approved, the relevant declaration, with reasons, must be pronounced in public. Thereafter, the prosecutor must also publish the agreement and the initial or provisional positive declaration (along with any earlier refusal to grant the declaration) in each case with

> the reasons provided. In that way, the entirety of the process, albeit then resolved, becomes open to public scrutiny. …

2. Judicial involvement in the process is pivotal. In the final judgment in *SFO v Standard Bank* (dated 30 November 2015), I put the matter in this way (at [2]):

> "In contra-distinction to the United States, a critical feature of the statutory scheme in the UK is the requirement that the court examine the proposed agreement in detail, decide whether the statutory conditions are satisfied and, if appropriate, approve the DPA. … In that way, the court retains control of the ultimate outcome …"

3. In one sense, *SFO v Standard Bank* represented a comparatively straightforward application of the principles and process. This application raises for the first time the problems generated when a modestly resourced small to medium sized enterprise ("SME") is demonstrably guilty of serious breaches of the criminal law. At what level of criminality is it necessary simply to allow the SME to become insolvent and to what extent is it appropriate to mitigate the financial penalty, knowing that the SME is only able to make any substantial payment with the support of the substantial company of which the SME is a wholly owned subsidiary? On the one hand, allowing the SME to continue to trade (assuming necessary compliance has been put in place) is in the public interest but, on the other hand, nothing must be done to encourage the pursuit of criminal behaviour through a corporate vehicle which can be abandoned as insolvent if necessary.

4. For that reason, I adjourned the preliminary hearing to give the Serious Fraud Office ("SFO") represented by Ms Zoe Johnson QC and Sarclad Ltd ("Sarclad") represented by Mr Vivian Robinson QC, the opportunity to put more information before the court. When the hearing resumed with further information (and detailed consideration of the points that I had raised), I indicated that I was prepared to grant a declaration pursuant to para. 7(1) of Schedule 17 of the 2013 Act to the effect that the proposed agreement between the SFO and Sarclad is likely to be in the interests of justice and that the proposed terms (viewed overall) are fair, reasonable and proportionate. In this field of developing jurisprudence, however, in the event of this agreement becoming final, at some stage my reasons will enter the public domain and are likely to inform other cases; in the circumstances, I reserved my reasons.

5. This judgment must remain private unless and until the agreement becomes final and a declaration is made pursuant to para. 8(1) of Schedule 17. Even then, subject to the production of a redacted version (see [82] below), the publication of information by the prosecutor is postponed until the criminal proceedings in relation to a number of Sarclad's former employees have concluded; only in that way will it be possible to avoid a substantial risk of prejudice to the administration of justice in those proceedings: see para. 12 of Schedule 17.

The Facts

6. Sarclad is an SME based in Rotherham, South Yorkshire, which employs 68 members of staff. It designs and manufactures technology based products for the steel manufacturing industry globally. Relevant to the present DPA, historically,Sarclad has

generated the majority of its revenue from exports to Asian markets. Following its acquisition in February 2000, it has been a wholly owned subsidiary of Heico Companies LLC ("Heico") which is a US registered corporation.

7. During the period June 2004 to June 2012, Sarclad, through a small but important group of its employees and agents, was involved in the systematic offer and/or payment of bribes to secure contracts in foreign jurisdictions. In total, of 74 contracts which were ultimately examined, 46 were characterised as "suspicious" by reason of there being suspicion (but no evidence) that those contracts may have been procured as a result of the offer and/or payment of bribes. Of these, 28 are said to be "implicated", that is to say there is specific evidence to suggest that each contract was procured as a result of the offer and/or payment of bribes. It is these which form the subject-matter of the present application.

8. Before embarking on an analysis of these contracts, it is important to identify those who have been involved in authorising the offering of bribes; at this stage, I name them only by reference to their positions in the company. These are the Managing Director (from 1990 until his retirement in August 2011), who was a controlling mind of Sarclad between 2004 and 2011, the Design Engineer, later Sales Engineer, then Sales Manager and finally Head of Sales and Marketing and a third man who had also been the Sales Manager and later the Project Manager in relation to one of Sarclad's products. Two of the three men had left Sarclad's employment prior to the discovery of what had happened; the employment of the third was terminated. All are now facing prosecution, with the first two being due for trial and an extradition warrant being executed in relation to the third (who had emigrated to Australia).

9. The way in which these offences were committed was for intermediary agents within a particular jurisdiction to offer or to place bribes with those thought to exert influence or control over the awarding of contracts; this was done on behalf of Sarclad's employees and ultimately the company. It is significant that these were payments which were not part of agency agreements which provided for agents' remuneration on the basis of commission expressed as a percentage of the contract value in each case. Rather, correspondence shows the payment also of what is described as "fixed commission", "special commission" and "additional commission". It is also important to emphasise that there is no direct evidence of any illegal agreement between the agents concerned and the purported recipients of bribes. However, given the context and correspondences between Sarclad employees and agents, this DPA preliminary application proceeds on the basis that the various terms used represent euphemisms for bribes.

10. The correspondence further shows that it is the agents who instigated the offer and/or payment of bribes. Furthermore, in respect of three of the 28 implicated contracts, payments were made through a company based in the Caribbean. The first relates to a contract made on 16 June 2004 for the supply of a Rollscan machine at a price of £68,000. In respect of that contract, on 10 April 2006, an employee of the Caribbean company e-mailed one of the Sarclad employees in respect of the other contracting party:

> "… 5% reimburse. If that is possible to agree compensation of this amount? This contact … is important for us and we even

> suppose that it is quite reasonable to give 10%, half of them we can pay on behalf of [the Caribbean company], that is on account [sic] of the commission".

A response was received:

> "[O]ffer nothing now but say that we will add an additional commission to the next contract we receive from them?"

11. Such correspondence was typical of contracts arranged through the Caribbean company and other agents. For the sake of brevity, for the most part, I provide only the essential details of arrangements made concerning the other 27 contracts and, for good reason, do not identify the companies concerned. In that respect, the second contract brokered by the Caribbean company was made on or around 13 April 2005 for the supply of a strand condition monitor at a price of £201,431, where there was an extra 5% paid. The last implicated contract arranged through the company was for the supply of a Rollscan machine at a price of €114,180, where, outside the contract, an "additional 5% in price" was paid to "the mill people".

12. Three arrangements were made with an Asian engineering company. In that regard, correspondence on or around 4 October 2004 shows "additional commission was used to secure the order" with respect to the supply of spare parts, where the contract price was £35,018.50. Next, on or around 1 August 2005 Sarclad contracted with another company for the supply of a Rollscan machine at a price of £80,960: "£2,500 extra" was paid through the agent. The third and final contract brokered through the same organisation was formed on or around 1 February 2006 for the supply of a Rolltex machine at a price which was the aggregate of €2,944,000 and 28,158,000 Rupees. It appears the additional payment was, after negotiation, €20,000.

13. Two arrangements were made through an Asian import company. The first contract brokered through that company was for the supply of a Strand Condition Monitor and to upgrade an existing machine, completed on or around 10 June 2005 at a contract price of £281,000: "5% special contribution" was paid. The second contract was for a Strand Condition Monitor at a contract price of £301,200 signed on or around 9 September 2005: "£10k additional commission was agreed".

14. An Asian agent was involved in a single implicated contract, agreed upon on or around 1 March 2006 with a steel company for the supply of a Rolltex machine. The correspondence between Sarclad and the agent speaks of an "under the table cost [of] 9,000 euro". A different Asian corporation also acted as agent on a single implicated contract, which was made on or around 9 September 2010 with a steel company for the supply of Rollscan spares and a 4 probe capsule, at a price of £3,211. There, an "additional 10% [was] actually for [a named company]". Finally, a third agent also operating in Asia negotiated a contract to supply a Rolltex machine at a price of $1,535,000, where "additional commission" of $80,000.00 was paid.

15. A particularly prolific agent operated through a company in relation to contracts in one specific part of Asia. The first of 17 arrangements was in respect of a contract Sarclad entered into, on or about 23 October 2006, with a steel company for the supply of spare parts; the contract price was £146,298.15. Beyond the agent's commission in the agency agreement expressed as a percentage, the agent sent an e-mail on 23 October 2006 to

two of the implicated Sarclad employees, copied also to another employee, on 23 October stating "as we discussed and agreed that customer want [sic] to place the order… with GBP6000 payout." The relevant invoice in respect of this contract shows a "Fixed amount commission" of £6,000.

16. Moreover, contracts were also signed on or around 18 January 2007, 17 August 2007 and 19 May 2008 in relation to the supply of further spare parts at a total of £185,004.24, where circumstances suggest bribes totalling £12,943.50 were paid. In addition, on and around 24 August 2007 and 23 March 2010, contracts were formed with yet another steel company totalling £196,928.90, where correspondences show £6,800 "extra" or "fixed" commission was paid. Then, on or around 31 August 2007 a contract was signed with a steel and stock company for the supply of spare parts worth £51,000, where £7,000 was paid.

17. Thereafter, on or around 1 December 2007, €90,000 "additional commission" was paid on a contract with another Asian iron and steel company for the supply of a Rolltex machine worth €2,320,000. A further Rolltex machine was supplied to a different company at a price of €2,426,350, where there was a "€80,000 payout". Spare parts worth £14,666.00 were ordered by a further client on or around 26 August 2008, where a "fixed amount commission" of £1,500 was paid. A strand condition monitor was supplied to a company at a contract price of £206,650, formed on or around 3 November 2008, where a "fixed commission" of £15,000 was paid.

18. On or around that same day, Sarclad contracted for the supply of a Rolltex machine at a price of £1,610,000, with an extra £10,000 being paid. Then on 9 September 2010, Sarclad contracted with an organisation for the supply of a Strand Condition Monitor at £212,000 where an "additional commission" of £15,000 was paid. Another strand condition monitor was supplied to a trade corporation in a contract formed on or around 23 March 2011, this time where the price was £182,430 and the bribe was £5,000.

19. Later in 2011, on or around 17 August, Sarclad contracted for the supply of a Rolltex machine at a price of £1,780,000, where a "fixed commission of £30,000" was paid. A further Rolltex machine was contracted for at a price of €1,900,000, on or around 14 December 2011, where a "fixed commission" of €185,000 was paid.

20. The last arrangement involving this agent was in respect of a contract entered into for the supply of a Rolltex machine, on or around 12 June 2012, where the contract price was $2,448,000. On 11 November 2011, the agent emailed one of the implicated Sarclad employees, copying another and a third employee, stating that he would need "GBP30,000 extra commission". On 23 December 2011, the Head of Sales and Marketing at Sarclad and the agent signed off a commission statement providing for a £30,000 "fixed commission". It should be noted that there is a European arrest warrant in force against this agent, although a policy decision has been made not to pursue his extradition.

21. Summarising the position, taken together, in the period 2004-2013, a total of £17.24 million was paid to Sarclad on the 28 implicated contracts on which bribes were offered. This sum represented 15.81% of the total turnover of Sarclad in the period (being £109 million). The total gross profit from the implicated contracts amounted to £6,553,085

out of a total gross profit of £31.4 million (i.e. 20.82%). Sarclad estimates a net profit of approximately £2.5 million in respect of the implicated contracts.

22. It is also appropriate to say something of the involvement of Heico in the business of Sarclad which, effectively, on acquisition it rescued. Heico provided support for annual budgeting, marketing and product development while also providing long-term strategic planning, supply chain and global sourcing resources. In 2007, a group-wide health and safety programme was rolled out which remains in place. Heico has also provided services in relation to cost-saving measures, a compliance manual, a code of conduct with online training together with management consultancy along with support in comprehensive environmental health and safety (EHS), corporate HR and internal audit. Sarclad paid Heico a total of £2.3 million in management fees over this period. During the period following the February 2000 acquisition, Heico received dividend payments totalling some £6 million. In the circumstances, Heico have agreed to divest a significant proportion of these dividends in the sum of £1,953,085.

Investigation

23. By its own admission, prior to 2012, Sarclad did not have adequate compliance provisions in place. In order to address this problem, in late 2011, Heico sought to improve matters in its subsidiary by implementing its global compliance programme (in respect of which it should be noted that Heico has invested £3 million to date) within Sarclad. It was within the context of this compliance programme that, at the end of August 2012, concerns came to light about the way in which a number of contracts had been secured. Sarclad took immediate action: on 4 September 2012, it retained a law firm, McGuireWoods LLP, to undertake an independent internal investigation. Its focus was contracts post-dating 1 January 2006.

24. While investigating and with the consent of its client, on 2 October 2012, McGuireWoods orally informed the SFO that an as yet unidentified client might be making a self-report to the SFO. On 13 November 2012, the lawyers met with the SFO and confirmed that Sarclad would be making a written self-report following the conclusion of the internal investigation. It was agreed that the written self-report would be submitted to the SFO by 31 January 2013. In the meantime, McGuireWoods was in the process of:

    i) collecting, processing and searching over 90GB of electronic data consisting of .pst files from the company server, images of laptop hard drives, and USE/external memory drives;

    ii) reviewing over 27,000 electronic records;

    iii) collecting and reviewing hard copy documents, including personal notebooks, agency files, contract files, invoices and shipping files; and

    iv) conducting 13 interviews of four Sarclad employees.

25. McGuireWoods delivered the self-report to the SFO on the agreed date. It was 39 pages in length and set out details of the evidence identified in relation to 16 implicated contracts and 20 suspicious contracts. Thereafter, between 26 April 2013 and 14 January 2016, with the full co-operation of Sarclad, the SFO conducted its own

investigation. Further, through McGuireWoods, Sarclad made continuing efforts to investigate and supplement the self-report and, in particular, expanded the scope of the investigation to include contracts before 1 January 2006.

26. So it was that, in June 2013, the Director of the SFO accepted the case for criminal investigation pursuant to s. 1(3) of the Criminal Justice Act 1987. Following the service of a notice to Sarclad issued under s. 2 of that Act, for personal email caches, Sarclad submitted a further report providing further information about five additional implicated contracts. A further analysis of material obtained from Sarclad's auditors revealed a large number of references to "fixed commission" on invoices in relation to contracts that had not been identified in the reports. Evidence relating to the agent and other suspects was also seized during searches at the agent's UK address. The SFO also itself conducted ten interviews under caution, one outside the jurisdiction, and ten interviews under s. 2 with former and current Sarclad employees and auditors.

27. On 27 November 2014, McGuireWoods produced a third self-report on Sarclad's behalf which contained details of 32 contracts which had not previously been identified, seven of those being implicated. This brought the total of contracts to be investigated on suspicion of being obtained as a result of corrupt payments to 74, of which 28 were implicated.

28. At this stage, it should be noted that the 28 implicated contracts straddle the coming into force of the Bribery Act 2010 ("the 2010 Act") on 1 July 2011. 24 pre-date and four post-date the 2010 Act, although in relation to two such contracts the agreement to make improper payments would have been concluded prior to 1 July 2011. With this legal complexity in mind and on the basis of the investigation set out above, the Director of the SFO was satisfied that there was sufficient evidence to provide a realistic prospect of conviction against Sarclad, in relation to the pre-2010 Act conduct, for an offence of conspiracy to corrupt and, in relation to post-2010 Act conduct, for conspiracy to bribe contrary to s. 1 of the Criminal Law Act 1977 along with an offence of failure to prevent bribery contrary to s. 7 of the 2010 Act. This conclusion was reached in accordance with the full code test set out in the Code for Crown Prosecutors and, therefore, para. 1.2.i(a) of the DPA Code of Practice.

29. Thus, a potential draft indictment has been drafted by or on behalf of the SFO in the following terms:

> "Count 1
>
> *Statement of Offence*
>
> Conspiracy to corrupt, contrary to section 1 of the Criminal Law Act 1977
>
> *Particulars of Offence*
>
> Sarclad Limited, between the 1st day of June 2004 and the 1st day of July 2011 conspired with [named] and other Sarclad agents corruptly to give, agree to give or offer gifts or payments, to other agents, as inducements to secure, or as rewards for having secured, contracts for Sarclad Limited, contrary to section 1 of the Prevention of Corruption Act 1906.

Count 2

Statement of Offence

Conspiracy to bribe, contrary to section 1 of the Criminal Law Act 1977

Particulars of Offence

Sarclad Limited, between the 1st day of July 2011 and the 13th day of June 2012 conspired with [named and] other Sarclad agents to offer, promise or give a financial or other advantage, to other persons as inducements to secure, or rewards for having secured, contracts for Sarclad Limited, contrary to section 1 of the Bribery Act 2010.

Count 3

Statement of Offence

Failure to prevent bribery, contrary to section 7 of the Bribery Act 2010

Particulars of Offence

Sarclad Limited, between the 1st day of July 2011 and 13th day of June 2012, through its employees or agents, bribed other persons, intending to obtain or retain business for Sarclad Limited or to obtain or retain an advantage in the conduct of business for Sarclad Limited."

30. The evidential test referred to in para. 1.2.i(a) of the DPA Code having been satisfied, the Director of the SFO also considered that the public interest would likely be met by a DPA with Sarclad (see para. 1.2.ii of the DPA Code). Accordingly, the Director invited Sarclad to commence negotiations; these began in August 2015. Following comprehensive discussion, a provisional agreement as to the terms of the DPA was reached and the SFO now seeks a declaration under para. 7(1) of Schedule 17 of the 2013 Act to the effect that entering into a DPA with Sarclad is likely to be in the interest of justice, and the proposed terms of the DPA are fair, reasonable and proportionate.

31. As I stated in *SFO v Standard Bank*, the assessment of the overall merits must be taken in the round: see [23]. However, given that the resolution and approval of DPAs remain novel and that the circumstances differ substantially from that case in terms of type and scale of offending and issues it raises (not least with regard to disgorgement of profits and financial penalty), I shall again analyse the merits individually and in some detail.

The Interests of Justice

32. Irrespective of the terms of the DPA, it must be in the interests of justice to proceed in this manner as opposed to prosecution and s. 11.3 (3)(i)(i) of the 2015 Rules requires the application for a DPA to explain the way in which the interests of justice are served. In making this assessment, a number of factors fall to be considered. These can be listed as follows:

    i) the seriousness of the predicate offence or offences;

ii) the importance of incentivising the exposure and self-reporting of corporate wrongdoing;

iii) the history (or otherwise) of similar conduct;

iv) the attention paid to corporate compliance prior to, at the time of and subsequent to the offending;

v) the extent to which the entity has changed both in its culture and in relation to relevant personnel;

vi) the impact of prosecution on employees and others innocent of any misconduct.

33. Dealing with each of these factors in turn, the first consideration must be the seriousness of the conduct on the basis that the more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interest of justice. This reflects para. 2.5 of the DPA Code (and see also the preliminary judgment in *SFO v Standard Bank* at [25]). There is no doubt that Sarclad's conduct was grave. Not only does the criminality which Sarclad potentially faces include failure to prevent bribery in respect of the post-2010 Act conduct, more seriously, it also encompasses conspiracy to corrupt and bribe reflecting substantive offences of bribery.

34. Moreover, this conspiracy involved a course of systematic conduct over eight years. It implicates seven agents in as many jurisdictions, generated some £6.5 million of gross profit (£2.5 million net) and caused detriment to other potential competitors. It was, therefore, part of Sarclad's established business conduct. These are factors in favour of prosecution and against entering into a DPA (see DPA Code 2.8.1(i)). In terms of gravity, it is of an entirely different order to that considered in *SFO v Standard Bank* which concerned failure to prevent a single (albeit very substantial) incident of bribery by a sister company in the same corporate family.

35. There is, however, another side to consider. Although the conduct was endemic and implicated 7 out of the 33 agents with which Sarclad dealt, the correspondence shows the great majority of the bribes were offered at the instigation of the agents, albeit with the agreement of Sarclad's employees. Correspondingly, there is no evidence of agents being pressured into giving bribes on behalf of Sarclad, thereby putting them at risk of (often very severe) penal consequences in their home countries. Nor, finally, did the bribing mechanism represent anything particularly sophisticated or redolent of a corporate cover-up: the conduct was there for all to see.

36. The second feature to which very considerable weight must be attached, reflecting a core purpose of the creation of DPAs being to incentivise the exposure (and self-reporting) of corporate wrongdoing, is the timeframe and sequence of events leading up to Sarclad's self-report to the SFO and the manner in which it adopted a genuinely proactive approach to the wrongdoing it uncovered: see para. 2.8.2(i) of the DPA Code of Practice and Joint Prosecution Guidance to the Bribery Act 2010 (page 7). In that regard, the promptness of the self-report and the extent to which the prosecutor has been involved are to be taken into account: see para. 2.9.2 of the DPA Code of Practice.

37. In that context it is also important to underline that, had it not been for the self-report, the offending might otherwise have remained unknown to the prosecutor: see para. 2.8.2(i) of the DPA Code of Practice. In that regard, the conduct had lasted eight years without being detected. There is no suggestion of a whistle-blower or any other mechanism whereby the matter might have come to the attention of the authorities.

38. Furthermore, the weight given to an organisation's self-report depends on the totality of the information that an organisation provides to the prosecutor: see para. 2.9.1 of the DPA Code of Practice. Specifically, the organisation must ensure in its provision of material as part of the self-report that it does not withhold anything that would jeopardise an effective investigation and, where appropriate, prosecute individuals involved. In that regard, Sarclad provided comprehensive information in its initial self-report, which was the result of an extensive investigation by McGuireWoods. The SFO's independent investigation effectively confirmed what was stated in that report. Sarclad through McGuireWoods subsequently identified further relevant information, as has been set out above, and submitted further reports. The 28 implicated contracts were all identified by internal investigation and the cache of probative emails was volunteered to the SFO on request.

39. Finally in relation to this point, co-operation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them: see para. 2.8.2(i) of the DPA Code of Practice. Where practicable it will involve making witnesses available for interview when requested. In that regard, Sarclad provided oral summaries of first accounts of interviewees, facilitated the interview of current employees, and provided timely and complete responses to requests for information and material, save for those subject to a proper claim of legal professional privilege. Taken together, Sarclad's timely self-reporting and full and genuine cooperation militates very much in favour of finding that a DPA is likely to be in the interest of justice.

40. The third feature relevant to the interests of justice test concerns the extent of any history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the organisation: see para. 2.8.2 (ii) of the DPA Code of Practice. In that respect, although the conduct at issue was over a period of eight years, Sarclad does not have a history of bribery and corruption before that nor has it been the subject of any criminal investigation by the SFO or any other agency, either within the UK or internationally. Further, there is no evidence that the offending is more extensive than that which has been disclosed to the authorities.

41. The fourth factor refers to the weight which must be given to any corporate compliance programme in place at the time of the offence, at the time of reporting, and any improvement that has occurred (para. 2.8.2 (iii) of the DPA Code of Practice). In that regard, although by its own admission Sarclad's compliance programme was inadequate during the period of the conduct at issue, a new compliance process was put in place from late 2011, prior to the self-report, including the implementation of new training programmes, policies and procedures: it was this programme that led to the discovery of the issues that, in turn, led to the self-report.

42. It should be noted at this stage that this change in compliance that ultimately led to the self-report was a consequence of the benefit that Sarclad derived from Heico's global compliance programme. A critical fact to which I shall return when discussing the

terms of the proposed DPA is that there is no question in this case of the parent company knowingly making profit from its subsidiary's criminality; neither is there any suggestion (let alone evidence) that Heico should have known about what was going on or behaved otherwise than with complete propriety when it was discovered.

43. The position of Heico takes me to the fifth and very important factor. It is clear that Sarclad in its current form is effectively a different entity from that which committed the offence. This weighs in favour of a proposed DPA being in the interests of justice: see para. 2.8.2 (v) of the DPA Code of Practice. In the period since Sarclad identified the misconduct, two senior employees have been dismissed. Relationships with the seven suspect agents were terminated and bids for two suspect potential contracts were withdrawn. At the conclusion of the SFO's investigation, none of Sarclad's current employees, or Directors, faces criminal charges. As such, Sarclad is a culturally different company to that which committed the offences subject to the present DPA application.

44. The context of the present position of Sarclad takes me to the final, sixth, factor which is that account should be taken as to whether a prosecution and conviction is likely to have disproportionate non-penal legal consequences for an organisation or is likely to have collateral effects on the public or the organisation's employees: see para. 2.8.2 (vi) and (vii) of the DPA Code of Practice. In that regard, quite apart from the fact that prosecuting and convicting Sarclad would inevitably lead to significant legal costs and financial penalty at an unfavourable time in the global steel industry, Mr Robinson has explained that, even without the potentially detrimental effect of a prosecution, Sarclad is currently operating on an 'economic knife-edge'. In addition, conviction would mean that Sarclad would be debarred from participating in public contract procedures in the UK under Regulation 57(1) of the Public Contract Regulations (SI 2015/102) and throughout the EU under Article 57(1) of Directive 2014/23/EU on the award of concession contracts. Taken together, Sarclad would risk becoming insolvent (even assuming that such an outcome was not inevitable), harming the interest of workers, suppliers, and the wider community.

45. Putting these features together, there is no doubt that Sarclad's conduct was very serious both in terms of type and scale so that it is not straightforward that a proposed DPA is in principle in the interest of justice. However, it is important to send a clear message, reflecting a policy choice in bringing DPAs into the law of England and Wales, that a company's shareholders, customers and employees (as well as all those with whom it deals) are far better served by self-reporting and putting in place effective compliance structures. When it does so, that openness must be rewarded and be seen to be worthwhile.

46. Furthermore, there is no question but that Sarclad spiralled into criminality as a result of the conduct of a small number of senior executives bending to the will of agents. It is also clear that the parent company, Heico, was not only entirely ignorant of what was going on but, as soon as the new compliance programme started to reveal a problem, immediately disclosed it. This last point is of particular significance for if a company is set up to provide an impecunious vehicle through which corrupt payments might be made, the fact that it is liable to face such sanction that it is wound up is a critically important deterrent. It is in those circumstances that investigation of the ultimate owner in relation to an offence under s. 7 of the 2010 Act is inevitable. This case is the very

reverse of that situation. Therefore, subject to the proposed overall terms being fair, reasonable and proportionate (which requires taking fully into account the financial circumstances of Sarclad), I am satisfied that it is likely to be in the interests of justice that Sarclad's conduct be resolved through the mechanism of a DPA. It is to these terms that I now turn.

The Terms

47. An application for a DPA is covered by paras. 11.3(3)(f) and (g)(i) and (ii) of the 2015 Rules and requires a description of the proposed terms, an exposition of its compliance with the DPA Code of Practice and sentencing guidelines and an analysis of how they are fair, reasonable and proportionate. The essential basis of this DPA is that effective from the date of a declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of at least three years, and up to a period of five years (in broad terms), the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, at the end of the period, discontinue the proceedings.

48. Conditions include the provision that there is no protection against prosecution of any present or former officer, employee or agent or, indeed, of Sarclad for conduct not disclosed by it prior to the date of the agreement (or any future criminal conduct); prosecution can also follow if the organisation provided information to the SFO which it knew or ought to have known was inaccurate, misleading or incomplete. There is no difficulty with any of these provisions.

49. The other requirements falling upon Sarclad are as follows:

    i) Disgorgement of gross profits of £6,201,085 (of which £1,953,085 will be contributed by Heico being the repayment by Heico of a significant proportion of dividends that it had received from Sarclad, albeit entirely innocently);

    ii) Payment of a financial penalty of £352,000 being a reasonable estimate of the unencumbered balance of cash available following a review by the SFO of Sarclad's cash flow projections over three years;

    iii) Past and future cooperation with the SFO (as further described) in all matters relating to the conduct arising out of the circumstances of the draft indictment; and

    iv) Review and maintenance of the organisation's existing compliance programme (as further described).

    It is also acknowledged that no tax reduction shall be sought in relation to the payments (i) and (ii) above.

50. As to duration, the DPA must be of sufficient length that the proposed terms are effective and their aims accomplished; this is obviously dependant on the individual circumstances of the case. The proposed DPA would be effective from the date of a declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act until the earlier of 31 December 2020, or such time after 31 December 2018 but before 31 December 2020, as the financial terms have been fully met. Such duration (with possibility of extension)

permits Sarclad to pay the disgorgement and financial penalty sums in instalments in circumstances of financial difficulty which are more fully explored in relation to calculation of the sums. In this way, the proposed duration allows for terms to be effective and their aims accomplished.

51. To satisfy the terms of the statute, I now turn to consider each limb in turn underlining, in relation to the financial commitment being undertaken, first, that all bar £352,000 will be paid only with the support of Heico and that the global figure represents the entirety of the gross profits (£6,553,085) in relation to the implicated contracts. How that sum is split up could be the subject of argument but, in the end, it is not material.

Compensation

52. Priority must be given to payment of compensation over fines: see *SFO v Standard Bank*, at [39], reflecting para. 5(3)(b) of Schedule 17, para 7.2 of the DPA Code of Practice, s. 130(12) of the Power of Criminal Courts Act 2000 ("2000 Act") and the Definitive Guideline issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences ("the guideline"): in relation to corporate offenders. In this context, and relevant to both prosecutors in applying to the court for approval of a DPA and the court in determining whether the (proposed) terms are fair, reasonable and proportionate, s. 130(3) of the 2000 Act provides:

> "A court shall give reasons, on passing sentence, if it does not make a compensation order in a case where this section empowers it to do so."

53. In that regard, 17 of the 28 implicated contracts were with entities based in a country in Asia with which there is neither a request for mutual legal assistance nor an established mechanism or practice in place for payments of compensation orders to the authorities. Other bribes Sarclad agreed to offer involved agents based in or working in relation to other countries in Asia and elsewhere in respect of which the same difficulties arise. Further, the amounts of the bribe payment are not always confirmed in the evidence and neither is any rise in the contract price to accommodate it (which would generate the loss). Finally, the SFO is not able to demonstrate whether and, if so, in what sum, the various Sarclad agents actually paid bribes to named or unknown individuals. Taken together, these factors amount to it not being possible to positively identify any entities as victims who may be compensated.

Disgorgement

54. The legislation specifically identifies disgorgement of profit as a legitimate requirement of a DPA: see para 5(3)(d) of Schedule 17 restated at para. 7.9 of the DPA Code of Practice. The provision is clearly underpinned by public policy which properly favours the removal of benefit in such circumstances. Sarclad made a total gross profit as a result of the 28 implicated contracts of £6,553,085 (and a net profit of £2.5 million). However, as identified above, Sarclad has limited means and ability to pay such a sum such that the maximum amount it would be able to provide towards paying any financial obligation imposed without becoming insolvent is estimated to be £352,000.

55. In this context, Sarclad's parent company, Heico, has offered to provide the necessary financial support should a DPA be agreed. In the initial DPA, disgorgement of profits in the sum of £3.3 million was proposed along with a financial penalty of £1.3 million,

making a total financial commitment of £4.6 million. It is important to point out that Heico had offered this support, effectively by way of a long term loan, notwithstanding that no contractual obligation requires Heico to do so; furthermore, it must be underlined that no legal obligation attaches to an innocent parent company which requires it to contribute towards a financial penalty imposed upon one of its subsidiaries for criminal conduct by the subsidiary. Ultimately, of course, the subsidiary can be prosecuted and, if unable to pay an appropriate penalty, wound up.

56. On the other hand, a parent company receiving financial benefits arising from the unlawful conduct of a subsidiary (albeit unknown) must understand how this will be perceived. In that respect, Heico has received £6 million in dividends from Sarclad since acquiring it in February 2000. To its credit, when I raised the matter with Mr Vivian Robinson QC, for Sarclad, as to whether an appropriate proportion should properly be reflected in the terms of any DPA, the proposition was accepted. Thus, Sarclad and Heico have jointly agreed that Heico will also return £1,953,085 for Sarclad to pay towards disgorgement, which brings the total sum to be disgorged to £6,201,085 which is the total gross profit less the sum of £352,000 available over the period from Sarclad's resources. When combined with the proposed financial penalty, the total properly addresses the 'removal of gain' objective, removes any concerns over the extent to which the dividend paid by Sarclad to Heico may have been tainted by Sarclad's unlawful conduct and further demonstrates Heico's continuing commitment to the DPA process and its support of Sarclad.

57. The proposed DPA further provides for the disgorgement sum to be paid by way of instalments over five years. Payment in that way reflects Sarclad's means and ability to pay and is of obvious benefit in maximising the amount of profit disgorged. This part of the agreement could hardly be improved and is undeniably fair, reasonable, and proportionate: its size will also impact on the financial payment.

Financial Penalty

58. A DPA may impose on an organisation the requirement to pay a financial penalty: see para. 5(3)(a) of Schedule 17. Significantly, para. 5(4) provides:

> "The amount of any financial penalty agreed between the prosecutor and [the organisation] must be broadly comparable to the fine that a court would have imposed on [the organisation] on conviction for the alleged offence following a guilty plea".

59. These provisions were explained in *SFO v Standard Bank*, at [44], in the following terms:

> "… although there is no question of a conviction, the legislation requires any financial penalty to demonstrate broad comparability with a fine following conviction. That exercise can only be undertaken by analysing and applying the approach adopted by the Sentencing Council Guideline; this follows that mandated by s. 143 of the Criminal Justice Act 2003 to the effect that when considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. In connection with corporate offenders in

> relation to this type of offence, that then translates into a non-exhaustive hierarchy of culpability characteristics with harm represented by a financial sum related (in the case of offences under the Bribery Act 2010) to the gross profit from the contract obtained, retained or sought."

60. Dealing first with culpability (Step 3 of the Guideline), a relevant characteristic that militates in favour of placing an offence in the category of high culpability is that the corporation at issue played a leading role in organised, planned, unlawful activity. In that regard, the evidence against Sarclad reveals that approving the offering of bribes was an accepted way of doing business for the company over the relevant time period and knowledge of such conduct was held, and authorised, namely by senior executives who represented its controlling mind.

61. A second characteristic of high culpability is that the offending was committed over a sustained period of time. That is undeniably the case in respect of Sarclad's conduct. In the extensive period 2004 to 2012, the company was involved in systematically agreeing to offer bribes through agents. Neither can the incidents in this period be considered isolated. During the period at issue, at least 28 contracts were secured after Sarclad had agreed to offer a bribe through an agent.

62. With regard to the offence alleged under s. 7 of the 2010 Act offence, a third high culpability characteristic is a culture of wilful disregard of commission of offences by employees or agents with no effort to put effective systems in place. In that regard, before 2012, there was no attempt on the part of Sarclad to put effective systems in place and there was a wilful disregard as to the need to do so, evidenced by the seniority of those involved. The culture prior to 2012 may justifiably be characterised as wilful disregard as to the commission of offences by employees or agents with no effort to put effective systems in place.

63. For these reasons, the correct culpability starting point is, as the SFO submitted, high.

64. Turning to harm, for offences of bribery, the appropriate figure will normally be the gross profit from the contracts obtained, retained or sought as a result of the offending. As has been discussed with regard to appropriate disgorgement of profits, in this case, this amounts to £6,553,085. The Sentencing Council Guideline identifies the starting point for a high level of culpability as 300% of the 'harm' i.e. gross profit, with a range of 250% to 400%.

65. It is then necessary to fix the level by reference to factors which increase and reduce the seriousness of the offending. As regards aggravation, the corrupt activity was endemic within Sarclad. The 28 implicated contracts accounted for almost 16% (£17.2 million) of total sales between 2004 and 2012. Further, attempts were made to conceal the misconduct. The term "fixed commission" was used to conceal the nature of offers to agents. Finally, the offence was committed across borders and jurisdictions. The 28 contracts involved bribes that Sarclad agreed to offer through agents based in Asia and other places.

66. On the other side of the coin, the mitigating features include the fact that Sarclad has no previous relevant convictions nor has it been subject of any relevant previous civil or regulatory action successfully taken against it. Further, Sarclad has cooperated fully with the SFO's investigation, making early admissions voluntarily and reporting the

offending to the SFO, and has assisted throughout with the SFO investigation. Finally, it should be noted that offending was committed under a previous management team and immediate remedial steps were taken by Sarclad to replace the relevant senior management team and to terminate agreements with six agents identified as being involved in the offering of improper payments; this caused a loss of income as a consequence of two contracts worth £1.7 million being cancelled.

67. In these circumstances, the parties submitted that the appropriate harm multiplier is 250%. This is at the lower end of the high culpability range and, on a strict application of the Guideline, is lower than can be expected in the light of the serious aggravating factors. The question, however, is academic because, given the amount disgorged, whatever multiplier is chosen and however substantial the discounts, the result is a figure which Sarclad simply cannot pay and which would result in its insolvency.

68. Thus, even taking a multiplier of 250%, the starting point for a financial penalty is just under £16.4 million. According to the guideline, by Step 5, it is then necessary to 'step back' and consider the overall effect of its orders such that the combination achieves "removal of all gain, appropriate additional punishment and deterrence". Having reached a conclusion as to the appropriate financial penalty based on the guideline, para. 5(4) of Schedule 17 of the 2013 Act mandates that the financial penalty must be broadly comparable to the fine that a court would have imposed for the alleged offence following a guilty plea: this is Step 7 in the guideline and follows the exercise of 'stepping back'. Although that will be the ordinary course, given that the financial penalty in this case will be substantially limited by ability to pay, it is in the interests of justice to apply the relevant discounts (Step 7) before 'stepping back' (Step 5).

69. Looking to the discount following a guilty plea, it is necessary to take into account the appropriate reduction in accordance with s. 144 of the Criminal Justice Act 2003 and the relevant guideline (issued by the Sentencing Guidelines Council). In particular, under s. 144(1)(a) and (b) of the Act, a court must take into account the stage in the proceedings the offender indicated his intention to plead guilty and the circumstances in which the indication was given. Given the self-report and admission, under the guideline, a full reduction of one third is justified and appropriate. In addition, given that the admissions are far in advance of the first reasonable opportunity having been charged and brought before the court, that discount can be increased as representing additional mitigation. In the circumstances, a discount of 50% could be appropriate not least to encourage others how to conduct themselves when confronting criminality as Sarclad has. On the face of it, that reduces the figure to £8.2 million.

70. It is now necessary to step back and consider all the circumstances both in accordance with Step 5 of the guideline and generic sentencing practice. There is no doubt that the value, worth and available means of Sarclad fall to be considered together with the impact of the financial penalties including on employment of staff, service users, customers and local economy (but not shareholders). In addition, the full financial impact of this offending on Sarclad is relevant. This is also clear from ss. 142 and 164 of the Criminal Justice Act 2003 ("2003 Act") which deals with the need to have regard to the principles of sentencing, the seriousness of the offence and, when imposing a fine, the means of the offender.

71. Thus, although gross profit is an appropriate starting point when initially calculating the fine, it cannot be the only denominator when stepping back. All the financial circumstances must be taken into account, including profitability: see section 164(4) of the 2003 Act and *SFO v Standard Bank*, at [54], importing the approach of the Court of Appeal in the environmental offending context in *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960, at [40i]. Furthermore, although not a feature which can or should be taken into account as a mitigating factor to reduce the sums that it is otherwise appropriate to pay, it is relevant (as a measure of the commitment to improve and the extent of co-operation) that Sarclad (with the financial assistance of Heico by way of further loan) has spent some £3.8 million in fees arising from the responsible steps it has taken through its own investigation, self-reporting, co-operating with the SFO and completing what might be described as a thorough 'self-cleansing' process.

72. Quite apart from these fees, it is appropriate to have regard to the sum which Sarclad is prepared to disgorge and the agreed fact (following proper investigation by the SFO) that only some £352,000 is potentially available to Sarclad to provide towards any financial obligation, the balance being provided through support from Heico. Taking into account the sum to be disgorged of £6,201,085, a financial penalty of £352,000 leads, as I have said, to a total which equates to the gross profit on the implicated contracts. These sums could have been calculated differently, for example by reducing the disgorgement by £1 million and increasing the financial penalty by a similar amount.

73. In the event, I am quite content that the £352,000 represents the sum which SFO accountants accept is a reasonable estimate of the sum that will be available to Sarclad without help from Heico and it is appropriate to express the figures in this way albeit that the fine looks extremely modest: the sums must be taken together. As with disgorgement, payment by instalments does no more than reflect means and ability to pay and the arrangement is also fair, reasonable and proportionate.

Co-operation and Corporate Compliance

74. The DPA also covers co-operation and future compliance. As to the former, the proposal provides that Sarclad shall continue to cooperate fully and truthfully with the SFO in any and all matters relating to the conduct arising out of the circumstances at issue in the present DPA. In particular, Sarclad must disclose all information and material in its possession, custody or control, which is not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure, in respect of its activities and those of its present and former directors, employees and agents concerning all matters relating to the conduct at issue in the present DPA. Sarclad also warrants by the proposed DPA that it has not thus far provided inaccurate, misleading or incomplete information. These terms are materially similar to the co-operation terms in *SFO v Standard Bank* and it may be appropriate that they be considered as standard in these cases. Without excluding the possibility of other terms being fair, reasonable, and proportionate, the following comments made in *SFO v Standard Bank*, at [59], bear reiteration:

> "This type of co-operation, and in particular, disclosure of this nature, is envisaged by para. 7.8 (iii) of the DPA Code of Practice and footnote thereto: it is obviously in the public interest that individuals involved in

> the conduct at issue are investigated and prosecuted and this term will obviously be critical to this (and any) DPA."

75. Turning to corporate compliance, para. 5(3)(e) of Schedule 17 states that a DPA may impose on an organisation the requirement to implement a compliance programme or make changes to an existing compliance programme relating to the organisation's policies or to the training of the organisation's employees or both. In this regard, para. 7.9 of the DPA Code of Practice specifically draws the prosecutor's attention to the fact that putting in place a robust compliance and/or monitoring programme may be a term of a DPA.

76. In order to reduce the risk of future failings, the proposed DPA provides that Sarclad will undertake a review including the implementation of its existing internal controls, policies, and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws. In particular, Sarclad's Chief Compliance Officer will prepare a report for submission to the SFO to be completed within twelve months of the DPA coming into effect and annually thereafter for its duration on Sarclad's anti-bribery and corruption policies and their implementation. The report will include circumstances where third party intermediaries (such as agents) are involved with transactions in which Sarclad participates, the completion and effectiveness of Sarclad's anti-bribery and corruption training, including the level of anti-bribery and corruption awareness among employees. Once again, this term is clearly appropriate for a DPA in these circumstances.

Costs and Ancillary Provisions

77. The legislation provides that a DPA may impose on an organisation the requirement to pay any reasonable costs of the prosecutor in relation to the investigation and the subsequent resolution of the DPA: see para. 5(3)(g) of Schedule 17. Similarly, para 7.2 of the DPA Code of Practice provides that costs should ordinarily be sought. However, in this case, in light of Sarclad's means and ability to pay, the SFO has agreed not to seek costs. Such agreement is, in the circumstances, fair, reasonable and proportionate.

78. In relation to ancillary matters, as I have identified, the proposed DPA requires Sarclad to pay the disgorgement of profits and financial penalty in instalments. Failure to meet the proposed instalments in principle constitutes breach of the DPA. However, in such circumstances, at the sole discretion of the SFO late payment of the profits by up to 30 days will not constitute a breach of the DPA agreement but will be subject to interest at the prevailing rate applicable to judgment debts in the High Court. This is entirely in keeping with para. 5(5) of Schedule 17 to the 2013 Act which envisages a DPA including a term setting out the consequences of a failure by an organisation to comply with any of its terms and, further, is reasonable and appropriate given Sarclad's financial circumstances.

Conclusion

79. It might be thought that the outcome of this case has been only to remove from Sarclad the gross profits which flow from its criminality and that little can be achieved by way of deterrence by not imposing a much more substantial penalty for such egregious criminality. In this case, which can be considered exceptional, the critical question was whether Sarclad should be forced into insolvency bearing in mind the self-reports, the

sterling assistance provided by Heico (whose conduct has been exemplary in these very difficult circumstances and which should be seen by its customers, shareholders and employees as revealing the highest standards of corporate integrity), the compliance mechanisms now put in place and the fact that all those facing prosecution no longer work for Sarclad and that the company is operating effectively and in the public good.

80. Once it was decided that it was in the public interest that Sarclad should not be forced into insolvency, what was fair, reasonable and proportionate fell to be considered in the context of the work put into the company to ensure that it was viable and operated in accordance with the law, the expense incurred and whether sufficient financial assistance could be sought to ensure that the criminality had not led to profit. By disgorging or paying by way of financial penalty the total of gross (as opposed to net) profit and by doing so by incurring long term liability to Heico (save for Heico's reimbursement of the dividends it received), I believe that the conclusion is fair, reasonable and proportionate. This is not least because it provides an example of the value of self-report and co-operation along with the introduction of appropriate compliance mechanisms, all of which can only improve corporate attitudes to bribery and corruption.

81. Before parting from this case, it is worth adding that nothing I have said should be taken as indicating that the courts take anything other than a stern view of this type of offending. Individuals who are involved in wholesale corporate corruption and bribery can expect severe punishment and, absent exceptional circumstances such as obtain in this case, corporations set up or operated in that way are unlikely to survive. Analysis of the guideline underlines the likely approach of the court when prosecutions follow with punishment and deterrence being at the forefront of the sentencing decision.

82. For the reasons set out in [5] above, this judgment may not be reported until the conclusion of criminal proceedings. In order to assist the development of DPAs and for the purpose of revealing the approach of the court in circumstances such as obtain in this case, I have approved a redacted extract for publication.