

E-ALERT | White Collar

January 18, 2012

VOLUNTARY DISCLOSURE AND THE UK PROCEEDS OF CRIME ACT: THE FINAL ACT IN THE MABEY & JOHNSON CASE

“There are two key messages I would like to highlight. First, shareholders who receive the proceeds of crime can expect civil action against them to recover the money. * * * The second, broader point is that shareholders and investors in companies are obliged to satisfy themselves with the business practices of the companies they invest in. This is very important and we cannot emphasise it enough.”

Richard Alderman, Director, UK Serious Fraud Office

INTRODUCTION

The UK Serious Fraud Office (“SFO”) recently announced an enforcement action that highlights the far reaching use prosecutors can make of proceeds of crime legislation to combat serious economic crime.

On 13 January 2012, the SFO announced that it had secured via an action in the High Court a civil recovery order (“CRO”) requiring Mabey Engineering (Holdings) Ltd (“Mabey”) to pay £131,201 plus costs. The amount of the CRO – which was agreed between the SFO and Mabey – was stated to be a reflection of the sums that Mabey unknowingly “received through share dividends derived from contracts won through unlawful conduct.”

The Mabey action is the first time the SFO has used the CRO mechanism to target dividends already paid to shareholders in the UK. In announcing this action, the SFO signalled its intention to use the CRO mechanism to recover the proceeds of crime from shareholders that fail to conduct sufficient due diligence on the business practices of the companies in which they invest.

BACKGROUND

Mabey is the parent company and shareholder of modular bridge manufacturer Mabey & Johnson Ltd (“M&J”). It is part of the Mabey Holdings Group. In early 2008, M&J voluntarily disclosed to the SFO irregularities that it had identified as a result of an internal investigation. M&J cooperated with the SFO and subsequently pleaded guilty to having bribed public officials in Jamaica and Ghana to win contracts and breaching United Nations (“UN”) sanctions against Iraq. Following its conviction in September 2009, M&J was required to pay £6,615,000 in fines, costs and reparations.

The present action, which represents the conclusion of all matters relating to M&J’s voluntary disclosure, follows the conviction in February 2011 of two former M&J company officers – David Mabey and Charles Forsyth – and the earlier conviction of M&J employee Richard Gledhill for their part in breaching the UN sanctions. Richard Gledhill, as Sales Manager, negotiated the contracts with the government of Iraq and obtained approval from Charles Forsyth and David

Mabey to make kickback payments to Saddam Hussein's government via a local representative, Upper Gulf Agencies.

The CRO in the Mabey case was obtained under Part 5 of the UK Proceeds of Crime Act 2002 ("POCA"), a statute that allows prosecutors to target and recover – by agreement with the company in appropriate cases – identifiable property that has been acquired through criminal conduct. In civil recovery proceedings the action is against the property and not against any individual or company that holds the property.

In announcing the CRO, the Director of the SFO, Richard Alderman, emphasized the SFO's continued commitment to the self-referral process –

“[t]oday's action represents the final piece in an exemplary model of corporate self-reporting and cooperative resolution. This is the approach I would like to foster across the wider business community when it comes to the self-referral process the SFO has created. The process should provide clarity, confidence and, ultimately for the business concerned, a resolution to the problem. It requires wholehearted support from the business concerned and we got this from the Mabey Group.”

Director Alderman also stated that the SFO intends in the future to make wider use of CROs against assets held by investors in companies that are found guilty of criminal wrongdoing than it has made in the past. Director Alderman noted in that connection that –

“[t]he 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 in this respect.”

THE SIGNIFICANCE OF THE ORDER

While the amount secured by the SFO in the Mabey case is relatively modest, it does mark the first time that the SFO has used POCA to target dividends already paid to a shareholder in the UK. The SFO previously had secured an order against funds earmarked – but not yet paid out – as shareholder dividends by M.W. Kellogg Limited.

The present action also emphasizes the central role that the SFO sees corporate voluntary disclosure playing in its enforcement actions. Director Alderman has praised the manner in which the Mabey Group has co-operated with the SFO since 2008, describing the Mabey CRO as “the final act in an exemplary model of corporate self-reporting and co-operative resolution.” Mabey is viewed by the SFO as having conducted itself “in an exemplary way through its self-referral, extensive co-operation with the authorities and the transformation of the company.”

Some commentators have expressed concern that the Mabey case will set a precedent for use by the SFO of CROs to target dividends that have been paid to investors from companies that are later found guilty of criminal wrongdoing. It should be noted, however, that the Mabey case has features that will not be present in every case in which the SFO may wish to pursue a CRO against funds held by investors. The Mabey case began with a voluntary disclosure to the SFO, leading to guilty pleas and the criminal conviction of M&J and senior officers of the company. The parent company, Mabey, then agreed to identify and hand over dividends paid out by the convicted subsidiary. While this case does not set a wide ranging precedent, it does signal the SFO's willingness to explore innovative and far reaching uses of POCA to combat serious economic crime.

CONCLUDING COMMENTS

The SFO is likely to make increasing use of the CRO mechanism to target property held by investors that can be shown to emanate from companies that have been convicted of criminal wrongdoing. It is important for investors – and in particular institutional investors that have the knowledge, expertise and resources – to investigate the business practices of the companies in which they have invested. Investors should urgently review the due diligence that currently is being performed on potential recipients of their investment funds to ensure that it is sufficiently robust.

In the event that a company uncovers issues or concerns about any part of its operations around the world, the company should seek timely and appropriate advice on the best approach to investigating the issue, remedying any control deficiencies that are discovered and, if necessary, deciding how to engage with the appropriate enforcement agencies.

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