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First Convictions for Corporate Bribery Target Construction and Property

After seven years of being in force, the UK Bribery Act is starting to make its presence felt. Three companies have entered into negotiated settlements with prosecutors for bribery in the last few years, but only two have actually been prosecuted and convicted. Both companies have been in the construction and property sectors.

Last week, public attention was drawn to the 21 February 2018 conviction of Skansen Interiors Limited (Skansen), which was tried at Southwark Crown Court after being charged by the Crown Prosecution Service (CPS) with failing to prevent bribery. Skansen, a refurbishment contractor which employed just 30 people and was dormant since 2014, was found guilty of failing to prevent bribes being paid to secure two contracts for office refurbishments.

According to the prosecution case, Skansen was invited by a large property company to tender for two office refurbishment contracts in London worth £6m, which it won.

The CPS alleged that a project manager employed by the property company had passed information to Skansen during the tender process and that this information had given Skansen a competitive advantage in its bid. The CPS told the jury that the project manager had passed the information following offers made by Skansen's managing director to pay him a bribe.

Following Skansen's successful bid for the two contracts, two payments were made to the project manager for a total of £10,000. A third payment of just under £30,000 was offered but unpaid. Invoices were sent to Skansen by a third-party company, linked to the project manager and his son, for services including "site surveys/drawings and final construction consultancy including CAD drawings", in order to make the transactions appear genuine.

Skansen's conviction was the first time any company has defended itself at trial against a charge under the Bribery Act's corporate offence. This followed the 2015 conviction of Sweett Group Plc (Sweett Group), a construction and professional services company employing more than 1,000 people, which pleaded guilty to corporate bribery over arrangements in the United Arab Emirates. The company accepted that bribes had been paid to retain a contract with Al Ain Insurance Company (AAAI) and was fined £2.25 million.

The Corporate Offence of Bribery

The Bribery Act creates four offences:

- paying a bribe (section 1);
- receiving a bribe (section 2);
- bribing a foreign public official (section 6); and
- failing to prevent bribery in an organisation (section 7).

If you would like more details, please do not hesitate to contact your Katten attorney or the following members of Katten's **Litigation** practice.

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Section 7 provides that a corporate is guilty of an offence if a person—usually an employee, contractor, sub-contractor, agent or supplier—associated with it bribes another person intending:

(1) to obtain or retain business for the corporate; or

(2) to obtain or retain an advantage in the conduct of business for the corporate.

Section 7 also provides that is a defence for a corporate to demonstrate that it had in place “adequate procedures” designed to prevent the person from paying bribes. Neither Sweett Group nor Skansen could demonstrate that their anti-bribery policies were “adequate.”

Sweett Group Plc

IIn 2012, Sweett Group’s Cypriot subsidiary entered into a contract with AAAI to manage the construction of a hotel in the UAE. Sweett Group also entered into a contract with North Property Management (NPM), purportedly for associated hospitality services. A director of AAAI—Mr. Al Badie—also was the beneficial owner of NPM. Payments were made to NPM under the contract, but no services were provided in return. When sentencing Sweett Group, Judge Beddoe described the process as a vehicle to provide a “bung.”

On 18 December 2015, Sweett Group pleaded guilty to the Section 7 offence, admitting that it had failed to prevent a person associated with it—a subsidiary—from paying bribes, and did not have adequate procedures from preventing such conduct from occurring.

Skansen Interiors Limited

In contrast to Sweett Group, Skansen Interiors Limited (Skansen) was a small company trading as a refurbishment contractor with a workforce of approximately 30 individuals based at a single site.

As in the Sweett case, no services were actually provided by the third-party company to which payments were made. Skansen’s senior management had not only approved the invoices, but when questions arose about whether or not they were valid, took steps to ensure the accounts team still caused them to be paid.

In January 2014, Skansen appointed a new CEO, who commenced an internal investigation into the payments. Having found that no anti-bribery policy was in place, the CEO implemented a new policy—just a few days before an attempted third payment of £29,000 to the company owned by the project manager employed at Skansen’s client. As a result of the investigation, Skansen’s managing director was dismissed and the company made reports to the National Crime Agency, City of London Police and Action Fraud requesting they conduct further investigations.

Skansen assisted the police in their investigation—even disclosing confidential and legally privileged material it would have been entitled to retain. The company’s defence was largely grounded on the basis that its controls and procedures were proportionate to its size and localised work, but the jury was not persuaded that such procedures were “adequate.”

This is a bitter pill for a company to swallow. Having discovered criminality, and reported it to law enforcement, Skansen has ended up being prosecuted for the very misconduct identified through its own internal investigation.

To Defer or Not—the Absence of DPAs

It is remarkable in both cases—Skansen and Sweett—that a deferred prosecution agreement (DPA) was not offered to either defendant. A DPA is an agreement reached—under the supervision of the court—between a prosecutor and company suspected of certain criminal offences. The agreement suspends a prosecution for a defined period of time in order for the company to meet specific conditions—usually remedying defects in controls, paying a significant financial penalty and compensating victims. Since 2015, three companies have entered into DPAs with law enforcement in the UK for corporate bribery—Standard Bank, Rolls Royce and an as yet unnamed company whose former executives are still being prosecuted.

UK prosecutors have made clear a DPA will only be offered to a company which has fully cooperated with the criminal investigation, usually including a full self-report to the relevant prosecutor or law enforcement agency. Uncomfortably for corporate boards trying to decide on the best course of action, both Sweett and Skansen made self-reports, but did not get a DPA, while Rolls Royce did not self-report and did get a DPA.

The issue is decided, according to the Serious Fraud Office (SFO), on the extent of the co-operation by the corporate, not merely whether or not it makes a self-report. As SFO General Counsel Alun Milford has said, "the absence of a self-report meant that [Rolls Royce] started at a disadvantage, but for a number of years thereafter it had provided us with a consistently high degree of co-operation, involving bringing to our attention wrong-doing we had hitherto been unaware of, including wrong-doing in bits of its business wholly unconnected to those business areas we had initially asked for the company for information about it." Mr. Milford has dismissed those companies that feign co-operation, but then withhold critical information they do not want released, or, as he puts it, have "a Damascene conversion to the merits of cooperation as we approach a charging decision."

For Sweett Group, although the company felt it had co-operated fully, the SFO was not satisfied, particularly with the fact that the company did not disclose accounts of witness interviews compiled in its internal investigation.

Skansen, however, appears to have handed over anything and everything the CPS asked for, but this decision was made on a different basis: Skansen was a dormant company, and had no assets to pay a penalty under a DPA. This has led some to question whether only companies with sufficient assets like Tesco (which paid £129 million under a DPA for accounting failures) or Rolls Royce (which paid £497 million for suspected corruption) will be able to avoid prosecution.

Lessons for Property Companies

The Skansen judgment is a stark reminder that self-reporting bribery—or even asking law enforcement to investigate—needs to be approached with caution. The only defence available to a corporate when identifying bribery in its operations is to ensure that it has in place adequate anti-bribery procedures. And as Skansen discovered, procedures are not adequate if they are limited to an anti-bribery policy written after the bribery is identified. Taking action after the event will not be sufficient to avoid conviction.

There are a number of steps internal risks and compliance teams can take now to ensure the adequacy of their anti-bribery procedures, including:

1. **Policies and procedures**—the Skansen case demonstrates that historic offending can lead to evidential challenges. Companies should not only implement procedures, but should carefully document the implementation.

2. **Communication**—aadequate procedures mean having appropriate policies in place and ensuring they are communicated to staff. Skansen could offer no evidence of training and a bribery policy was only introduced in 2014 with the arrival of a new CEO.

3. **Reporting**—companies should ensure they have policies and a culture which encourages internal reporting of any concerns or suspicions about potentially criminal conduct. This will include documenting reporting lines and having a clear whistleblowing policy.

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