

Deferred Prosecution Agreements

Should corporate justice be served or procured?

Tim Harris writes

The director of the Serious Fraud Office (SFO) and the Solicitor General, Edward Garnier QC, have recently made no secret of the fact that they consider the criminal justice system to be incapable of dealing with corporate prosecutions in a way that reflects commercial realities. The blunt impact of a prosecution of a company has the impact of damaging innocent parties including employees, shareholders and creditors. Garnier cited the cautionary example of the ill-effects of prosecution caused to Arthur Andersen, eventually acquitted on charges of obstruction of justice by the US Supreme Court, many years after the allegations had destroyed the company.

US prosecutors have a tool at their disposal, the deferred prosecution agreement (DPA), which is being touted as a viable alternative to the present options of either prosecution or civil recovery. Much of the impetus for the reform has been caused by the difficulties faced by the SFO when they sought to prosecute Innospec. The SFO effectively had already agreed with the company, pre-sentencing, the nature of the sentence in return for a guilty plea. This was criticized by Thomas LJ who reminded the SFO that it is for the Judge to determine sentence at his discretion and especially that any plea must be “rigorously scrutinized in open court”.

The US Approach

In the US, DPAs are considered a hugely important weapon in the armoury of a highly successful prosecutor – the Department of Justice, which entered into nine DPAs in 2009. The DPA does pretty much what it says on the tin, deferring criminal prosecution pending certain terms and conditions being agreed (and adhered to) and filed in a formal indictment at court. Typical conditions are that prosecution is deferred for two - three years with the payment of a fine commensurate with the Federal Sentencing Guidelines, disgorgement of profits, a clear

out of implicated directors, a possible pull-out from the market in which the wrongdoing is admitted, and the possible instruction of a court appointed monitor where the corporate does not have proper anti-corruption procedures presently in place.

The appointment of monitors has been particularly contentious in the US where there have been allegations of a lack of transparency in their appointment, cronyism and high cost. The costs charged by monitors is particularly eye-watering to UK onlookers. Innospec were charged \$50m for the corporate monitor (described by the sentencing Judge as “an outrage”), agreed as part of their DPA in the US.

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Are DPAs Right for the UK?

As it stands in the UK, the SFO has found it difficult, time consuming and costly to prosecute corporates in the UK for bribery and related offences as well as occasionally stymied by political interference.

It is unlikely to find it any easier under the Bribery Act. It should also be noted that the SFO has been given no new money to prosecute offences committed under the Bribery Act. DPAs would therefore be a godsend.

Corporates for their part may accept their criminality more readily should they be given the option of accepting a DPA as opposed to being prosecuted with all the economic damage that would entail.

Explicit in the agreement of the DPA is that the company is properly prosecutable (ie, the identification principle is met) and the course of conduct meets the criminal test for prosecution ie, this isn't a civil recovery under Pt.5 of POCA.

Thomas LJ again commented in his Innospec judgment that matters involving corrupt payments “will rarely be appropriate to the dealt with by a civil recovery order”.

One wonders whether the judiciary will be resistant to DPAs which explicitly admit criminality but where penalty may be considered tantamount to a civil recovery order.

What Will DPAs Look Like?

The mechanics of DPAs are a long way from being ironed out. The DPAs must have the public's confidence and, in the words of Garnier be "policed and controlled by the judiciary". In the event that an offence is either detected, perhaps through a whistleblower, or self-reported and the SFO considers a DPA may be an appropriate resolution, the Judge will become involved early, and before charges are brought to scrutinize any proposed agreement. This will be problematic.

However, Judges in the criminal justice system are already accustomed to providing early input in sentencing, through the procedure of Goodyear indications. In such cases where an individual is considering pleading to agreed facts he may request a-binding indication on sentence in open court, with reporting restrictions, from the trial Judge. Once given an indication, the defendant is not committed to pleading.

It will be the type and severity of the sentence that will be the most contentious aspect of DPAs and the most at risk to accusations of a lack of transparency. In addition, it is essential for the corporates legal team to be able to advise with a degree of reasonable certainty what the likely sentence will be. The US has a system by which sentence can more or less be worked out on a calculator – that is an anathema to Judges here. In light of the Grazia Report, a number of guidelines were introduced in this area (eg, Attorney General's Guidelines on

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Pleas, and the SFO Guidelines on Self Reporting), which are instructive for advisers and clients. In the absence of settled Court of Appeal case law on corporate sentencing, properly debated and approved sentencing guidelines (related to the guidelines already issued by the sentencing council for theft and statutory fraud offences) setting out procedure and factors affecting sentence would be helpful in answering criticism of a lack of transparency as well as assisting parties to the DPA.

Finally, it will be important that it is made explicit that while DPAs may prove an alternative to prosecution for corporates, where individual criminality is committed (as is necessary for the corporate to meet the identification principle), DPAs will not provide immunity to those directors deserving of prosecution.

We consider that as with most US developments in business crime, DPAs are likely to prove popular over here with the SFO. The principal question exercising legislators will be how to ensure that DPAs have the public's confidence that they are fair and just while ensuring that Judges' concerns will be met and the sacrosanct principles underpinning sentencing will not be undermined.

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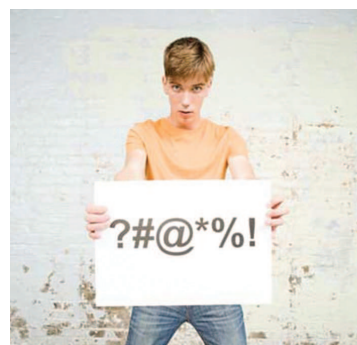
Is using the F word to an officer of the law now acceptable?

22 November 2011 No Comment
By Sarah Lewis

“Our changing attitude towards bad language was highlighted last week in *Harvey v DPP*, AC, 17 November 2011 which confirmed that, whilst it is an offence to use threatening, abusive or insulting words and behaviour, swearing at police officers is not a crime because officers hear foul language all too frequently to be harassed, alarmed or distressed by it.

This decision overturned the public order conviction of Denzel Harvey, a young suspect who repeatedly said the 'F' word while being searched for drugs.

Harvey was standing with a group of people outside a block of flats when he was approached by police officers who told him that they wished to search him. His response to the officers was, "F— this man. I ain't been smoking nothing". He was warned about his behaviour and threatened with an arrest under s 5 Public



Order Act 1996. When the search revealed nothing, he continued, "Told you, you wouldn't find f— all". He was further warned and then, when asked if he had a middle name, he replied, "No, I've already f—ing told you so". Harvey was arrested for a s 5 offence, and subsequently convicted before the Magistrates' Court who held that "there were people around who don't need to hear frightening and abusive words issuing from young men" despite there being no evidence that anyone, officer or otherwise, was in fact caused harassment, alarm or distress."

Read more at <http://www.halsburyslawexchange.co.uk/is-using-the-f-word-to-an-officer-of-the-law-now-acceptable/>