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FEATURE › BRIBERY AND CORRUPTION

If I could turn back prosecutorial time…

Was it a UK crime before 2002 to corrupt an agent of a foreign public body? **Kevin Roberts** and **Laura Steen** of Morrison & Foerster consider the details of the Court of Appeal's ruling in R v AIL, GH and RH [2016] EWCA Crim 2 and its possible implications on prosecutions by the Serious Fraud Office.

The case of *R v AIL, GH and RH*, one of the first the Court of Appeal has considered in 2016, is an interesting one from the perspective of all white-collar crime practitioners. [1] The Court of Appeal had to consider whether it was a criminal offence, prior to 14 February 2002 (the date on which the *Anti-Terrorism, Crime and Security Act 2001* came into force and extended the scope of the offence), to corrupt an agent of a foreign public body. The Court of Appeal, after undertaking an interesting review of the law in the area from the late 19 century to present day, ruled that it was indeed a criminal offence. The decision was reached following the application of the pure statutory construction rule, which led to the conclusion that, as there was no indication to the contrary, the legislation did intend for the corruption of foreign agents to be caught within the legislation and held the acts to be criminal offences.

The implications of this ruling may be widespread and an appeal to the Supreme Court is not unlikely.

The case for the Court of Appeal

The Court of Appeal accepted the appeal from the High Court, as the question before it was considered one of public importance.

The facts

The facts of the case were summarised rather obliquely by the Court of Appeal as *section 11* of the *Criminal Justice Act 1987* applies and, therefore, reporting of the case is restricted. However, taking the facts as they were presented, the case breaks down as follows:

- AIL is a company incorporated in England and Wales and is part of a large multinational conglomerate involved in the power generation and transport sectors.

- GH was the chairman and chief executive of AIL.
- RH was the managing director of an Indian subsidiary of AIL.
- The Serious Fraud Office (SFO) alleges that between June 2000 and November 2006, AIL paid bribes to secure contracts for companies within its group. The bribes are alleged to have been paid from English bank accounts to officials or agents of three foreign organisations in India, Poland and Tunisia.
- The SFO alleges that the payments were disguised as legitimate payments for consultancy services given under consultancy agreements, whereby the consultants would assist the companies in obtaining contracts in such countries.
- GH is believed to have been involved in corrupt payments in India and Poland, while RH is believed to have been involved in negotiating and arranging two false consultancy agreements in India.
- Both GH and RH have been charged under section 1 of the Prevention of Corruption Act 1906, which reads as follows: "If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or

forbearing to do, or for having after the passing of this Act, done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour, to any person in relation to his principal's affairs or business; or if any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business; or if any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal; he shall be guilty of a misdemeanor…"

The High Court's judgment

In the High Court, the judge accepted the argument put forward by AIL, GH and RH that it was not a criminal offence, prior to the coming into force of the *2001 Act*, to corrupt an agent of a foreign principal or body. This argument succeeded on the basis of a strict interpretation of the relevant acts, namely the 'suite' of acts made up of the *Public Bodies Corrupt Practices Act 1889*, the *Prevention of Corruption Act 1906* and the *Prevention of Corruption Act 1916*, which interacted to illustrate that the offence did not extend to offences committed beyond the United Kingdom. The High Court reached this conclusion finding that, if parliament had intended the offences to extend beyond the UK, it would have expressly stated so in the legislation.

The Court of Appeal's analysis

The Court of Appeal took a different view.

In ruling that the High Court had erred in its interpretation of the law prior to 14 February 2002, the Court of Appeal gave a useful and instructive summary of the 'suite' of acts that governed the area prior to the introduction of the *2001 Act*. Interestingly, the Court of Appeal noted that the *2001 Act* came into being due to pressure from the international community in the wake of the UK becoming a signatory to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the '1997 Convention'). This Convention required signatories to ensure that their national legislation had procedures in place to prosecute bribery of foreign officials. It was felt that the existing legislation, ie, the *1906 Act*, did not provide sufficient certainty that the bribery of a foreign official would be considered criminal under English law and, therefore, the *2001 Act* amended the 'suite' of acts expressly to make corrupting a foreign agent or body a criminal offence.

The Court of Appeal saw the question before it as a question of pure statutory construction and reiterated the principle that, unless there is an expression to the contrary, the words of the statute ought to be given their plain, ordinary and natural meaning. The Court of Appeal argued that the meaning given to 'principal' and 'agent' in the *1906 Act* was not the narrow legal meaning, but rather the more widely defined everyday meaning of the words.

The Court gave weight to the principle that, under English criminal law, offences are defined by the elements that make up the offence. As there is no general principle to exclude crimes committed by foreign persons, there is no clear indication that the nationality, location or residency of the person is relevant for the purposes of establishing the elements of the crime.

The Court of Appeal also rejected the argument that, given that the *2001 Act* was implemented in response to the 1997 Convention, the amendments to the 'suite' of acts showed that, prior to the *2001 Act*, the corruption of a foreign official/agent was not a criminal act. The Court of Appeal identified the fundamental problem facing the respondents in their argument as being that, unlike the *1889 Act*, the *1906 Act* and the definition of 'principal' and 'agent' therein did not expressly limit the definitions. In other words, on the clear meaning of the words in the *1906 Act*, there is no reason to suppose the definition did not extend to foreign officials, agents or organisations.

In ruling that it was indeed an offence under *section 1* of the *1906 Act* to corrupt an agent of a foreign principal or body prior to the coming into force of the *2001 Act*, the Court of Appeal rejected any argument that this would be "an illegitimate 'long-arm' interference with the affairs of a public body".

Implications of the judgment

It is clear that the outcome of the case will have an immediate impact on the "other bribery and corruption prosecutions which it is understood from Counsel are pending" as referred to in the Court of Appeal's judgment. The implication for the subjects of such pending cases is that they will be prosecuted for the offence without the question of the right of the SFO to pursue such convictions being raised. A direct follow-on from this is that any person who is alleged to have committed such offences prior to 14 February 2002 may now be prosecuted by the SFO as the principle of *nullum tempus occurrit regi* (time does not run against the Crown)

applies in English criminal law, meaning that there is no limitation as to time regarding indictable criminal offences, with the exception of summary offences.

There is obviously a floodgates argument that the ruling will open the doors for the SFO to pursue everyone who is suspected of having committed such an offence prior to 14 February 2002. However, practicality will have to play a part in such potential prosecutions. Questions as to the resources available to the SFO to pursue such convictions will be relevant, as well as the level of documentation relating to such actions and if they are sufficient to secure a conviction.

Arguably, it is easy to see why the SFO might seek to pursue actions that it believes to be 'slam dunk' cases in order to secure a better record of convictions. However, given the recent bad press that the SFO has received due to the clearing of Tom Hayes' alleged co-conspirators in the highly-publicised LIBOR trials, the SFO may be cautious when deciding which cases to pursue.

Another possible unintended consequence of the ruling by the Court of Appeal relates to Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the 'ECHR'), which provides that it is unlawful for a person to be convicted of a crime that was not a crime when it was committed. Although the Court of Appeal ruled that it was indeed a crime to corrupt a foreign agent prior to 14 February 2002, it will be open to defence lawyers to argue that there was sufficient doubt in the area, as evidenced by the fact that the UK government felt the need to enact the *2001 Act* to clarify the position (an argument that the respondents failed to succeed on in the Court of Appeal, but which another defendant may have more success with), to raise an article 7 ECHR argument. A defendant could argue that it was not clear that the actions were a criminal offence prior to the ruling in this case, and therefore it would be contrary to their human rights to convict them of a *section 1 1906 Act* offence.

Regardless of the success of such arguments before a future criminal court, it will be interesting to see how the law develops in this area in the coming months and years. In particular, it will be interesting to see if the Supreme Court is asked to consider the matter and if the SFO will indeed pursue further prosecutions.

Watch this space.

■ **Kevin Roberts** (+44 (0)20 79204160, kroberts@mofo.com), a partner with Morrison & Foerster, advises corporations and individuals in money laundering compliance and investigations, regulatory compliance, tax investigations, fraud, including the investigations and enforcement actions by the UK's Financial Conduct Authority. Associate **Laura Steen** (+44 (0)20 79204171, lsteen@mofo.com) advises on general commercial litigation and dispute resolution.