BRIEFING

THE MABEY CIVIL RECOVERY ORDER: INVESTORS BEWARE

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INTRODUCTION

The UK Serious Fraud Office ("SFO") has succeeded for the first time in obtaining a civil recovery order against an 'innocent' shareholder of a company which had been engaged in bribery and sanctions offences. There is no suggestion that the shareholder knew anything of the wrongdoing of the company concerned while it was going on.

Richard Alderman, the Director of the SFO, warned investors that the case marks the beginning of a more proactive approach by the investigating agency, saying:

> '*Shareholders who receive the proceeds of crime can expect civil action against them to recover the money. The SFO will pursue this approach vigorously*'

The case highlights the importance for institutional shareholders of careful and extensive due diligence prior to investment – the risk of a poor choice of stock is now greater than mere poor performance.

FACTS

Mabey Engineering (Holdings) Limited ("Mabey") was a shareholder in its subsidiary, Mabey & Johnson Limited ("M&J"). In 2009, M&J was convicted of a series of sanctions breaches and corruption offences relating to transactions in Jamaica, Ghana, and Iraq. M&J was fined £6.6m with a confiscation order subsequently being made under the Proceeds of Crime Act 2002 ("POCA") for a further £1.1m. Two former directors and one former employee of M&J were also convicted for their part in breach of sanctions offences.

On 12 January 2012, the High Court in London ordered Mabey to disgorge £131,204, representing dividends which it had received from its shareholding in M&J. The order was made pursuant to Part 5 of POCA, which provides for the recovery of property derived from "*unlawful conduct*." The case against Mabey was brought by the SFO, which accepted that Mabey had been '*totally unaware of any inappropriate behaviour* [by M&J]'.

ANALYSIS

The SFO's pursuit of a civil recovery order against an 'innocent' shareholder is undoubtedly intended to send a message to institutional investors that its ethical shareholding initiative has teeth. Earlier this year Richard Alderman discussed the position of shareholders who found themselves in a Mabey situation:

> *'You might at first think that this is nothing to do with you as the owners of the company. It might be that as portfolio owners you are not committing an offence of failing to prevent bribery. But it does not end there. First of all we will be looking at money laundering in order to see what money has been laundered as a result of criminal conduct and to whom it has gone. It may be indeed that the owners have some knowledge of the contract that was obtained through bribery…'*

The determination of the SFO in this regard is eloquently demonstrated by its actions in relation to Mabey, which self-reported in 2008 and gave full cooperation thereafter. The fruits of that cooperation have been actions against a 'full house' of parties accused of wrongdoing: M&J, its directors, and its shareholders all ultimately ended up in court.

The SFO is assisted in pursuing this policy by having a formidable weapon at its disposal. The power used against Mabey – part 5 of POCA – has a wider scope even than the UK Bribery Act. Civil recovery orders made under the legislation do not require linked criminal proceedings, and are determined according to the (less onerous) civil standard of proof. Moreover, there is no requirement for any corporate link to the UK before an action can be brought, other than that property alleged to be derived from "*unlawful conduct*" has reached or passed through the UK financial system.

Going forward, investors will naturally be concerned to minimise risk when acquiring a new shareholding, or reviewing existing stakes. In his statement following *Mabey*, Richard Alderman made clear that a 'see no evil' approach will no longer do:

> '*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. It is particularly so for institutional investors who have the knowledge and expertise to do it. The 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 problem is that the contours of investor due diligence obligations remain unclear. No equivalent to the guidance issued under the Bribery Act has been provided by the SFO, and investors will be left wondering what they must do to comply with the SFO's requirements.

OUTLOOK

The Mabey civil recovery order emphasises the critical importance of adequate due diligence before shareholdings are acquired, and periodically in respect of existing holdings. Prudent investors

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will wish to undertake a thorough anti-corruption and sanctions compliance risk analysis before moving to acquisition. It is important in this regard to understand the distinction between an assessment of the target's bare policies and procedures and a comprehensive understanding of how these are applied by the target in practice.

The alterative may be to consider whether the risk of a civil recovery order should be priced into the acquisition.