I Smell a Rat: SFO Looks to Informants – Dangling the Carrot of Immunity?

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Lisa Osofsky, the new director of the UK Serious Fraud Office, says her agency should use insiders and co-operators to bring to life by way of live evidence the document-heavy cases it prosecutes.

Speaking to the Commons Justice Committee in December 2018, Ms Osofsky alluded to the slow pace of SFO investigations as one of the agency’s key criticisms and suggested that getting an ‘insider’ to help the SFO understand what was going on could be helpful in presenting cases to juries.

These comments are perhaps unsurprising from Ms Osofsky, who was previously a federal prosecutor and assistant general counsel to the FBI in the United States, where plea deals and immunity in exchange for testimony are more prevalent.

In a speech delivered earlier the same month, Ms Osofsky recognised that historically, cooperators in the UK have been used mostly in the context of gang-related and terrorism offences.

The statutory power to grant immunity and other protections can be applied in any type of case. Ms Osofsky has made clear that she and her SFO colleagues are ‘[intent on] exploring this area in the white-collar world’.

In this GT Advisory, we discuss the controversial history of ‘grassing’ in the UK and describe the process of obtaining immunity and other protections.

A Brief History: The ‘Supergrass’

The term ‘supergrass’ was used in Britain to describe individuals who provided information on criminal activity to the police and other law enforcement agencies in exchange for a reduced sentence or complete immunity from prosecution. It is a term perhaps most associated with Northern Ireland during the 1980s, as the Royal Ulster Constabulary used the testimony of informants to secure the convictions of a number of alleged members of paramilitary organisations. Extensive criticism was levelled against this system of prosecution because it lacked safeguards for defendants, was based on the accounts of those who were often by their own admission involved with the paramilitary organisations, and there was little or no evidence to corroborate their testimony.

In more recent times, the term has been associated with organised criminal gangs. One of the most famous examples of a supergrass is Michael Michael, the former leader of an organised criminal group who turned informant in order to secure a reduction in sentence as well as a favourable financial deal for himself and his immediate family.

It is reported that over the course of his career as an informant, Michael passed information on several of his criminal associates to the police, MI5, and Her Majesty’s Revenue and Customs; the information reportedly led to 49 arrests and 34 convictions. He was eventually imprisoned in 2001 for six years, a significantly reduced sentence, for his partial involvement in the smuggling into the UK of £132 million worth of cocaine.

These examples took place at a time the UK had no rules governing the practice of offering such deals or immunity from prosecution. In 1981, when asked to make a statement on the practice, then-Attorney General Sir
Michael Havers said:

Immunity from prosecution can only be granted by the Attorney General or Director of Public Prosecutions because it is only with them that there lies the power to stop any prosecution. Each application made to either the Director of Public Prosecutions or myself is treated separately on its merits, and it is not possible to set out any comprehensive set of rules.

Having recognised the value of such information, and perhaps with a desire to employ the benefits offered by informants on a more consistent and prescribed basis, Parliament enacted the Serious Organised Crime and Police Act 2005 (the 2005 Act).

The Statutory Regime

The 2005 Act formalised the process by which an individual may be given protection from prosecution or a reduced sentence for cooperating with law enforcement, or given an undertaking that certain evidence will not be used against them.

Protection from Prosecution - 1 - Immunity

Section 71 of the 2005 Act provides that if a specified prosecutor, which includes the Director of Public Prosecutions, the Director of the SFO, and the Financial Conduct Authority (FCA), thinks that it is appropriate to offer any person immunity from prosecution for any offence, he may give the person a written ‘immunity notice’.

If a person is given an immunity notice, no proceedings for an offence of a description specified in the notice may be brought against that person in England and Wales, except in circumstances specified in the notice.

The notice will list the conditions with which the individual must comply and could include the following:

1. That the individual must admit participation in the offences shown in the notice.
2. That the individual must provide all information (including documents) available to him in relation to that offence.
3. That the individual must maintain continuous co-operation with the investigators including without prompting, providing any information relating to the offence which may become known to him.
4. That breach of the conditions could lead to revocation of the agreement, and in that case any information provided as part of the process could be used against him.

In deciding whether to grant immunity, the SFO must consider (1) the public interest in having as a witness of fact an individual who has accepted a level of criminality, (2) the value of the information in the context of the case as a whole, and (3) if the information could be obtained without offering immunity. The decision requires the SFO to analyse the account provided against the motivation of the individual to provide it.

The 2005 Act does not require the SFO or Crown Prosecution Service (CPS) to seek the Attorney General’s consent before giving an immunity notice; however, the CPS guidance states that ‘as a matter of policy and good practice, the Attorney General should be consulted before any agreement for full immunity under section 71 is signed’.

Unlike the CPS and despite Ms Osofsky’s comments, the SFO does not yet have its own available policy, and the FCA, whether or not it has a policy, may only give an immunity notice with the consent of the Attorney General.

Protection from Prosecution - 2 - Restricted Use Undertaking

Similarly, Section 72 of the 2005 Act provides that if a specified prosecutor thinks it appropriate to offer any person an undertaking that information of any description will not be used against the person in criminal proceedings, or proceedings under Part 5 of the Proceeds of Crime Act 2002 (Civil Recovery) (See GT Alert, Prove It or Lose It! Part II: Civil Recovery Orders), then he may give that person a ‘restricted use’ undertaking.

If a person is given a restricted use undertaking, the information described therein must not be used against that person in any proceedings brought in England and Wales or Northern Ireland to which Section 72 applies, except in the circumstances specified in the undertaking. The effect may be to render prosecution against the informant for an offence difficult or impossible due to a lack of evidence, so the authorities must weigh the value of the information carefully.

If giving the undertaking is made subject to compliance with certain conditions broadly similar to those in the
Immunity section above, then failure to comply with them could lead to revocation of the undertaking by formal notice, thus allowing the prosecutor to use the information to which the notice relates against the individual.

**Reduction in Sentence**

Section 73 of the 2005 Act provides that a sentencing court, following an individual’s guilty plea, may take into account the extent and nature of any assistance given or offered pursuant to a written agreement made with a specified prosecutor. Again, the written agreement will specify the conditions with which the individual must comply.

In such a situation, the sentencing judge should assess the assistance provided against all other relevant considerations, and it should also be stated in open court that a lesser sentence has been passed and what the greater sentence would have been, although judges can choose not to make such a statement if they consider that it would not be in the public interest to do so. Unfortunately, the lack of guarantee of a reduced sentence means that these agreements are not popular and have been little used in practice.

**Obtaining Protection from Prosecution**

A key concern for any individual seeking immunity is not to incriminate themselves before obtaining assurances that they will not be prosecuted. The process and sequencing of discussion with law enforcement is critical in this regard.

We anticipate the SFO process will follow the CPS approach to these types of agreements, which generally is as follows:

**Step 1 - The Request**

The request is likely to be made formally by an investigator to his or her superior following preliminary discussions with the individual involved or the individual’s legal team.

**Step 2 - The ‘Proffer’ Letter**

The proffer letter, sent to the individual/the individual’s legal team, should outline the purpose of further interviewing, what is expected of the potential witness, and the implications of the individual misleading or failing to properly engage in the process.

While this step is not mandatory, such a letter is generally sought because it helps provide clarity and some level of protection for the individual. A well-constructed proffer letter stipulates that the purpose of the interview is to obtain information to inform the prosecutor’s decision about whether a formal agreement should be offered – not to secure an admission of guilt – and that the initial ‘scoping’ interview will not be under caution.

**Step 3 - The Scoping Interview**

This is a recorded interview enabling senior investigators to ascertain the level of assistance being offered by the individual and the motivation behind the offer.

Scoping interviews are likely to be relatively vague in nature, as the individual is required only to discuss the general areas with which they can assist.

**Step 4 - Immunity?**

Extensive discussions, correspondence, and negotiation between legal counsel likely follow.

Depending on the effectiveness of such discussions, an immunity agreement could be sought at this stage, and it is possible, though not guaranteed, that one could be offered.

**Step 5 - The Debrief**

Also referred to by the CPS guidance as ‘cleansing’, the debrief is a process during which the individual is asked to repeat under caution any information revealed during the scoping interview, and disclose the full extent of any past criminal activity.

If an offer of an immunity agreement has already been made, it will be conditional on completion of this step.

Prior to entering into a formal agreement, the SFO may choose, like the CPS, to consult with the Attorney General.
**Step 6 - Immunity**

The prosecutor drafts a formal immunity agreement, which the potential witness and his or her legal counsel should scrutinise before signing.

**Take the Carrot; Avoid the Stick**

Individuals seeking immunity may be required to reveal extensive criminality to the authorities, making the immunity process extremely sensitive.

Effective and meaningful communication with the authorities through experienced legal counsel and the building up of trust between the parties are key to minimizing risk in this new area of focus for law enforcement.

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