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M&A Deal Flushes Out Bribery Scheme Leaving Seller Director with a Multi-Million Pound Hangover and Jail Time

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On 30 May 2019 the SFO issued a press release announcing that Carol Ann Hodson, the former director and owner of a company named ALCA Fasteners Ltd (ALCA), pleaded guilty to paying bribes amounting to £300,000 in order to secure contracts worth £12m. The bribes were paid to purchasing manager[1] of a German company over the course of five years and, according to a Serious Fraud Office (SFO) press release, the bribes were paid monthly in cash instalments and on one occasion, Ms Hodson sent jewelry in a brown envelope to the purchasing manager.

Ms Hodson pleaded guilty at her first appearance at Walsall Magistrates' Court. Pleading at this stage (at the first opportunity) meant that she would have received a one-third discount, off of her sentence.

On 27 June, Ms Hodson was sentenced at Wolverhampton Crown Court to two years immediate imprisonment and was ordered to pay a confiscation order of £4,494,541.46 plus the costs of the prosecution by the SFO of £478,351.00.

Details of this case did not enter the public domain until Ms Hodson's guilty plea.

However, the SFO's website, as well as revealing the details of the sentence received by Ms Hodson, indicates that the investigation was opened in December 2017 following a report by ALCA's current owners who purchased the company from Ms Hodson in early 2017.

Post Closure Report to the Authorities

The SFO press release states that the 'investigation began on 20 December 2017 following a voluntary referral by the current owners and directors of ALCA Fasteners Ltd' and that 'the Company and its new directors cooperated fully with the investigation, and no further action will be taken'.

It is further stated that Ms Hodson 'lied to the purchasers [of her company] by claiming that the company had not been involved in any unlawful conduct.'

Although limited details of the case are available it serves to highlight the potential risks when buying a company and is a reminder of the importance of both pre and post-acquisition due diligence.

In this case, the buyers appear to have identified the suspect payments soon after acquisition (which appears to have been completed in January 2017) and made a report to the SFO which formally opened its investigation on 20 December 2017.

Once formally accepted the investigation was completed within 17 months.

No Charges Against the Company Represent a Pragmatic and Fair Approach

It is noteworthy that, notwithstanding the Company would have received the benefit from the conduct (i.e., the profit from the tainted contracts), the SFO did not pursue action against the Company in this case. Instead it appears to have essentially traced the benefit through to the seller director who is subject to a hefty confiscation order.

The lack of action against the Company is illustrative of the proper application of the public interest test in circumstances where a purchaser discovers post-acquisition that there have been breaches of criminal law. The joint SFO/CPS guidance on corporate prosecution lists as a public interest factor against prosecution, '*The offending is not recent in nature, and the company in its current form is effectively a different body to that which committed the offences – for example it has been taken over by another company'*. This together with the other public interest factors which, on the limited information available, appear to have been present in this case such as the conduct having ceased prior to the sale, the only apparent culpable individual having left the company, the timely self-report, full co-operation and remedial action (all of which are factors against prosecution both within the joint prosecution guidance on corporate prosecutions and the guidance on the Bribery Act) would have weighed heavily against prosecution of the Company.

It has been several months since SFO Director Lisa Osofksy promised new guidance on what corporates and their legal advisers 'might expect if they decide to self-report fraud or corruption to my office.' While this guidance is still outstanding the

decision not to prosecute ALCA sends out a positive message that, in a mergers and acquisition context, companies who identify wrong-doing in an acquired company relatively soon after acquisition can self-report it with a reasonable degree of confidence that the company itself will not be prosecuted. Better still, where possible, would be to identify any misconduct during the pre-acquisition due diligence phase.

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[1] The purchasing manager, Terje Moe, pleaded guilty in Norway to two charges relating to the receipt of bribes on 6 July 2018.