

## SFO Recovers Dividends from Innocent Shareholder

### Landmark Development in Anti-corruption Enforcement

The UK's Serious Fraud Office ("SFO") today (13 January 2012) announced a new development in its efforts to tackle corruption. Using its civil recovery powers under Part V of the Proceeds of Crime Act 2002 ("POCA"), the SFO has taken action to recover funds from the parent and sole shareholder of a UK company which was convicted in 2009 for various corruption related offences. Today's announcement is significant because it demonstrates that the SFO can recover, through civil action, the proceeds of unlawful conduct already paid out to shareholders, even if those shareholders are completely innocent of the wrongdoing that has occurred. In the context of anti-corruption enforcement, it is also a further pressure point for companies to put in place preventative measures or else they and their shareholders face the consequences.

### Background

Mabey & Johnson Limited, a privately owned engineering company, following a self-report to the SFO, pleaded guilty to corruption and sanctions offences in 2009. In doing so, it became the first company in the UK to receive a conviction for corruption under the then existing legislation. More recently, two former directors of Mabey & Johnson and a senior manager were convicted in February 2011 of sanctions offences in connection with the Iraq Oil for Food programme. It is that sanctions offence that is the basis for the SFO now exercising its civil recovery powers.

### Civil Recovery Powers

This is not the first time the SFO has used its civil recovery powers against a shareholder company. It recovered £7 million from MW Kellogg Limited in February 2011, but that related to funds that had been identified as recoverable property which were due to the shareholder. The SFO's action in the Mabey case represents the first time that the powers have been used to claw back dividends that had already been paid up. The company successfully negotiated a plea in relation to the criminal charges in 2009, so the SFO's action against the shareholder might be seen as having a second bite of the cherry. The legal basis is quite straightforward as POCA (section 276) enables the SFO to recover property (such as dividends) obtained by the unlawful conduct of others from those who had no knowledge of, or involvement in, the unlawful acts. The SFO's rationale is clear: this is not about punishing further a company that has demonstrated full co-operation and which now has a very strong ethical and compliant culture. It is about sending a message to shareholders of other companies that they should be proactive in seeking to ensure compliance within the companies in which they invest.

### Potential Implications for Institutional Investors

In using the Mabey & Johnson case as its pilot, the SFO has focussed on a privately owned parent of a company convicted of corruption related offences. At least in theory, however, the principles could apply equally in relation to shareholders of publicly traded companies, and the SFO has indicated its intention to use its powers of civil recovery

more widely. The Director of the SFO, Richard Alderman stated:

*. . . 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 been lax in this respect.*

Given the SFO's public pronouncement, fund managers and other institutional investors should therefore sit up and take note of this case. At the same time, it would seem to be extremely challenging for the SFO to reliably identify dividends linked to illegal conduct after they are paid to numerous shareholders of a publicly-traded company. Moreover, there have already been criticisms levelled in the press in the wake of the announcement that the exercise of such powers is unfair on investors who do not have access to internal compliance procedures of the companies in which they invest.

## How to Guard Against Action for Civil Recovery

This development brings into sharp focus the steps that certain institutional investors might consider in relation to current and potential investments, including some form of enhanced risk-based due diligence of higher risk companies. Depending on the facts and circumstances, investors might consider the following questions:

- What is the nature of the business? Is it high risk?
- In which jurisdictions is it operating? Where do those jurisdictions rank in the Corruption Perceptions Index?
- How extensive are the company's policies and procedures?
- How does the company train its employees and agents? And which of them do they train?
- How does it test and monitor its processes and controls?

- And how does the company assess the *understanding* of its employees as to the correct behaviours, so as to measure the effectiveness of the training?

## The Future for Self-Reporting?

What does this mean for companies thinking of self-reporting corruption issues to the SFO? At first glance, today's announcement could be seen as a disincentive to self-reporting. After all, Mabey & Johnson self-reported its issues to the SFO.

The answer lies in the nature of the SFO's press release, which recognised the reformed nature of the Mabey business. The Director of the SFO praised the Mabey Group for its co-operation and added:

*We have been very impressed by its attitude and the clear commitment of the new management to ethical trading. . . . in many ways the Mabey Group is now leading the way in implementing controls and procedures to ensure that it is able to trade ethically in high-risk jurisdictions.*

*Today's action represents the final piece in an exemplary model of corporate self-reporting . . . [which] requires wholehearted support from the business concerned and we got this from the Mabey Group.*

This represents a ringing endorsement of the management and culture within the Mabey Group. It is another clear message from the SFO that there are clear benefits of corporate self-reporting where there is a genuine commitment to change and to ethical business conduct.

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This update was authored by Jonathan Pickworth (+44 20 7184 7608; jonathan.pickworth@dechert.com) and Caroline Lee (+44 20 7184 7543; caroline.lee@dechert.com).

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## Practice group contacts

If you have questions regarding the information in this legal update, please contact one of the attorneys listed or the Dechert attorney with whom you regularly work. Visit us at [www.dechert.com/white\\_collar](http://www.dechert.com/white_collar).

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### Neil Gerrard

London  
+44 20 7184 7672  
neil.gerrard@dechert.com

### Andrew Hearn

London  
+44 20 7184 7466  
andrew.hearn@dechert.com

### Jonathan Pickworth

London  
+44 20 7184 7608  
jonathan.pickworth@dechert.com

### Caroline Lee

London  
+44 20 7184 7543  
caroline.lee@dechert.com



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