

## ***Days of Future Passed: The Moody Blues and the End of Facilitation Payments?***

*Nights in White Satin, never reaching the end,*

*Letters I've Written, never meaning to send*

This past weekend I caught the Moody Blues' tour celebrating the 45<sup>th</sup> anniversary of their seminal classic album, "*Days of Future Passed*". This was the second album released by the band and while I had always thought of it as the first rock concept album, it is seen by many rock critics as a precursor to progressive rock music. Bill Holdship, Yahoo! Music, said that the band "created an entire genre here." Robert Christgau noted that it was "closer to high-art pomp than psychedelia." And finally, Allmusic editor Bruce Eder calls the album "one of the defining documents of the blossoming psychedelic era, and one of the most enduringly popular albums of its era." The band had its core members of Justin Hayward, John Lodge and Graeme Edge playing at the concert and I can assure you that even in their 70s, they can still rock.

I thought about this album and its title while reading the Memorandum and Order from District Judge Keith Ellison in the Security and Exchange Commission (SEC) civil action filed against current and former officers of Noble Corporation, Mark A. Jackson and James R. Ruehlen. The Foreign Corrupt Practices Act (FCPA) commentariat has gone both ways on interpreting the Court's Order; witness the headline by the FCPA Professor, "*Judge Grants Jackson And Ruehlen's Motion To Dismiss SEC's Monetary Claims – Finds That SEC Was Not Diligent In Bringing Case And That SEC Failed To Negate Facilitation Payments Exception – However Judge Allows SEC To File An Amended Complaint*", in contrast with Dick Cassin on the FCPA Blog, whose headline read "*Great guidance from the bench: 'The FCPA casts a wide net'*". However, I found one other part of the Court's ruling by far the most interesting. It was the section which discussed whether the defendant's claims that their actions met the facilitation payment exception under the FCPA. The Court granted the SEC leave to amend to proffer facts which would overcome the facilitation payment exception.

The allegations of facilitation payment exception as a defense in this lawsuit turn on permits called Temporary Import Permits (TIPs) in Nigeria. As set out in the Court's ruling, "TIPs allow drilling rigs to operate in Nigerian waters without payment of permanent import duties. Under Nigerian law, the Nigeria Customs Service ("NCS") grants TIPs for rigs that will be in the country for only one year. NCS may, in its discretion, grant up to three six-month extensions to a TIP. Upon the expiration of a TIP and any TIP extensions, NCS requires the rig to be exported from Nigeria. If the owner of the rig wishes to continue using the rig after the expiration of a TIP and any applicable extensions, he can either convert the rig to permanent import status and pay the appropriate permanent import duties, or he can export the rig and seek a new rig TIP to re-import the rig. In order to obtain a TIP or an extension, the rig owner must submit an application through a licensed customs agent as the NCS does not deal directly with rig owners such as Noble. The SEC alleged that the defendants authorized customer agents to submit false paperwork and pay bribes to NCS officials to obtain these TIPs. In other words, the SEC alleged

that the Nobel officials knew that the company was not entitled to obtain the TIPs as they did not meet the basic requirements for the granting of such licenses.”

Judge Ellison, in his ruling, noted that the “SEC alleges that Defendants authorized payments to foreign officials in order to obtain TIPs based on false paperwork, in contravention of what Defendants knew was the proper process for obtaining TIPs. As discussed supra in Part III.A.1, the SEC pled sufficient facts to support the allegation that Defendants knew these payments would be going to Nigerian government officials to obtain TIPs in a manner that violated Nigerian law. The grant of permits by government officials that have no authority to grant permits on the basis sought is in no way a ministerial act nor can it be characterized as “speeding the proper performance of a foreign official’s duties.” Similarly, if payments were made to induce officials to validate the paperwork while knowing it to be false, that too would not qualify as simply expediting a ministerial act.” [all citations by Court omitted]

The FCPA states that it “shall not apply to any facilitating or expediting payment to a foreign official, political party, or party official the purpose of which is to expedite or to secure the performance of a routine governmental action . . .” Further, the FCPA has a list of examples of facilitation payments in the definition of routine governmental actions, which include the following:

- Obtaining permits, licenses, or other official documents;
- Processing governmental papers such as visas and work orders;
- Providing police protection, mail services, scheduling inspections;
- Providing utilities, cargo handling; or
- Actions of a similar nature.

The key has always been whether the function in question was a “routine governmental action” because a facilitation payment is clearly a bribe. From the Court’s discussion, it is clear that it is thinking that if the end goal of a facilitation payment is to obtain something that the person or entity making the facilitation knows that they are not entitled to, then it cannot be a facilitation payment because it is not a “routine governmental action”. However, the Court also focused on “corruptly” and cited to the legislative history of the statute for the following:

*The word “corruptly” is used in order to make clear that the offer, payment, promise, or gift, must be intended to induce the recipient to misuse his official position; for example, . . . to induce a foreign official to fail to perform an official function. The word “corruptly” connotes an evil motive or purpose such as that required under 18 U.S.C. 201(b) which prohibits domestic bribery. As in 18 U.S.C. 201(b), the word “corruptly” indicates an intent or desire to wrongfully influence the recipient.*

As part of its instructions to the SEC to re-plead the Court said that it should plead Nigerian law to show this corrupt intent. If the SEC does this and the illegal nature of the defendants’ actions

under Nigerian law forms a basis of a successful action, how long do you think it will be before the entire concept of the facilitation payment comes in an enforcement action as there is no country in the world which allows bribery of its own government officials?

If the Court continues down this path, we may see the United States move towards a de facto end of the facilitation payment exception. The OECD, among others, has urged the United States to ban these types of bribes. The UK Bribery Act has no such exception under it. Numerous commentators, including Jon Jordan, have argued eloquently for the facilitation payment exception to end.

So what about the Moody Blues and *Days of Future Passed*? Just as many people remember only the song “*Nights In White Satin*” from the album and do not recall its greater importance as the either the first concept album or as a precursor to progressive rock, analysts and commentators may miss the significance of Judge Ellison’s ruling as it may signal the first step on the judicial journey to end facilitation payments.

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