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CORPORATE CRIME REPORTER

BCL PARTNER RICHARD SALLYBANKS ON CORPORATE CRIMINAL PROSECUTIONS IN THE UK

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In the United Kingdom, there is no vicarious corporate criminal liability. Prosecutors in the U.K. have to prove that a directing mind – in most cases a member of the board of directors – was involved with the criminality before the corporation can be held liable.

While the U.K. has yet to import vicarious liability from the United States, it has imported deferred prosecutions for corporations. This has led to perverse outcomes such as corporations getting deferred prosecution agreements, the agreements naming directing minds as the culprits, those directors being charged with a crime and then those directors being found not guilty.

Richard Sallybanks has represented such directors at trial. He is a partner at BCL Solicitors in London.

Much of the corporate criminal defense practice in the United States is dominated by alternative resolutions such as deferred and non prosecution agreements. What about in the U.K.?

"For many years, the Serious Fraud Office (SFO) looked enviously across the Atlantic to how white collar cases were investigated and prosecuted and the resolutions that U.S. prosecutors were able to reach with corporates and the eye-watering penalties that corporates would pay," Sallybanks told *Corporate Crime Reporter* in an interview last week.

"The question for the authorities was – how can we do something like that? What do they have in their armory that we don't have? We have seen the introduction of deferred prosecutions in the U.K. as one example of American methods being imported here."

"We have a different approach to corporate criminal liability than that in the United States. In the U.K., a corporate can only be criminally liable if somebody who is a directing mind of that organization is criminally culpable."

"The difficulty in the U.K. in establishing corporate criminal liability is that you can't do it unless you can show that somebody who is effectively on the board of directors of that company was involved. If it was a junior salesman who was paying a bribe for the benefit of the company, while that junior salesman has individual criminal culpability, absent the introduction of a failure to prevent bribery type of offense, the company could not be held criminally liable."

"And that is where there is a fundamental difference in terms of being able to establish corporate criminal liability – other than offenses which are effectively strict liability, where you don't require a guiding mind. The failure to prevent bribery offense is a new model of offense to capture corporates."

"While we have seen the introduction of deferred prosecution agreements in the U.K., which are focused on companies only, that hasn't overcome the fundamental problem that the authorities have and about which they are frequently complaining – which is the way the law works still makes it very difficult to pin criminal liability on a corporate."

"Now as a consequence of the introduction of the deferred prosecution process, you have an alternative means of dealing with that problem. Before, you simply had a choice – do I prosecute a company or do I not? Now, the authorities have a choice of – shall I invite the company to enter into deferred prosecution negotiations to try and effectively reach an agreed settlement of their criminal liability?"

"That process was introduced in 2013. It has been used exclusively by the SFO, although other agencies can use these agreements. And it has been used five times so far in the five years it has been open to them. That is probably a reflection of the difficulty the SFO still has as a result of the state of the law."

(See **SALLYBANKS**, page three)

(**SALLYBANKS**, from page one)

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"The problem with establishing corporate criminal liability in the U.K., and establishing that a directing mind was involved, is why we have seen the offense of failing to prevent bribery. And we have seen an equivalent offense of failing to prevent tax evasion. And there is pressure to introduce analogous offenses across the financial crime sphere so that the corporate can be held criminally accountable for failing to prevent the offense instead of being prosecuted for the offense itself."

Is there any public pressure to broaden corporate criminal liability through vicarious liability?

"There is and it is forever in a state of consultation. I fear that it is not a priority for the government at the moment. A lot of government effort in the last three years has been concentrated on something called Brexit and things like enforcement of white collar offenses against corporates is simply not a priority for the government. But it is something that is permanently under consultation. As far as the prosecuting authorities are concerned, they want to see it addressed by Parliament. They want to make it easier to prosecute companies and hold companies accountable. And certainly Lisa Osofsky has been slightly more cautious in what she has been saying of late. Certainly early on in her tenure, she was talking about vicarious liability for companies as it exists in the United States."

Given the narrow definition of corporate crime in the U.K., does it mean that the focus of prosecutors is individuals more than on corporations?

"It certainly has always been historically focused on individuals. The introduction of the failure to prevent bribery offense has meant more of a focus on corporates. And certainly the introduction of the DPA regime has meant that there is a greater focus on corporates. I don't think we are seeing a corresponding reduction on the focus on individuals."

"There is a greater focus on corporates. At the moment, the authorities here would say they are hamstrung in their efforts by the state of the law. The law can be changed to make it easier to make corporates accountable. But they are always going to be struggling because until you can say to a company – we can show that someone who is your directing mind was involved – the company doesn't have to come to the table to talk. It will say – I have no criminal liability so why should I enter into a deferred prosecution agreement?"

"It is only when the company recognizes itself or can be persuaded by the SFO that it could be prosecuted that there is going to be any motivation to do a deferred prosecution agreement."

What about general differences you see between the practice there compared to the practice here?

"In the US, you have vicarious liability for corporates and plea bargains. And of course, the speed with which the cases are dealt with – it's very much quicker in the U.S. than in the U.K."

"For individuals, we don't have deferred prosecution agreements or non prosecution agreements. The SFO conducts an investigation of an individual and in the end, they either charge your client with offenses or they write you a very short letter saying – we are not charging your client with anything."

Is there a sense that there is a double standard there – that corporations get deferred prosecution agreements but individuals don't?

"Yes. There is a very real risk that a deferred prosecution agreement allows a corporate to buy itself out of a problem and the individuals then are prosecuted for the conduct in a case where the corporate has paid a penalty and entered into a deferred prosecution."

"In the last two corporate deferred prosecution agreements, the individuals who have been prosecuted for the conduct, they have all been acquitted. That's not necessarily an inconsistent outcome. The corporate may believe on the evidence presented to it that the best thing it can do is enter into a deferred prosecution agreement as opposed to contest criminal proceedings."

"The individuals of course fight tooth and nail to establish their innocence. I was involved last year in one such case – a company called Tesco, a major supermarket chain, entered into a deferred prosecution agreement. The allegation was false

accounting because the company had overstated its profits by a quarter of a billion pounds. But then when the SFO prosecuted the three directors who they believed were responsible for the profit overstatement – and I was representing one of those three – they were all acquitted. The case didn't even get to a jury. The judge stopped the case and said – there isn't enough evidence here for this case to go on."

"So at the moment, you have the concept of a deferred prosecution agreement as a means by which a corporate can buy itself out of a prosecution. You have pressure that individuals should still be prosecuted because otherwise there is a risk that corporates will disregard the prosecution as just a cost of doing business and individuals won't be deterred from engaging in the conduct if they don't think they are going to be prosecuted."

"The outcome is not great for the SFO. They don't get the prosecution home. And then everyone says – why did the corporate enter into the deferred prosecution agreement?"

Did the Tesco case significantly weaken the SFO's position?

"It may mean that a corporate that is negotiating a deferred prosecution agreement may look at what the SFO is presenting to them with a greater degree of scrutiny as to whether it is a case that will stand up to challenge at trial."

"The problem for corporates in this situation is that in order for them to even get themselves into that deferred prosecution agreement situation, they have had to demonstrate exemplary cooperation with the SFO from the very outset. They may well have self-reported. They will have provided all documentation. They may well have waived privilege over their internal investigation. They will certainly have gotten rid of all of the individuals involved in the conduct so they can demonstrate to the SFO that they are a new and different corporation than the one that was there years ago when the conduct took place."

"And then when they get themselves into a position to talk with the SFO to reach a resolution, it is unrealistic in those circumstances for a corporation to then say – actually, take us to trail because we think we can win this. That's another two or three years."

It's much more realistic that the corporate is going to take a commercial view which is -- it is better for us to pay a penalty. We don't have the stigma of a conviction, we pay a penalty and we move on. But the SFO is left with egg on their face when the individuals walk free from court. In the deferred prosecution paperwork, those individuals have been identified as effectively guilty. The individuals in that situation are in a terrible position. They are not involved in the DPA process. They have no insight into what is being agreed. They have no input into how it is being recorded."

"In the Tesco case for example, you have individuals walking free from court having been cleared from involvement in fraud and false accounting. And yet, in the public domain and incapable of being challenged is an agreement between the SFO and the company agreeing that these people dishonestly falsified the accounts."

"The SFO must be more cautious in how they document matters within the DPA paperwork with the corporate. But you have the pressure to prosecute the individuals because you need a deterrent. But of late, the SFO has not brought those prosecutions home.

Have there been other similar cases where the individual prosecutions have failed?

"Yes. This summer there was a case against a smaller steel company called Sarclad. There was a deferred prosecution agreement. They paid a financial penalty. It was a corruption case. The individuals stood trial this summer on the substantive corruption offenses. And they were all acquitted. That doesn't necessarily mean that the company did the wrong thing in entering into the deferred prosecution agreement at the time that it did. It may have been the best resolution for the company. But we do now have seemingly inconsistent outcomes."

There must be incredible tension growing between corporations and their boards of directors. It appears as if in these cases, the corporations are throwing the directors under the bus.

"I would agree with that summary. In order for a company to put itself in the best position vis-a-vis the SFO, in an investigation, it has to cooperate from the outset. The die is cast very early on in these investigation. The matter is reported. The executives are suspended then pretty soon dismissed. The company may refrain from conducting too much of its own internal investigation because the SFO once notified and aware are very anxious that any internal investigation shouldn't trample over the evidence.

And so to the extent that as part of its cooperation the corporate has had to step back from conducting the type of thorough internal investigation it might wish to do, it is then presented with the product of the SFO's investigation. The company is still looking for the best way out and won't say to the SFO – I don't want to talk to you. I'll see you in court if you put up the charges. That is really unrealistic."

"But there is a real concern on the part of those who represent individuals that the executives are being thrown under the bus. If the SFO has persuaded the company to write a check and enter a DPA on the basis that its directing minds committed a crime, it would be inconsistent for the SFO not then to prosecute the individuals. The SFO may feel that they are damned if they do and damned if they don't."

"The Rolls Royce settlement was based on twelve charges, the majority of which were based on directing minds' liability. While the individuals were not identified, the basis of the corporate acceptance of liability was because its directing minds were liable. Yet, earlier this year, the SFO said – we are not prosecuting any individuals involved in the Rolls Royce case. Then everyone in this practice area said – how can that be? On what possible basis can you not prosecute the individuals?"

(For the complete Interview with Richard Sallybanks, see page 11.)

INTERVIEW WITH RICHARD SALLYBANKS, BCL SOLICITORS, LONDON, ENGLAND

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Richard Sallybanks has represented such directors at trial. He is a partner at BCL Solicitors in London.

We interviewed Sallybanks on October 21, 2019

CCR: Tell us about your education and your professional background.

SALLYBANKS: In the U.K., we have a split legal profession between solicitors and barristers. I wanted to go down the solicitor's route, so I went to law school at Exeter for a year and then after that I had a two year period of articles as it was then known. That was with a big commercial law firm in London. After my two year training, I qualified as a solicitor. I spent six months of my training in their Hong Kong office. I then spent six months at a law firm in Stuttgart in Germany.

I then returned to London to begin my practice. I spent three years with McKenna. And then I moved to BCL in the summer of 1995 to practice exclusively in business crime and white collar crime.

I have been at this firm ever since. I was made a partner here in late 1999. I have been a partner in the practice for almost 20 years now.

CCR: Is your firm primarily a corporate crime defense firm?

SALLYBANKS: We would be described as a boutique firm. I am not sure how big you can get before the term boutique ceases to apply. We are roughly around 35 lawyers. We practice exclusively in the areas of business crime, financial crime and contentious regulatory work.

We also have a number of lawyers who concentrate on serious and general crime – all types of crime.

That is a pure criminal defense practice that is a smaller part of the firm. The bulk of the firm concentrates on business crime defense work. We are boutique in the sense that we only concentrate on business crime and criminal defense.

CCR: Give us the lay of the land in terms of the corporate criminal defense bar in the U.K.

SALLYBANKS: You have really seen a change in the marketplace in the last ten years. It was driven by the introduction of a piece of legislation here called the Bribery Act. It was passed in 2010 and came into force in 2011. It upped the ante in terms of corporate risk for corruption.

Up until that point, corporate crime defense work was predominantly practiced by the smaller boutique firms representing the executives within the corporates who found themselves subject to investigation and prosecution for the corporate crime offenses.

The introduction of the Bribery Act and specifically the creation of a corporate only offense of failing to prevent bribery meant that corporate risk hit the boardroom agenda.

And consequently, companies that had not previously focused on their corporate criminal risk had to do so. That then drove an expansion of the marketplace in terms of the firms providing corporate crime advice and compliance advice.

In the last decade, that has driven an expansion of the corporate crime defense market in London such that you now see in virtually every major firm, every mid sized commercial firm and the majority of the U.S. firms in London, a practice which might be called government investigations, corporate crime, or regulatory risk. But it has effectively driven a very big expansion of the marketplace in terms of professionals advising corporates on their criminal risk.

It's a much more congested marketplace than it was ten years ago. The lines between firms that represent individuals and represent corporates are blurring. But there is still very much room in the marketplace for boutique firms that have the track record and experience in representing the individuals in these big corporate crime investigations and prosecutions.

And while the bigger U.S. firms and city firms might sometimes represent individuals, they are more commonly associated with representing the corporates with the individuals being referred onto other firms, including BCL.

CCR: How does your firm break down – corporate versus individual?

SALLYBANKS: The majority of our work is representing individuals. We are sometimes called upon to advise corporates on discrete issues. It may be that we are called on to advise corporates on money laundering type issues. But certainly, probably as a result of scale as a result of anything, we are unlikely to be called upon by a global corporate to run an investigation.

We are more likely to be involved in that type of thing on behalf of one of the individual target suspects in that type of investigation.

CCR: In the United States, the two primary investigative agencies are the Justice Department and the Securities and Exchange Commission. What is the story in the U.K.?

SALLYBANKS: The predominant authority we deal with is the Serious Fraud Office (SFO). They were established in the late 1980s to investigate cases of serious and complex fraud. And that now includes the big corruption investigations, whether domestic or international.

The SFO is akin to your Main Justice. That is the predominant authority in big corporate crime cases. Our equivalent of the SEC is the Financial Conduct Authority (FCA). While it has the power to bring criminal cases, it does so relatively infrequently. It will prosecute insider dealing cases, for example. But the majority of the investigations and enforcement action it brings is what we would describe as civil cases – resulting in financial penalties on individuals or financial institutions.

There are a plethora of other investigative agencies – the City of London police, for example. But most of the big ticket cases are handled by the SFO and the FCA.

CCR: Who are the key prosecutors?

SALLYBANKS: The actual prosecution of the case will be presented by counsel external to the SFO, even though the investigation and case work will be done by the SFO. But the actual person who stands

up in court presenting the case is external counsel.

In terms of the decision making process that lies with the director of the SFO – she is an American lawyer – Lisa Osofsky, who has been in her position just over a year now.

Her equivalent at the FCA is the head of enforcement – Mark Steward.

CCR: How did a U.S. attorney get to be the head of the SFO?

SALLYBANKS: She is also a qualified U.K. barrister. She has spent a considerable amount of her professional career in England. She originally came to the U.K. in the late 1990s as part of the cooperation on the BCCI investigations. She has practiced here as a barrister.

She chaired a consultancy company called Exiger, who were monitors for HSBC. She has practiced in this space in England and in the U.S. She is a former federal prosecutor in the United States. She is very experienced in this area. She has been the director for the last twelve months.

Mark Steward is originally from Australia.

CCR: Much of the corporate criminal defense practice in the United States is dominated by alternative resolutions such as deferred and non prosecution agreements. I hear they have infected the U.K. practice too.

SALLYBANKS: It is quite ironic that we have an American lawyer heading the SFO at the moment. For many years, the SFO looked enviously across the Atlantic to how white collar cases were investigated and prosecuted and the resolutions that U.S. prosecutors were able to reach with corporates and the eye-watering penalties that corporates would pay.

The question for the authorities was -- how can we do something like that? What do they have in their armory that we don't have? We have seen the introduction of deferred prosecutions in the U.K. as one example of American methods being imported here.

Without wanting to turn this into a law lecture, we have a different approach to corporate criminal liability than that in the United States. In the U.K., a corporate can only be criminally liable if somebody who is a directing mind of that organization is criminally culpable.

The difficulty in the U.K. in establishing corporate criminal liability is that you can't do it unless you can show that somebody who is effectively on the board of directors of that company was involved.

If it was a junior salesman who was paying a bribe for the benefit of the company, while that junior salesman has individual criminal culpability, absent the introduction of a failure to prevent bribery type of offense, the company could not be held criminally liable.

And that is where there is a fundamental difference in terms of being able to establish corporate criminal liability – other than offenses which are effectively strict liability, where you don't require a guiding mind. The failure to prevent bribery offense is a new model of offense to capture corporates.

While we have seen the introduction of deferred prosecution agreements in the U.K., which are focused on companies only, that hasn't overcome the fundamental problem that the authorities have and about which they are frequently complaining – which is the way the law works still makes it very difficult to pin criminal liability on a corporate.

Now as a consequence of the introduction of the deferred prosecution process, you have an alternative means of dealing with that problem.

Before, you simply had a choice – do I prosecute a company or do I not?

Now, the authorities have a choice of – shall I invite the company to enter into deferred prosecution negotiations to try and effectively reach an agreed settlement of their criminal liability?

That process was introduced in 2013. It has been used exclusively by the SFO, although other agencies can use these agreements. And it has been used five times so far in the five years it has been open to them.

That is probably a reflection of the difficulty the SFO still has as a result of the state of the law.

We have seen five DPAs so far. The most significant was with Rolls Royce, as part of a combined settlement with the U.S. and the Brazilian authorities. For the SFO, it included a penalty of 497 million pounds. And that certainly has been the most significant DPA to date. Others have been on a smaller scale.

The problem with establishing corporate criminal liability in the U.K., and establishing that a directing mind was involved, is why we have seen the offense of failing to prevent bribery. And we have seen an equivalent offense of failing to prevent tax evasion. And there is pressure to introduce analogous offenses across the financial crime sphere

so that the corporate can be held criminally accountable for failing to prevent the offense instead of being prosecuted for the offense itself.

CCR: Is there any public pressure to broaden corporate criminal liability?

SALLYBANKS: There is and it is forever in a state of consultation. I fear that it is not a priority for the government at the moment.

A lot of government effort in the last three years has been concentrated on something called Brexit and things like enforcement of white collar offenses against corporates is simply not a priority for the government.

But it is something that is permanently under consultation.

Certainly as far as the prosecuting authorities are concerned, they want to see it addressed by Parliament.

They want to make it easier to prosecute companies and hold companies accountable.

And certainly Lisa Osofsky has been slightly more cautious in what she has been saying of late. Certainly early on in her tenure, she was talking about vicarious liability for companies as it exists in the United States.

CCR: Given the narrow definition of corporate crime in the U.K., does it mean that the focus of prosecutors is individuals more than on corporations?

SALLYBANKS: It certainly has always been historically focused on individuals. The introduction of the failure to prevent bribery offense has meant more of a focus on corporates. And certainly the introduction of the DPA regime has meant that there is a greater focus on corporates certainly. I don't think we are seeing a corresponding reduction on the focus on individuals.

There is a greater focus on corporates. At the moment, the authorities here would say they are hamstrung in their efforts by the state of the law. The law can be changed to make it easier to make corporates accountable. But they are always going to be struggling because until you can say to a company – we can show that someone who is your directing mind was involved – the company doesn't have to come to the table to talk. It will say – I have no criminal liability so why should I enter into a deferred prosecution agreement?

It is only when the company recognizes itself or can be persuaded by the SFO that it could be prosecuted that there is going to be any motivation to do a deferred prosecution agreement.

CCR: How do cases come in the door for you and your firm?

SALLYBANKS: The firm has a well established reputation in this area. The majority of our clients are not people who ever thought they would need a white collar crime lawyer.

They are unfamiliar with the firms that practice in this area. And it is very difficult for us to market our services directly to these people. They may regard it as offensive to suggest that they may ever need our services.

We have good relations with the firms that represent the corporates. And it will often be the corporate lawyers who provide the individual with our names or with a short list of firms for them to contact.

CCR: Is your practice exclusively defense side? Might you represent whistleblowers?

SALLYBANKS: The whole whistleblower area is much less developed in the U.K.

The overwhelming majority of our work is defense work. Sometimes our clients who are suspects in an investigation, it will be in their interest to cooperate.

We represented the first cooperating defendant in an SFO corruption investigation. He was a suspect. It was in his interest to cooperate. As a result, he was treated far more leniently in the courts in the U.K. He was also in the crosshairs of the Department of Justice.

He entered into a non prosecution agreement. He ended up being prosecuted in Greece along with others for the same conduct.

The fact that he was a cooperator in the U.K. and the U.S. meant that ultimately things played out in his favor in Greece.

We will sometimes assist people who are being asked to attend interviews as potential prosecution witnesses and certainly if asked, we will help a company who wishes to make a complaint to the police.

CCR: In the United States, there are bounty provisions for whistleblowers. Do you have those in the U.K.?

SALLYBANKS: It is certainly nowhere nearly as well developed as in the US. In the cartel area in the U.K., there are incentives that can include financial rewards. But cartel prosecutions are an extinct animal in the U.K. We don't have those type of whistleblower rewards.

Lisa Osofsky at the SFO is certainly very keen on providing whistleblower cooperation. She talks about people wearing a wire. That's another manifestation of a U.S. law enforcement investigative approach trying to be introduced here.

CCR: Is a big part of your work foreign corrupt practices?

SALLYBANKS: Yes. Overseas corruption we call it. Money laundering and fraud and false accounting. Global corruption.

CCR: What about general differences you see between the practice there compared to the practice here?

SALLYBANKS: In the US, you have vicarious liability for corporates and plea bargains. And of course, the speed with which the cases are dealt with – it's very much quicker in the U.S. than in the U.K.

For individuals, we don't have deferred prosecution agreements or non prosecution agreements. The SFO conducts an investigation of an individual and in the end, they either charge your client with offenses or they write you a very short letter saying – we are not charging your client with anything.

CCR: That's effectively a declination.

Is there a sense that there is a double standard there – that corporations get deferred prosecution agreements but individuals don't?

SALLYBANKS: Yes. There is a very real risk that a deferred prosecution agreement allows a corporate to buy itself out of a problem and the individuals then are prosecuted for the conduct in a case where the corporate has paid a penalty and entered into a deferred prosecution.

In the last two corporate deferred prosecution agreements, the individuals who have been prosecuted for the conduct, they have all been acquitted. That's not necessarily an inconsistent outcome. The corporate may believe on the evidence presented to it that the best thing it can do is enter into a deferred prosecution agreement as opposed to contest criminal proceedings.
The individuals of course fight tooth and nail to establish their innocence.

I was involved last year in one such case – a company called Tesco, a major supermarket chain, entered into a deferred prosecution agreement. The allegation was false accounting because the company had overstated its profits by a quarter of a billion pounds. But then when the SFO prosecuted the three directors who they believed were responsible for the profit overstatement – and I was representing one of those three -- they were all acquitted. The case didn't even get to a jury. The judge stopped the case and said -- there isn't enough evidence here for this case to go on.

So at the moment, you have the concept of a deferred prosecution agreement as a means by which a corporate can buy itself out of a prosecution.

You have pressure that individuals should still be prosecuted because otherwise there is a risk that corporates will disregard the prosecution as just a cost of doing business and individuals won't be deterred from engaging in the conduct if they don't think they are going to be prosecuted.

The outcome is not great for the SFO. They don't get the prosecution home. And then everyone says – why did the corporate enter into the deferred prosecution agreement?

CCR: Did the Tesco case significantly weaken the SFO's position?

SALLYBANKS: It may mean that a corporate that is negotiating a deferred prosecution agreement may look at what the SFO is presenting to them with a greater degree of scrutiny as to whether it is a case that will stand up to challenge at trial.

The problem for corporates in this situation is that in order for them to even get themselves into that deferred prosecution agreement situation, they have had to demonstrate exemplary cooperation with the SFO from the very outset. They may well have self-reported. They will have provided all documentation.

They may well have waived privilege over their internal investigation. They will certainly have gotten rid of all of the individuals involved in the conduct so they can demonstrate to the SFO that they are a new and different corporation than the one that was there years ago when the conduct took place.

And then when they get themselves into a position to talk with the SFO to reach a resolution, it is unrealistic in those circumstances for a corporation to then say – actually, take us to trail because we think we can win this. That's another two or three years.

It's much more realistic that the corporate is going to take a commercial view which is – it is better for us to pay a penalty. We don't have the stigma of a conviction, we pay a penalty and we

move on. But the SFO is left with egg on their face when the individuals walk free from court. In the deferred prosecution paperwork, those individuals have been identified as effectively guilty.

The individuals in that situation are in a terrible position.

They are not involved in the DPA process. They have no insight into what is being agreed. They have no input into how it is being recorded.

In the Tesco case for example, you have individuals walking free from court having been cleared from involvement in fraud and false accounting. And yet, in the public domain and incapable of being challenged is an agreement between the SFO and the company agreeing that these people dishonestly falsified the accounts.

The SFO must be more cautious in how they document matters within the DPA paperwork with the corporate. But you have the pressure to prosecute the individuals because you need a deterrent. But of late, the SFO has not brought those prosecutions home.

CCR: Have there been other similar cases where the individual prosecutions have failed?

SALLYBANKS: Yes. This summer there was a case against a smaller steel company called Sarclad. There was a deferred prosecution agreement. They paid a financial penalty. It was a corruption case. The individuals stood trial this summer on the substantive corruption offenses.

And they were all acquitted. That doesn't necessarily mean that the company did the wrong thing in entering into the deferred prosecution agreement at the time that it did. It may have been the best resolution for the company. But we do now have seemingly inconsistent outcomes.

CCR: There must be incredible tension growing between corporations and their boards of directors. It appears as if in these cases, the corporations are throwing the directors under the bus.

SALLYBANKS: I would agree with that summary. In order for a company to put itself in the best position vis-a-vis the SFO, in an investigation, it has to cooperate from the outset.

The die is cast very early on in these investigations. The matter is reported. The executives are suspended then pretty soon dismissed.

The company may refrain from conducting too much of its own internal investigation because the SFO once notified are very anxious that any internal investigation shouldn't trample over the evidence.

And so to the extent that as part of its cooperation the corporate has had to step back from conducting the type of thorough internal investigation it might wish to do, it is then presented with the product of the SFO's investigation.

The company is still looking for the best way out and won't say to the SFO I don't want to talk to you. I'll see you in court if you put up the charges. That is really unrealistic.

But there is a real concern on the part of those who represent individuals that the executives are being thrown under the bus.

If the SFO has persuaded the company to write a check and enter a DPA on the basis that its directing minds committed a crime, it would be inconsistent for the SFO not then to prosecute the individuals. The SFO may feel that they are damned if they do and damned if they don't.

The Rolls Royce settlement was based on twelve charges, the majority of which were based on directing minds' liability. While the individuals were not identified, the basis of the corporate acceptance of liability was because its directing minds were liable.

Yet, earlier this year, the SFO said – we are not prosecuting any individuals involved in the Rolls Royce case. Then everyone in this practice area said – how can that be? On what possible basis can you not prosecute the individuals?

CCR: In the United States, most of the major corporate crime cases are driven by self-reports. Something similar in the U.K.?

SALLYBANKS: Self reporting is a real incentive in terms of outcome. A company that self reports will achieve a better outcome than one that doesn't.

But because of this directing mind problem, some companies that are aware of criminality or potential criminality, might think – what's in it for us?

We don't think we are going to have liability. We don't think this problem may come to light. We are not dealing with an organization with the resources of the Department of Justice.

The SFO is keen to encourage people to self-report. The SFO will say – of course you should. But companies will still sit back and think about it – if we don't, what are the risks of getting caught?

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