actually 100% accurate. We did the
count!)

Seventeen years ago, then, I flew
home with absolute confidence in our
criminal justice system. Sure, it wasn’t
perfect. But just look at the alternative.

Well, it seems to me that someone
did look at the alternative. And that
someone shamefully saw a system
to which they aspired. This is why
England and Wales are closer to ‘US
dom’ in 2021 than we have ever
been.

Some would argue otherwise, of
course. The Public Defender Service
exists, they would say, but it has yet
to take off. Most accused are still
defended by the self-employed barr and
by independent solicitors, they would
posit. And that is true. But it is also
misleading. Almost two decades of
cuts have seen to it that in every other
respect, those who cannot afford to pay
privately for their defence now face a
level of representation that - whilst still
ahead of what the poorest would expect
in the US - is now running America
far too close. It is for this reason that I
personally work so closely with private
criminal defence specialists Ewing
Law; because only for privately paying
clients are the necessary resources still
available to ‘defend at all costs’.

With fees cut to the bone, publicly
funded defence lawyers - both solicitors
and barristers - are now working
on a shoestring. Where possible
they will still provide the very best
representation they can; thankfully
there are many still left from the ‘good
days’ who will not allow themselves to
do their job any other way. But pure
determination and an understanding
of professionalism can only carry them
so far. With the threat of insolvency
or bankruptcy hanging over far too
many heads, how long can dedicated
practitioners’ drive to defend be
expected to overcome the financial
reality where - for publicity-funded
work - only ‘stack em high’, ‘volume
over quality’ can pay the bills?

And what about when those who knew
the ‘good days’ are gone? When all
that’s left is the minuscule amount of newer recruits, lawyers who have
only seen the ‘bad times’ and the ‘bad
ways’?

The direction of travel could not be
clearer. Publicly-funded firms are
disappearing at a shocking rate and, as
sad as it is to admit this, the two-tier
system already exists. All because some
faceless mandarin with zero experience
of a courtroom decided to emulate the
US ethos of ‘Justice for the Rich and
Just This for Everyone Else’.

Is it too late to stop this rot? Who
knows. But while some of us still
remember the ‘good days’, should we
not at least try?

Tony Wyatt, Associate Counsel at Ewing
Law; best-selling crime author
under the pseudonym Tony Kent

The Bribery Act: The First 10 Years

Ten years after it came into force in the UK,
John Binns and Umar Azmeh of the Financial
Crime team at BCL Solicitors LLP, review the
performance so far of what has been called
‘a landmark of legislation’, including its most
important innovation – the ‘failure to prevent’
offence.

Introduction

The Bribery Act 2010 (the ‘2010 Act’)
reformed Royal Assent in April 2010
and came into force on 11 July 2011.
Its 10th anniversary gives us a good
opportunity to reflect upon the impact
that it has had within the criminal
justice system, with one eye to the
future as it becomes more entrenched
and even inspires other legislation.
Whatever its effects, it is certainly clear
that it modernised the UK’s out-dated
corruption laws, which had not been
updated for almost 100 years, and
which clearly struggled to deal with
more modern iterations of bribery and
corruption.

Background to Reform

Prior to the 2010 Act, the law of
bribery comprised various common
corruption laws, including event-specific
defences such as embracery [bribing
a juror], attempting to bribe a privy
councillor, and attempting to bribe a
police constable, along with a number

of statutory offences. The most
significant statutes were the Public
Bodies Corrupt Practices Act 1889
(the ‘1889 Act’), the Prevention of
Corruption Act 1906 (the ‘1906 Act’),
and the Prevention of Corruption Act
1916. A UK Government Consultation
Paper in 2005 (Bribery: Reform of the
Prevention of Corruption Acts and SFO
Powers in Cases of Bribery of Foreign
Officials) noted that the law was
“fragmented and out of date and needs
to be reformed.”

The OECD had also been critical
of the UK’s bribery and corruption
laws, describing them as being
“characterised by complexity and
uncertainty” (OECD Phase 2 Report on
the Application of the Convention on
Combating Bribery of Foreign Public
Officials in International Business
Transactions).

- Issues with the previous law (as
highlighted by the Law Commission
in its Consultation Paper, No.185,
Reforming Bribery (2008)) included
the following:

- The distinction between public
sector and private sector
bribery: the law drew a distinction
between bribery in the public
and private sectors. The 1889 Act
was concerned with public sector
bribery (members, officers and
servants of public bodies). The
bribery cases, due to the identification principle. The offence contrary to section 7, removes that hard requirement, along with effectively reversing the burden of proof in connection with its defence. However, far from the expected slew of corporate convictions for the offence contrary to section 7, there have been two companies convicted of that offence: Sweett Group PLC and Skansen Interiors Limited.

Statistics within the criminal justice system are somewhat difficult to obtain. However, in 2020 and in response to a Freedom of Information request, the SFO revealed that it had taken 5 cases under the 2010 Act to Court (excluding DPAs), and in 2019 it was revealed that the Crown Prosecution Service had instituted criminal proceedings in 16 cases under the 2010 Act. Hardly the flood of cases that was perhaps envisaged as part of a revamped drive to tackle bribery and corruption.

There has, however, been more success from the 2010 Act where Deferred Prosecution Agreements (DPAs) are concerned (under the Crime and Courts Act 2013). There have so far been nine DPAs that have involved the offence contrary to section 7 of the 2010 Act: Standard Bank PLC (2015); Sarclad Ltd (2016); Rolls Royce PLC and Rolls Royce Energy Systems Inc (2017); Guralp Sys Ltd (2019); Airbus SE (2020); Airline Services Ltd (2020); Amec Foster Wheeler (2021); and two involving as yet unnamed companies (2021). The total sums ordered by the Court to be paid under those DPAs exceeds £1bn.

It is worth noting that the DPA regime potentially provides the best of both worlds for companies and prosecuting authorities alike. As far as companies are concerned, they are able – even in circumstances where they would almost certainly be convicted – to admit wrongdoing and avoid a criminal conviction, with all of the negative consequences that would follow e.g. prohibitions on public procurement contract tendering and reputational damage. Prior to the 2010 Act, the company would either have had to plead guilty or take the case to a jury – if convicted, that would have been on the basis that a ‘guiding mind and will’ had committed the offence. The company is effectively permitted to take a commercial decision on a potentially criminal matter. As far as the prosecutor is concerned – thus far just the SFO – it is able to pass significant investigative costs onto the company, avoid the very expensive and resource-intensive trial which may – as it has done in the case of every individual it has prosecuted where a DPA has been awarded to a company – result in acquittal, and also obtains significant financial penalties and its costs where appropriate.

Assessing Success

Clearly, the 2010 Act has its influential supporters, and has both changed attitudes and raised revenues for HM Treasury. But perhaps its most important criteria of success are also the hardest to judge. The question of whether incidences of bribery are now more likely to face justice rather depends on whether DPAs are included within that term; otherwise, it is surely hard to make the case that they are. What about the question of whether the 2010 Act has genuinely prevented bribery? We might hope that, ten years into the life of the 2010 Act, contracts are now granted on a fair basis without the need for bribes. A cynic might doubt whether either hope is realistic; they may wonder instead whether bribery methods have simply adapted to work around corporate procedures more effectively, thus making them harder to detect.

One of the drivers for the 2010 Act, and where perhaps it has been most successful, is in changing the perception of bribery, particularly in the corporate world. Whilst the 2010 Act has not led to a torrent of prosecutions, it has brought about a sea change in how corporates consider and mitigate against bribery. This may ultimately be the most important change the 2010 Act has brought about.

John Binns is a partner and Umar Azmeh an associate in the financial crime department of BCL Solicitors LLP.

Section 7 – A Template?

In 2017, the Ministry of Justice published a Call for Evidence on Corporate Liability for Economic Crime; however, the evidence submitted in response was considered inconclusive. In November 2020, the Government asked the Law Commission to examine the issue again and to publish an Options Paper providing an assessment of different options for reform. The Law Commission intends to provide that Paper by the end of 2021. Meanwhile, the Law Commission published its Discussion Paper in June, the responses to which will influence the Options Paper.