

DPAs and Associated Guilt – Does the SFO struggle to prosecute individuals?

When considering the News or Case Update section of the Serious Fraud Office's (SFO) website, you cannot fail to see numerous examples of positive stories detailing the latest Deferred Prosecution Agreements (DPAs) entered into by the SFO. What is less apparent are the successful outcomes relating to individuals who prosecuted as a result of a company entering into a DPA – to date there has been no successful prosecution of an individual after a company has secured a DPA.

What is a DPA?

A DPA is an agreement reached between a prosecutor and an organisation which could be prosecuted; it is not available for individuals. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified requirements. The SFO stipulates that an organisation would only be invited to enter into DPA negotiations if there was full co-operation with the investigation – this includes self-reporting – and the agreement to a number of terms including co-operating with future prosecutions of individuals.

The importance of the two-stage test

It would be easy for the SFO to be of the view that by securing a DPA, the prosecution of individuals allegedly responsible for the criminal act would naturally follow, particularly if the organisation had agreed to co-operate with the prosecution of those individuals. However, the SFO, as a prosecuting body, is still required to follow the code for crown prosecutors which sets out the two-stage test which must be met before any prosecution is undertaken:

1. Realistic Prospect of Conviction: the evidence must be able to be used in court, be reliable and credible and there should be no other material that might affect the sufficiency of evidence;
2. Public Interest: the public interest factors in favour of a prosecution outweigh those against.

The difficulty, particularly apparent in the individual prosecutions following the DPA between Tesco Stores Limited and the SFO in April 2007, is that whilst the SFO decided to charge the individuals with reference to the two stage test, there has been a failure of the evidence and therefore, there was no realistic prospect of conviction. This should have been identified when the decision to prosecute was taken. In fact the trial judge in the Tesco executives case, Sir John Royce said that "in certain crucial areas, the prosecution case was so weak that it could not be left for a jury's consideration" and that the "real weakness" was of proving knowledge.

The case was dismissed and the SFO appealed this decision to the Court of Appeal. Leave to appeal was refused by the Court of Appeal and the original decision of the Sir John Royce was upheld.

Disclosure Failures

Criticism has also been aimed at the SFO as a result of disclosure failures. In April 2021 disclosure errors led to the collapse of a fraud trial involving two former senior executives at Serco – a company

which had entered into a DPA with the SFO. Whilst in a non-DPA related prosecution of an individual, Ziad Akle, the Court of Appeal quashed the conviction of an individual accused of bribery after it was revealed that the SFO had refused to disclose evidence that would have supported his defence. In the judgment, Lord Justice Holroyde agreed that the SFO had failed fundamentally to comply with its disclosure obligations and called it a serious error; as a result the defendant did not receive a fair trial.

Key takeaways

The SFO's investigations into individuals usually take numerous years and come at a great cost to the SFO and to the individuals, but it has suffered some significant defeats and there have been calls for the SFO to be disbanded. Whilst the SFO can point to successful DPAs and the revenues the DPA fines bring in, it is yet to achieve a successful prosecution of an individual following on from a corporate DPA.

As it currently goes through an independent review into its handling of the Akle case, it should also review how it assesses evidence against individuals in DPA cases to ensure that associated guilt on the back of a DPA isn't the reason for bringing the proceedings.



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