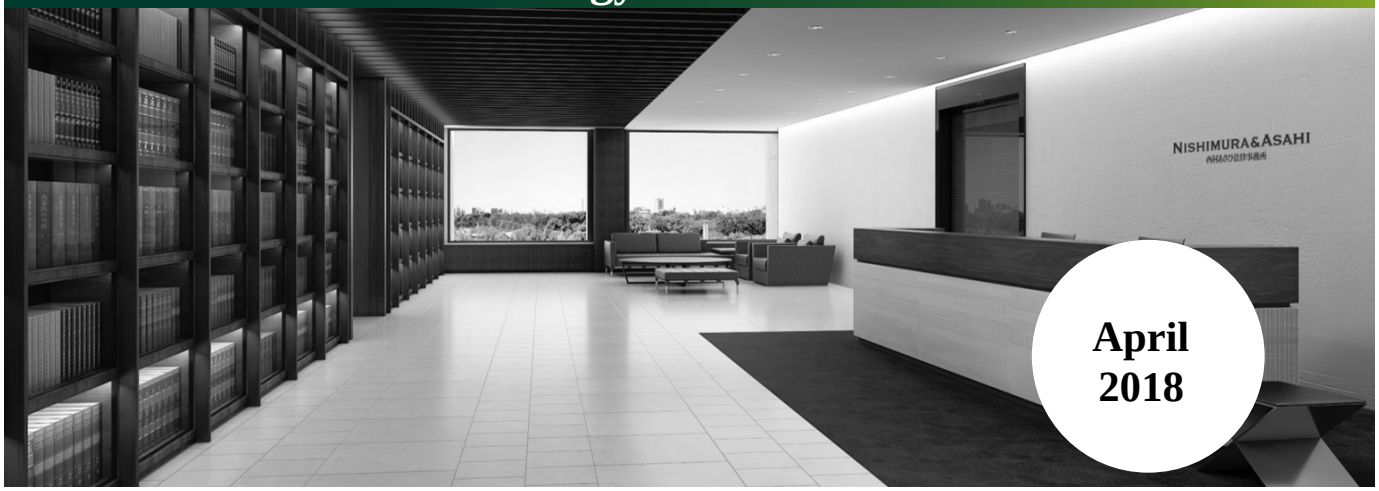
西村あさひ法律事務所

NISHIMURA & ASAHI

Corporate Crisis Management Newsletter
Natural Resources and Energy Newsletter



April
2018

UK Bribery Act: First Case on "Adequate Procedures" under the UK Bribery Act

Hiroshi Kimeda, Mark Tudor, Hiroyasu Konno

In February 2018 a jury in England considered the first contested case of whether a company (Skansen Interiors Limited (the "**Company**")) was guilty of the "**Corporate Offence**" of failure to prevent bribery under the UK Bribery Act ("**Bribery Act**").

The general defence for a company being prosecuted under the Corporate Offence is for the company to prove that it had put in place "adequate procedures" to prevent bribery.

In this case, the jury found the Company guilty of the offence (ie the jury did not think that the Company had put adequate procedures in place).

The Bribery Act itself provides no explicit guidance on what will be regarded as "adequate procedures" and accordingly this case is the first example of how a jury might interpret the law.

Unfortunately, however, jury verdicts do not come with reasons for a conviction but some lessons can be learnt from the surrounding circumstances.

Please see our previous newsletter of November 2016 on the UK Bribery Act for a detailed description of:

- the general offences under the Bribery Act;
- the potential punishments under the Bribery Act; and

- how the Bribery Act applies to Japanese companies and their affiliates.

Background

The Company was a small contractor employing around 30 people.

When a new Chief Executive Officer arrived at the Company in 2014 he discovered that the Company had made a payment of £10,000 to another company in order to win tenders worth around £6 million.

On discovering what looked like a bribe the new CEO launched an internal investigation and urgently put in place a formal anti-bribery and corruption policy.

He also stopped an additional payment of £29,000 which had been put in process.

After the results of the internal inquiry the CEO dismissed the member of staff who had been responsible for the bribes (who subsequently pled guilty to offences under the Bribery Act) and the Company self-reported to the police and fully assisted the police with their investigation.

Why was a Corporate Offence prosecution brought against the Company?

This question is being asked by many commentators.

The Company self-reported after its internal investigation, dismissed the responsible member of staff and fully co-operated with the police investigation.

It is generally expected, in circumstances where a company has self-reported and has fully co-operated, that the Crown Prosecution Service ("**CPS**") will enter into a deferred prosecution agreement rather than go through the expense of a criminal trial.

However, in this case, after initial discussions in relation to a deferred prosecution agreement the CPS decided not to pursue this.

In addition, at the time of the trial, the Company itself was no longer active and so, even though it was found to be guilty, a financial penalty could not be imposed on it and the only sentence available to the judge was an absolute discharge of the case (meaning that the conviction would not appear on the Company's records).

The general consensus appears to be that the CPS considered that there was no benefit in entering into a deferred prosecution agreement (perhaps as the Company was dormant) and that prosecution of the case might send a message to companies that bribery will not be tolerated and that bribery cases will be actively pursued (even against small companies).

Comments

From the perspective of Japanese companies that carry out business in the UK and UK subsidiaries of Japanese companies, care should be taken to ensure that bribery risk-assessments are conducted and that robust anti-bribery and corruption procedures are put in place (ie it is better to be cautious and enact more robust procedures).

Where procedures are put in place on a group-wide basis (ie from a Japanese head-office) rather than on a country-specific basis care should be taken to ensure that the group-policies satisfy the requirements of and protect the company against prosecution under the Bribery Act.

Hiroshi Kimeda — Partner
h_kimeda@jurists.co.jp

Hiroshi Kimeda joined Nishimura & Asahi in 2002. His main areas of practice are Corporate Crisis Management and Litigation. As for Corporate Crisis Management, he has extensive experience in corporate scandal cases including window-dressing, misrepresentation of financial statements, insider trading, antitrust (bid rigging, price cartels, and abuse of dominant position), product defects, misleading representations of products, divulging confidential information, bribery, political funding, money laundering, breach of industrial regulations, and factory accidents.

Mark Tudor — Partner (Foreign Law Partner*)
m_tudor@jurists.co.jp

Mark Tudor joined Nishimura & Asahi in May 2016 and has over 18 years experience advising in the energy and natural resources (with 10 of those years being in Japan with an international law firm). Most recently he worked for an FPSO and engineering contractor and has experience advising on onshore and offshore FEED, EPC and other engineering and construction contracts and on development of oil, gas and LNG projects.

*Please note that we are not engaged in a Gaikokuho Kyodo Jigyo (the operation of a foreign law joint enterprise).

Hiroyasu Konno — Attorney-at-Law
h_konno@jurists.co.jp

Hiroyasu Konno advises clients on various matters of energy and natural resources transactions, such as LNG SPAs, oil upstream projects and metal mining projects. Besides such transactions, he was a committee member of Agency for Natural Resources and Energy's Study Group on Procurement Method of Raw Materials (2014-2015), and has been a committee member of the Institute of Energy Economics, Japan's Study Group on Energy and Law (2015-). While he was a deputy director of the Strategic Planning Division of Japan, Oil Gas and Metals National Corporation, he worked in various exploration and development projects of oil and gas and metal in different countries.

Public Relations Section, Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi, Chiyoda-ku, Tokyo 100-8124, Japan
Tel: +81-3-6250-6202 Fax: +81-3-6250-7200 E-mail: newsletter@jurists.co.jp URL: https://www.jurists.co.jp/en