

MANAGING BRIBERY AND CORRUPTION RISKS THROUGH CONTRACT – SIMPLE AS ABC CLAUSES ...?

Paul Marshall, Partner

Katie Love, Solicitor

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ENLIGHTENED THINKING

WE WILL COVER

- Foreign Corrupt Practices Act (“FCPA”)
- Bribery Act 2010
- Practical considerations
- Contractual considerations
- Policies & procedures
- Case Study

- Your supply chain can:-
 - **Create criminal liability** for your organisation – if an associated person bribes
 - **Damage your reputation** – if your supply chain engages in illegal activity your name is still tarnished
- Protect yourself:-
 - With **effective and enforceable ABC clauses**
 - Oblige counterparty to **comply with your ABC policy and procedures**
 - Require **counterparty to conduct due diligence** on its sub-contractors, agents or intermediaries

FOREIGN CORRUPT PRACTICES ACT 1977 (“FCPA”)

- Enforced by the US Department of Justice and the US Securities and Exchange Commission
- Contains a **general prohibition, made up of 5 elements**
- There are **3 key exceptions / defences**:
 - **Facilitating payments** for routine government actions
 - Payments permitted by written laws
 - Reasonable and *bona fide* expenditures
- UK Bribery Act 2010 contains further requirements which may apply to US/international organisations...

- A commercial organisation is guilty of an offence if an **associated person** bribes on its behalf...
- Guilty unless...
 - ...the commercial organisation had in place **adequate procedures** designed to prevent bribery.
- A “commercial organisation” is:
 - UK registered; or
 - **Carrying on business in the UK.**

- A commercial organisation can be prosecuted in the UK:-
 - ...for overseas activity
 - ...by associated person
 - ...if the same activity would be bribery in the UK
- Unless the overseas activity is permitted by the written law of the overseas territory

WHO IS AN ASSOCIATED PERSON?

- Employee
- Agent

OR

- any other person who performs services for or on behalf of the corporate

AND

- the question whether or not a person who performs services is to be determined by reference to all the relevant circumstances.

- Defence to show you had **adequate procedures** in place
- UK MoJ: *“The principal way in which commercial organisations may decide to approach bribery risks which arise as a result of the supply chain is:-*
 - *by employing anti-bribery procedures,*
 - *e.g. risk based due diligence and the use of anti-bribery terms and conditions,*
 - *in the relationship with their contractual counterparty, and*
 - *by requesting that counterparty adopt a similar approach with the next party in the chain.”*

A PROPORTIONATE RESPONSE

- Starts with the **risk assessment**
- Standard terms for **lower risk relationships** such as
 - Supply chain partners also bound by FCPA/Bribery Act
- Enhanced terms for **higher risk relationships**
 - Joint ventures
 - Projects involving agents, intermediaries, consultants
 - Public bodies, government, state controlled agencies

Simple, proportionate, and risk based.

- Demonstrating adequate procedures – 2 starting options:-
- **Option 1**
 - A wide ranging suite of ABC contractual rights and protections
- **Option 2**
 - A small and focussed set of ABC contract controls
- The best option for an organisation will turn on its ability to enforce the contractual requirements
- Avoid provisions that you are not going to be able to demonstrate in action

- **Right to review contract**
 - Periodically; or
 - Upon a designated event arising e.g. allegation made, police investigation instigated
- **Right to suspend payment**
 - All payments; or
 - Only payments that can be substantiated as being connected with the breach
- **Right to terminate for breach of ABC clause**
 - Conviction, when lengthy investigations are the norm; or
 - Investigation

- Consider whether or not proposed terms are proportionate and achievable.
- e.g. Audit provisions
- **Good**
 - ✓ Organisation's commitment to ABC
 - ✓ Appropriate risk assessment of counterparty
- **Bad**
 - X Can be difficult to implement in practice
 - X If you have the right, sooner or later you had better exercise it

- will comply with relevant ABC laws in the performance of obligations under the contract
 - have in place adequate procedures and/or specific policies and procedures designed to prevent bribery
 - have not breached any relevant ABC laws, are not under investigation, and have not been investigated/convicted for bribery offences
 - accurate books and records are kept
-
- ✓ Use language consistent with counterparty's place in your ABC tier and level of understanding of FCPA/Bribery Act.
 - ✓ High risk/poor understanding would recommend “spelling out” requirement of counterparty rather than referring to legislation.

- *“You will indemnify the operator for any losses arising as a result of your failure to comply with any requirement of the [FCPA/Bribery Act]”*
- Remember...failure to prevent bribery by an “associated person” is an Bribery Act offence by the organisation.
- Which means an indemnity in respect of criminal penalty would be unenforceable:-

“...a right of recovery will be excluded not only by intentional wrongdoing but also by negligence.”

- *“You will indemnify the operator for any losses arising as a result of your failure to comply with any requirement of [FCPA/Bribery Act]”*
- What about civil losses arising as a result of the activity of the associated person?

“you cannot recover compensation for loss which you have suffered in consequence of your own criminal act”

Gray v Thames Trains Ltd [2009] 1 AC 1339

- Barring recovery by indemnity of losses that flow from a conviction for failure to prevent bribery.

A “CATCH ALL”?

“The Parties shall abide by and comply with all applicable laws, rules and regulations of any governmental or regulatory body (including any Anti-Corruption Laws and Trade Compliance Laws) directly affecting the Work or the performance of either Party’s obligations under this Contract.”

Great in theory, but in practice...

- How do you ensure compliance?
- How can you demonstrate that the necessary checks are being carried out?
- Are you aware of the applicable laws, rules and regulations?

CONTRACT IS NOT ENOUGH

- You must have ABC clauses in place; and
- You must enforce the contractual rights you have; and
- Still not enough... you need a complete suite of protections from ABC risks:
 - **Policies**
 - **Procedures**
 - **Risk assessment of partners/supply chain**
 - **Monitoring & review**

WHAT POLICIES AND PROCEDURES SHOULD BE IN PLACE?

For **business partners, contractors and third parties...**

- Conduct due diligence at take on; and
- Require compliance with your policies and procedures

Policies and procedures will include:-

- Anti-bribery and corruption
- Gifts and hospitality
- Sponsorship and charitable donations
- Whistleblowing
- Training of personnel

Ensure you have a **mechanism for review of policies, procedures and partners...**

CASE STUDY

Our story begins here...



EASTWOOD PLC

- Eastwood plc a UK oil and gas drilling business
- Bid for major project in little known overseas territory, Caledonia
- Eastwood plc appoint local agents in Caledonia, Punk Ltd to manage bid
- Punk's bid team is led by their regional VP Harry Callaghan
- Callaghan had worked in Caledonia for many years
- **Success!** Caledonia award drilling contract to Eastwood plc after competitive tender process

THE BID STRUCTURE

**EASTWOOD
PLC**



PUNK LTD



CALEDONIA

ALLEGATION:

A WIN FUELLED BY CORRUPTION...!



The Office of Caledonian National Audit and Works (OCNAW) investigates...

THE INVESTIGATION FINDS...

- **Pre appointment**

- Substantial sums deposited in bank accounts of Caledonian state family members

- **Post appointment**

- Funds continued to flow into personal accounts of Caledonian state family members
- Punk's agency invoices to Eastwood were inflated
- Inflated rates funded the bribery to Caledonian state officials

EASTWOOD'S FD... WILLIAM MUNNY



HERE'S WHAT HE SAID...

"We thought that Punk was a respectable outfit. We trusted them to represent us on the ground...."

"Our team was not in the loop on all of the Punk discussions with the Caledonian state"

"We heard some rumours which were worrying, but we trusted Punk to behave responsibly..."

"Punk ran the procurement exercise for us – they knew how best to present our position to the local decision makers"

THE INVESTIGATIONS FINDS CORRUPTION...

... in two parts

- PART 1:
- Punk's regional VP Harry Callaghan had promised a kickback of 5% of contract value to Caledonia state officials if they awarded the contract to Eastwood.

“DIRTY” HARRY CALLAGHAN

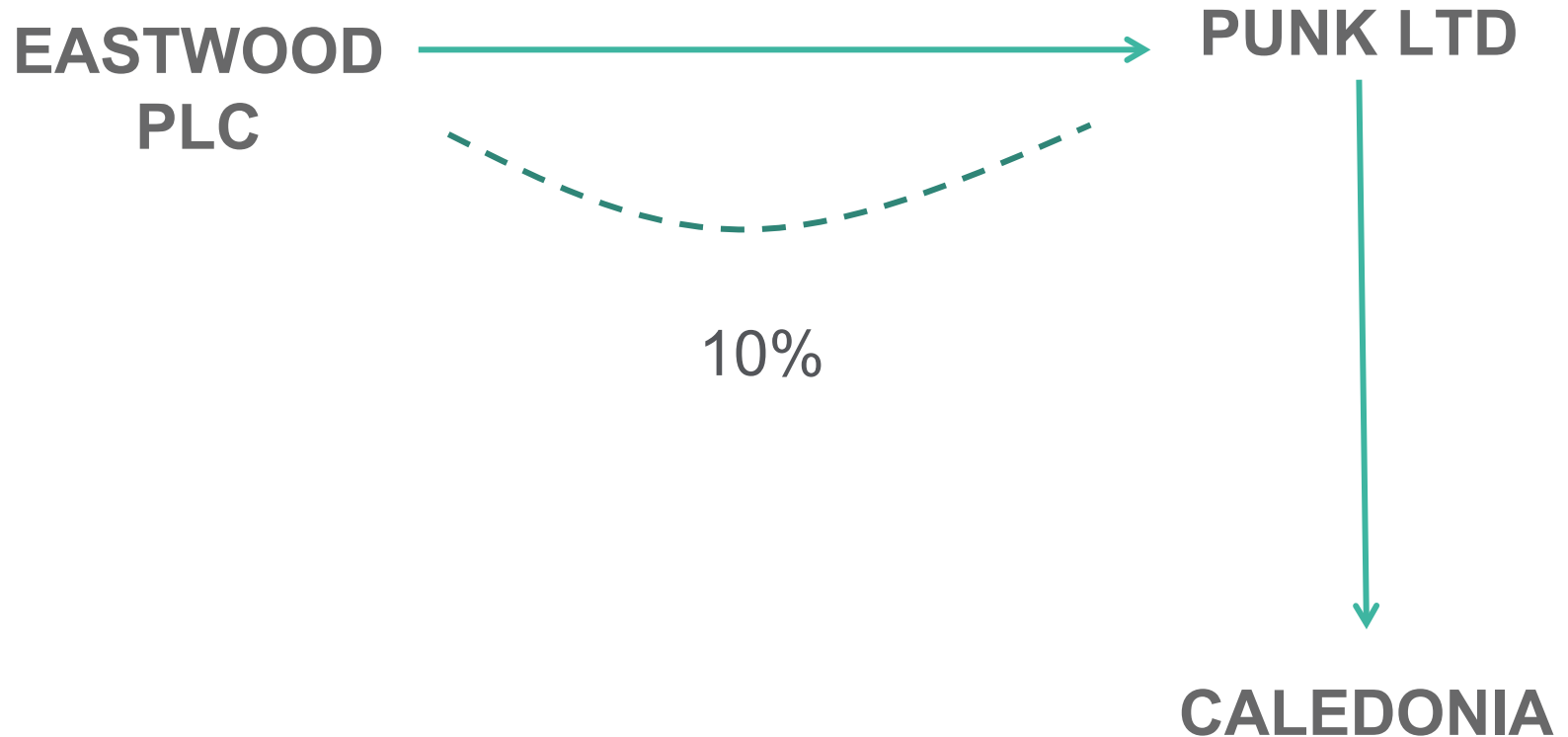


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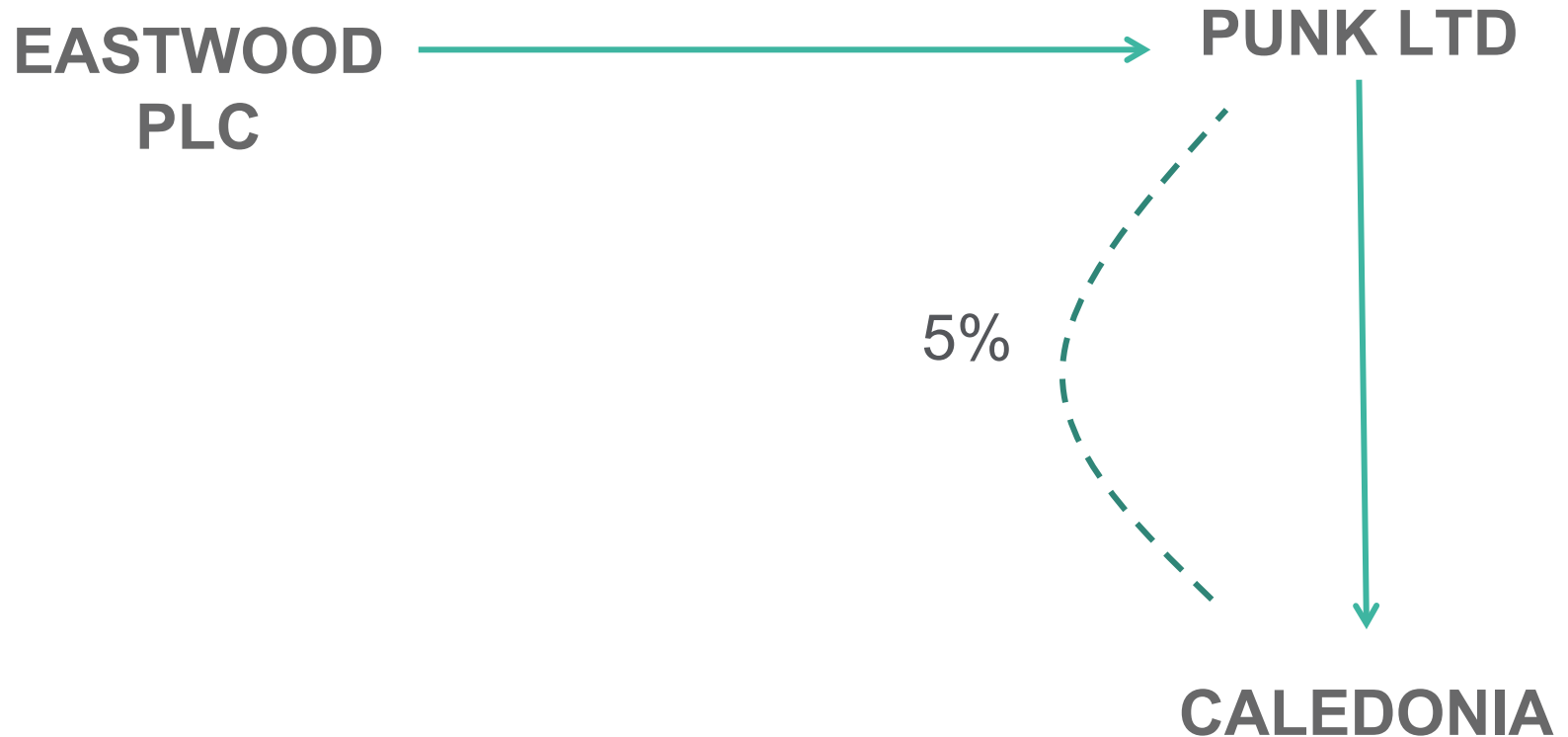
... in two parts

- PART 2:
- Punk's agency invoices to Eastwood received a 10% mark up –
- This covers Dirty Harry's 5% bribe to Caledonian officials **and** 5% into the pocket of Dirty Harry

STEP 1: THE INVOICE UPLIFT



STEP 2: BUY THE WORK



Key factual findings

- Punk was an “associated person” of Eastwood
- Eastwood failed to carry out appropriate due diligence on Punk – they had simply hired the agent they backed to get them the job
- Eastwood’s terms of engagement with Punk didn’t specify what was and what was not acceptable conduct
- Eastwood had secured a contractual right of audit of Punk’s performance
- Eastwood received concerning reports about Punk’s engagement **before** the contract was awarded
- Eastwood failed to exercise audit right

SFO Conclusions

- Eastwood secured the project as a result of bribery by Punk
- Eastwood had no contemporaneous knowledge of the bribery
- Eastwood had failed to prevent bribery by their associated person Punk
- Eastwood did not have reasonable procedures in place to prevent bribery

Specifically

- Eastwood's contractual provisions were either insufficient; or
- Not leveraged

Post investigation Eastwood learned of the bribery

- Eastwood had secured a right of termination
- Prosecutor asks: "Are you terminating your relationship with Punk...?"



QUESTIONS?



Paul Marshall

Partner

+44(0)7581 064 801

paul.marshall@brodies.com



Katie Love

Solicitor

+44(0)7973 752 875

katie.love@brodies.com

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