



The Bribery Act 2010 and the Construction Industry (or How Max Proffitt Went to Prison)

A highly commended paper in The Brooking Prize 2012

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THE BRIBERY ACT 2010 AND THE CONSTRUCTION INDUSTRY (OR HOW MAX PROFFITT WENT TO PRISON)

Disclaimer: All characters appearing in the following article are fictitious. Any further resemblance to real persons, living, or dead, is purely coincidental. All diagrams and visual examples were prepared from scratch by the author of this article.

Prelude

“Announcement:

On 28 July 2011, it was reported that 11% of small and medium enterprises were not aware of the UK Bribery Act 2010 (the Act), a further 33% had heard of the Act but were not aware of its details and only 16% of businesses had put in place anti-bribery training for relevant staff. 22% of businesses had no plans to implement policies or procedures to take account of the Act and 55% either ‘suspected’ or were sure that they have lost out to a competitor due to their excessive corporate hospitality. 60% believed that the Act would have an effect and 11% felt it would ‘completely change’ the way their business will be conducted.¹

The Bribe Payers Index from Transparency International found public works and construction companies to be the most ‘corrupt-prone’ when dealing with the public sector, and the most likely to exert undue influence on the policies, decisions and practices of governments.”²

Chapter one: year 2022

It was 3 January 2022. This was Max Proffitt’s last New Year’s Eve spent in prison. Max never used to regret anything he did, for he thought one is at a loss for not doing rather than doing.

However, he did regret one thing. Despite being a shady construction businessman, what he regretted was nothing particularly sinister: it was simply not paying attention to changes in the law. Particularly the old Bribery Act 2010, which became effective on 1 July 2011, and the Guidance from the Ministry of Justice issued on 30 March 2011. Yes, now he knew all about the

* MA (Oxon), LLM (PLP), Construction Disputes Associate at Dentons UK and Middle East LLP. With thanks to Laura Lintott who has made this article available in her personal capacity for educational purposes only, as well as to provide general information and a general understanding of the law and not to provide specific legal advice. By using this article, readers understand and accept that there is no solicitor/client relationship arising between them, the writer and/or Dentons UK and Middle East LLP. This article should not be used as a substitute for legal advice, nor construed as legal advice on behalf of Dentons UK and Middle East LLP. Laura Lintott wrote this article in 2011 in her personal capacity (when she was employed as an Associate at White & Case LLP) and since then, there have been no changes to the Bribery Act 2010. The guidance set out in the last section remains relevant. Laura’s paper was Highly Commended in the General Division of the Society of Construction Law Australia Booking Prize for 2012.

¹ (2011) 129 *Watts Bulletin*.

² Andrew Pugh, “Bribery/Anti-corruption: Balfour Beatty” *The Lawyer* 18 March 2011.

Act. He had had 10 years to study the legislation behind bars and all the consequences of breaching it. He remembered that on 1 July 2011 he was sitting comfortably in his private jet on his way to Argentuela with his constantly worried general counsel—Ann O’Nym. Of course, back then Max had no idea that the following few days would change his life

Chapter two: the beginning; July 2011

Max was a businessman through and through. He would get an idea and delegate its performance half trusting, half monitoring. Mostly, he would observe his investments from a distance and watch them grow. He had built more plants than he could remember and despite ongoing arbitrations, delays, accidents and the ever present unpredictable human factor, he was more or less thriving, considering the credit crunch. Sometimes he would have to be ruthless and sometimes he indulged his favourites he considered to be “trustworthy”. His company was focusing mainly on building oil refineries and with the growing fierce competition Max was one of the first ones to venture into emerging markets. His up and coming project was to build a new oil refinery in Argentuela with high hopes of having a functioning plant by 2016. It was all in the early stages but his trip seemed to be a promising one.

Max’s company started as a small business but grew quickly and ended up operating internationally with several subsidiaries, each devoted to one particular project. The main holding company called Oil Well was incorporated in London. However, most of the subsidiaries operated abroad both in the same business of building plants and in other areas like car manufacturing.

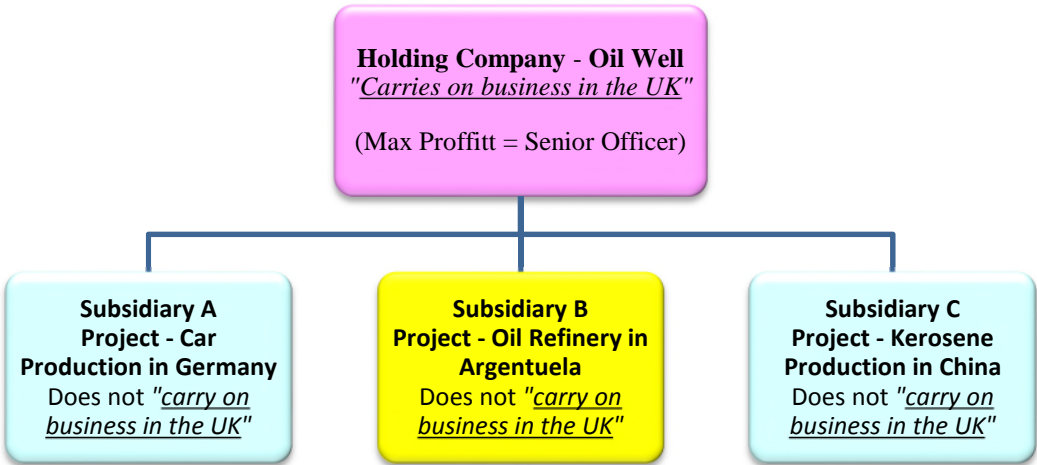


Figure 1: Oil Well Group; Corporate structure

Ann O’Nym was general counsel to Oil Well Group and was entirely devoted to Max. She was well aware of the Bribery Act 2010 and the uproar it had caused. Her job was to protect Max and his company from whatever dangers she could. To be able to warn him before he would take any incriminating action, without even knowing it, she had prepared a presentation for the trip to Argentuela. Max thought of Ann as an important part of his business activity, however often he worried about her overt cautiousness. After all, he was 15 years her senior, so if someone knew how to do business, it was him with his practical experience. However, he was fond of her and thought there to be little harm in taking a minute for her news about the new legislation.

Ann started to explain to Max that the threat of bribery is particularly prevalent in the construction industry. Predominantly, risks arise from the industry’s tendering processes, associated licences and permissions, interaction with Government officials, the complex relationships between contractors, subcontractors, agents and suppliers, and the geographical reach of many construction companies and projects similar to Max’ business. Up to a quarter of construction companies had been affected by financial crime, including bribery, in the previous year.³

Ann outlined the first three offences: active bribery⁴; passive bribery⁵ and bribing a foreign public official.⁶

She stressed that if any of “associated persons” of Max’s holding company (Oil Well), such as its employees or subsidiaries, commit such crimes the consequences could by no means be limited to such individuals or corporate organisations.

As long as they “perform services” for Oil Well, their actions could have a direct impact on Max. Ann explained that under s.7 of the Act, it is an offence for a “relevant commercial organisation”, i.e. Oil Well in our case, to fail to prevent bribery by an “associated person”, regardless of whether Oil Well knew of the bribery in question. Ann continued, that the offence would only be committed if the “associated person” acted with an intention to obtain

³ Graeme Bradley, Simon Airey and Lucy Candey (DLA Piper), “Impact of the Bribery Act 2010 on the Construction Industry—A Consideration of the Key Issues” (undated).

⁴ Under s.1 of the Bribery Act 2010 (offering, promising or giving a bribe).

⁵ Under s.2 of the 2010 Act (requesting, agreeing to receive or accepting a bribe).

⁶ To obtain or retain business—under s.6 of the 2010 Act

or retain business or a business advantage for Oil Well. So, for example, if Subsidiary B in Argentuela pays a bribe to a local public official to obtain a building permission sooner rather than later, Oil Well could be found guilty as it is in the business of building oil refineries and Subsidiary B is building such an oil refinery as part of Oil Well's business.

Another danger is that if such an offence qualifies as committed by Oil Well with Max's consent or connivance in his capacity as a senior officer of British nationality, he could be personally prosecuted for this. Similarly, other directors of Oil Well (who are UK residents or nationals) would also be liable as the result of s.14 of the Act (consent or connivance of senior officers) if they knew of the bribery but did nothing to prevent it.

Max had another sip of his whisky and kept nodding pretending to listen. Ann continued, believing that her presentation would culminate with the hottest point the Act has brought about—the penalties for the strict liability offence of “failing to prevent bribery” under s.7. Ann looked up from her notes saying that if Oil Well failed to prevent bribery, it could face unlimited fines, possibly confiscation of proceeds of criminal conduct under the UK Proceeds of Crime Act 2002 or debarment under the EU Public Procurement Directive. Max, as the director, could face exposure to corporate governance failure giving rise to a separate liability for directors as individuals.

Max did not seem to be particularly worried, since the actions Ann was describing had been a daily routine in the past to get the “job done” and no one had ever been caught. Ann stressed that even if the bribery offence was committed without the knowledge of Oil Well in London, Oil Well would only have a defence if it showed that it had adequate procedures in place which were designed to prevent bribery.⁷ She urged him to take the matter seriously and implement such procedures as soon as possible.

Finally, she gave Max a piercing look and said that apart from the threat of a prison sentence, that would dangle over Max like the sword of Damocles, practical consequences could include confiscation of all illegally obtained contracts from all around the world, an increase in the cost of Oil Well's transactions, a reduction in value of all proposed mergers and acquisitions and a decrease in Oil Well's share price or a rise in its insurance.

⁷ Bradley, Airey and Candey, “Impact of the Bribery Act 2010 on the Construction Industry—A Consideration of the Key Issues” (undated).



Figure 2: Defence to s.7 offence

Max quickly looked at Ann and noted, that last night his friend, another successful businessman told him that the debarment is on a discretionary basis and that, anyway, the Guidance on the Bribery Act offers a softer reading than that suggested by the Act. He laughed, uttering that he has looked into this and that the Government itself has undermined the concept of the parliamentary authority by attempting to rewrite the Act retroactively. Ann opposed this by saying that the Guidance has only helped to clarify the core aims and likely enforcement strategies of the Act and that the Act should not be underestimated.⁸ She quoted from the Introduction to the Guidance that:

“... it is not intended to be exhaustive and prosecutors should be mindful of the wide range of circumstances and culpability which may arise in any particular case”.

Ann prepared a diagram for Max which showed how the Bribery Act 2010 “worked”.⁹

⁸ Georgina Stanley and Friederike Heine, “Kickbacks—does the Bribery Act deserve to be mired in controversy?” *legalweek.com* 21 April 2011.

⁹ The Bribery Act 2010 diagram was prepared from scratch by the author of this article (as well as all other visual aids).

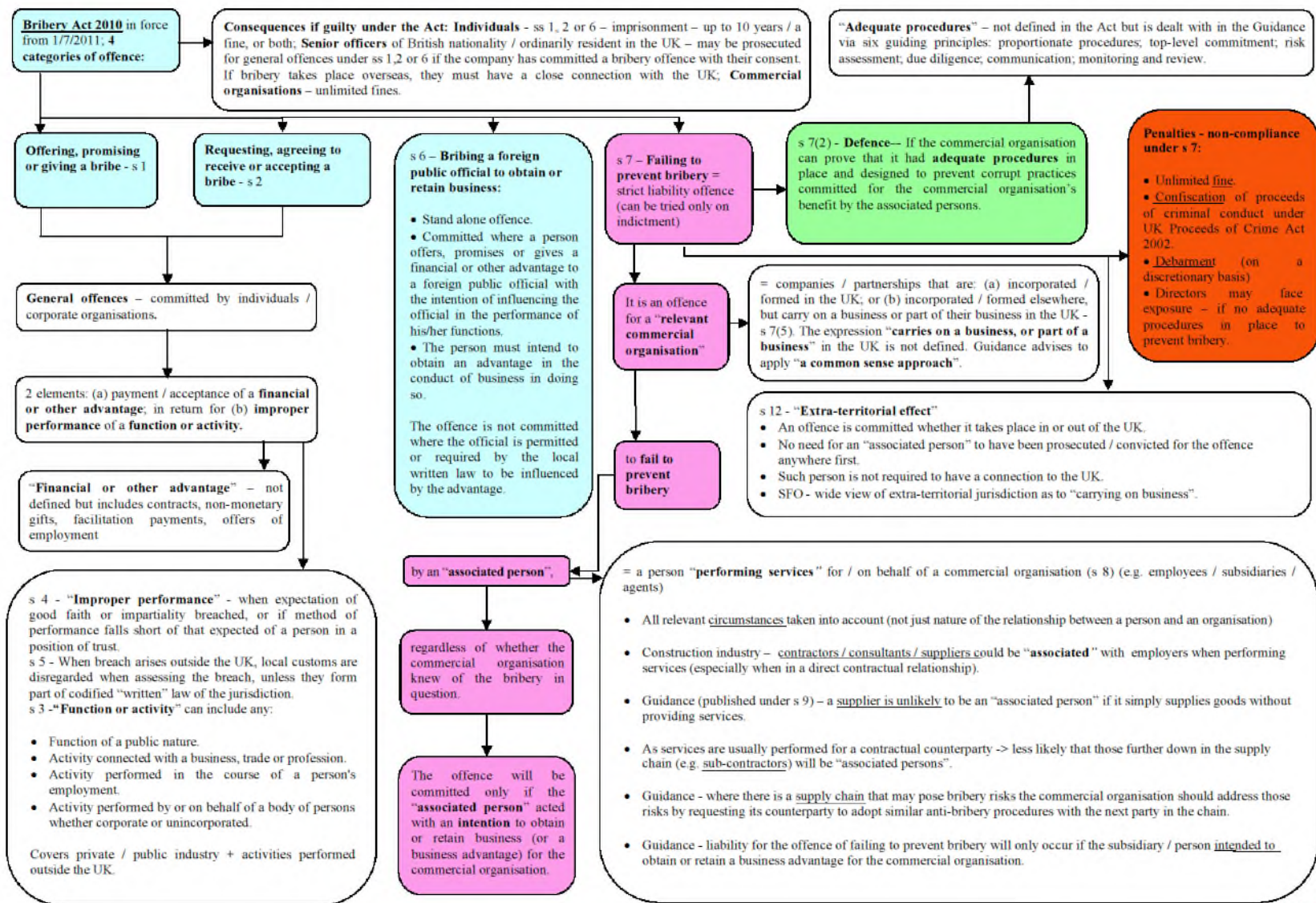


Figure 3: Bribery Act 2010 diagram

Ann went on to focus on her main concerns about Max' business plans. As previously discussed, Max' intention on this trip was to meet up with Argentuela's Government officials and persuade them that his company's ability to build an oil refinery quickly and to a high standard guarantees a smooth process for the Argentuelan Government at a relatively low cost compared to what other tenderers for the project could offer. Max could show a range of past successful projects in other countries and having good relations with several ministers in the current Argentuelan Government, he seemed to be quite confident that he would come home with a new project and a pleasant deposit in his pocket.

Ann warned Max, that despite his good intentions, the "main concerns" in her next diagram below are all relevant to his situation and urged him to consider all implications thoroughly.

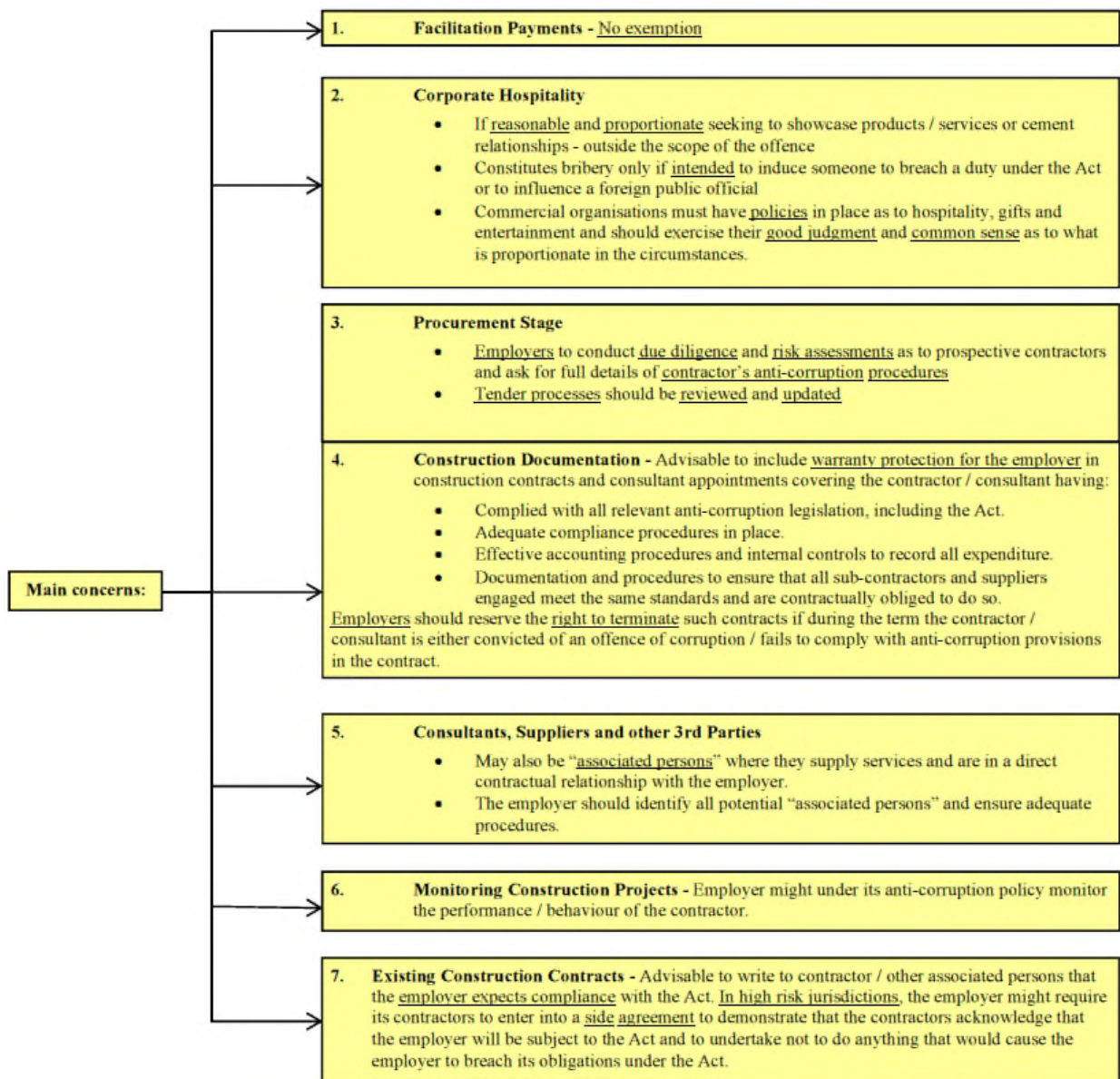


Figure 4: Main concerns

However, once Ann poured herself a cup of tea and looked at Max again, she knew he was not worried—particularly since he made a paper plane out of her Bribery Act 2010 diagram. As the jet was landing Max smiled at Ann and told her not to be concerned, that everything “is under control”.

Chapter three: Argentuela

Once Max got off his jet, things took a quick spin. He first met up with Fred, a highly senior employee of Oil Well’s Argentuelan Subsidiary B. Fred followed Max everywhere every time Max came to Argentuela and Max relied on Fred when it came to local business decisions.

Ann and Fred did not get on very well which amused Max. After a few meetings with Government officials and suppliers, Max left Argentuela with a pleasant sense of anticipation, a contract and a deposit in his pocket. The contract was worth £100,000,000.

Once he was gone, he left most of the routine tasks to Fred. Of course Max gave Fred clear instructions to keep an eye on the site and staff when Max was away.

Chapter four: not so happy New Year 2012

Max was with his family in the Cotswolds after having a pleasant private New Year's celebration at his estate. It was 3 January 2012 and he was aware that he would have to take charge of his duties again shortly. He had two sons in their early teens who he hoped would take over his business one day.

It must have been no later than 16.00 when he heard the frantic sound of the doorbell. Once he brought himself to get up and open the door, Ann rushed in holding a newspaper pacing quickly into the living room to switch on the TV.

Max thought this to be excessive but before he could say anything, he saw the headlines on BBC, saying "game over for Max and his Proffitt". A few seconds later, the doorbell rang again and this time it was the police.

Ann walked straight over to Max and asked: "What have you done? You must tell me if we are to do anything about it." Max was silent and went to open the door. Shortly, the police car was driving away from the Cotswolds with Max and Ann leaving Max's wife and sons on the doorstep wondering what was going on.

Chapter five: what really happened

In August 2011, Fred was left behind in Argentuela knowing that he was responsible for the smooth running of the project and if Max were to be displeased, he would suffer the consequences. Fred was aware of the local customs and how things "get done" and proceeded accordingly. Although Max won the tender, the Government officials had many queries and demands that Fred had to deal with. After prolonged meetings, to create a more co-operation friendly atmosphere, Fred took the relevant Government officials on a trip to Hawaii for two weeks to continue with the talks in a pleasant environment. Of course, he made sure that all the expenses of the attendees (including the officials' spouses and children) were covered by Argentuelan

Subsidiary B.

Fred was pleased. It worked and many points, amongst others, relating to tax on necessary materials that needed to be imported to start building the plant were resolved in Fred's favour, or rather in Subsidiary B's favour. Fred was aware that the milestones of the project were unrealistic and could be met only with a little "help" when it came to planning and building permissions. Therefore, he made sure that when he went to check on his ongoing applications for permissions, he took a suitcase with him containing cash amounting to a solid six digit sum. He passed it casually under the desk to the Minister of Works.

The result was that rather than getting the permissions in months, he had them within a week. Fred knew Max would appreciate his efforts. Especially, since Fred asked for Max's approval to go ahead with the "passing of the suitcase". All Max had to do, was email an "OK" to Fred, which Max did and Fred made it all happen. Fred was running out of time and could not afford to make a prolonged check on the potential contractors. He simply said yes to the largest contractor company thinking that if they had such a high success rate in Argentuela before, they would hardly fail.

Once all the construction documentation was signed, Fred employed his usual consultants and suppliers. One of the suppliers provided services for free to a public official in Argentuela in exchange for obtaining imported pipes quicker.

Chapter six: prosecution

"Guilty", proclaimed the jury¹⁰ and the sound of the falling hammer stressed the finality of the decision. Ann was exhausted and angry and at the same time sorry for Max, who was still in a state of shock. He looked at Ann and he looked at his family but what would pain him more than the loss of the money and time, was the loss of his wife, whom he knew he would not see again after today. He knew that his case would set an ostentatious precedent of how the Bribery Act 2010 was to be applied. The media preyed on his well known name and that of his company and the limited discretion that the court had did not seem to help Max since he had an affair with one of the judge's daughters in the old days with an undignified ending.

The judgment handed down by the court was merciless. It held on indictment that:

¹⁰ For the purposes of this article an assumption is made that the enforcers would choose the direct s.1 and s.6 liabilities as well as the s.7 liability for failing to prevent the offences. In reality, the first would usually suffice.

- 1) Since Fred was an employee of subsidiary B, performing services for it, Fred qualified as an associated person as to subsidiary B; in addition, Fred was also deemed to be working for Oil Well in view of his close relationship with Max. Therefore, Oil Well was also found guilty of failing to prevent bribery.
- 2) Putting aside direct corporate offences for now, when Fred took the Government officials to Hawaii for two weeks to influence their demands as to, amongst others, tax conditions, this amounted to an unreasonable and disproportionate corporate hospitality. Since neither subsidiary B, nor the holding company had any policies in place regarding hospitality, gifts and entertainment, this was considered to be an aggravating factor triggering a s.7 offence.
- 3) When Fred gave the suitcase to the Minister of Works, this was an offence under s.6 of “bribing a foreign public official to obtain or retain business” again triggering s.7 offence for Oil Well.
- 4) The email from Max, citing “OK” as a response to Fred’s question as to whether the conduct above would be approved showed Max’s clear encouragement. Not mentioning the fact that neither Subsidiary B, nor the holding company had any adequate procedures in place designed to prevent corrupt practices committed for the company’s benefit thus also triggering a s.7 offence. Since Fred acted with Max’s consent and Max was a British national, and some conduct occurred in the UK, Max was held to be personally liable in his capacity as a senior officer.
- 5) Fred chose the largest construction company without scrutinising it. The judgment stated that considering the scale of the project and the jurisdiction in which the works were to be carried out, Fred and Max should have monitored the performance and behaviour of the construction company to ensure its compliance with the anti-corruption procedures of such company. Unfortunately, the company did not have such procedures in place at all.
- 6) Further, the court added that as for the construction documentation, it should have complied with all relevant anti-corruption legislation (including the Bribery Act 2010).
- 7) It was held that since the pipe supplier simply supplied goods without providing services to the company, it did not qualify as an “associated person”. Therefore, the fact that it bribed a public official in Argentuela by providing charge-free services in exchange for obtaining imported pipes quicker did not affect Max or his company. It was stated that if it did qualify as an “associated person”, then the payment would be considered to be a facilitation payment, since it was made to obtain something to which the supplier was already legally entitled.¹¹ Facilitation payments are strictly prohibited under the Act and could trigger either a s.6 offence or also a s.1 offence where there was an intention to induce improper conduct thus potential liability under s.7 could arise.
- 8) Ann had turned whistleblower with complete indemnity. She persuaded Max to open a main office in the US in the run up to the bribery, and had staked a claim with the US Securities and Exchange Commission who are waiting their turn at

¹¹ Shoosmiths, “The Bribery Act: Facilitation payments—A real dilemma”, 24 August 2011

enforcement. Ann is a bit resentful that the UK Serious Fraud Office acted first.

- 9) It was further held that Max should be imprisoned for 10 years and should be fined £2.5 million. This was for his part in bribery by conspiring in it and encouraging it (as such behaviour took place partly in the UK) and also for excessive corporate hospitality.
- 10) By virtue of Max's guilt, three other directors were found guilty of conniving in the bribery, by failing to prevent it despite their knowledge of it. Each received three years in prison and a fine of £500,000.
- 11) As a consequence of Max's position, Oil Well was found guilty as well and was fined £200 million.
- 12) The value of the contract was confiscated since it was classified as proceeds of criminal conduct under UK Proceeds of Crime Act 2002.
- 13) Oil Well was debarred from any public contracting in the EU as well as the rest of the world.

Chapter seven: a new beginning in 2022

It was 3 January 2022 and Max was looking out of his prison cell window for the very last time. His suitcase was packed. He'd heard of released prisoners who could not cope with life outside. He was not sure to what extent he was the same person he had been before. After a general check-up and some paperwork, he was standing at the front gate and three people were greeting him. Not his wife, as she divorced him during the first year of his prison sentence but his two sons, now in their 20s, were looking at their father with uneasy anticipation. Of course, the third person was Ann. He called her telling her he would need her legal advice in the future. She came but more as a friend since she was aware that he could not afford her services anymore which she pointed out to him on the way to her car and to which Max replied with something like a semi-smile: "Ann, I may have been careless about your advice but I was not careless about reserves." The next day, Ann and Max were sitting on an aeroplane, not Max's private jet, but nonetheless, flying into a new future in the Cayman Islands.

Epilogue

Max' eldest son, George, had his father's business drive but lacked experience. Max would always be happy to assist his son but in the end George would have to make his own decisions as Max's set views could impede George's new ideas and Max knew this. However, he did learn from the past 10 years and urged George to protect himself and his company and to take the Bribery Act 2010, with all its amendments dating up to January 2022, seriously.

Max advised George to avoid financial costs and reputational damage depending on his company's size and geographical location of its activities by at least:¹²:

- 1) establishing an anti-corruption culture;
- 2) appointing a senior compliance officer;
- 3) implementing a code of conduct published in and outside the firm and a policy on gifts and hospitality;
- 4) implementing due diligence procedures;
- 5) providing anti-corruption training to staff;
- 6) carrying out due diligence on business partners, contractors, subcontractors; and
- 7) ensuring any "associated persons" have a code of conduct prohibiting corruption, together with active policies and procedures preventing bribery within the organisation.

The rest was left to George's judgement and that of his own lawyers.

"Though the bribe be small, yet the fault is great." Lord Edward Coke

The End.

¹² Norton Rose, "What does the Bribery Act 2010 mean for the construction industry?", June 2011