UK Bribery Act – keeping to the rules

Anyone who thought that the Bribery Act 2011 might not impact on real estate should pause for thought. Michelle Anthofer explains why.

Whilst most companies have put strict policies in place to govern corporate entertaining, recent events show that property companies must carefully govern procurement and tendering processes. According to Crispin Rapinet, head of Global Investigations, White Collar and Fraud practice at Hogan Lovells, *"property development involves interactions with government officials and a clear risk in some jurisdictions of people who want to line their pockets in return for permission"*.

Why does the Act have such a bite? For starters, the Act radically overhauled the UK's corruption legislation and introduced a much more stringent and far-reaching regime. Under the Act, the usual burden of proof is reversed, meaning corporates can only avoid conviction if they can prove "adequate procedures" were in place to prevent bribery. Demonstrating adequate procedures will show that the incident was a one-off anomaly rather than the result of institutional management failure.

The Act also introduced the strict liability offence of failure of a commercial organisation to prevent bribery. As such, there is no requirement for the prosecution to prove intention or knowledge on the part of a company's senior management. Where a bribe is paid by anyone acting on the company's behalf and for the company's benefit, the company will automatically be guilty of a criminal offence, subject to the "adequate procedures" defence.

Also unprecedented is the jurisdictional scope of the Act. Not only is the Act applicable to UK individuals and companies and conduct taking place in the UK, but also to any foreign company which carries on business in the UK. In the case of the corporate offence, liability will arise even if the bribe took place in an overseas jurisdiction, by a foreign agent or subsidiary and with no connection to the UK. These ramifications are far reaching, particularly when coupled with the increasingly diligent approach to enforcement by UK authorities.

The consequences of falling foul of the Act can be very serious. Lord Justice Thomas has signalled that the financial penalties imposed by the English courts ought to be consistent with those imposed in the US, which can run into the hundreds of millions of dollars, clearly illustrating the extent of the risk.

For corporates, concerns naturally stem from how corporate hospitality will be interpreted in line with the Act. While the lavishness of the hospitality relative to common market practice will be taken into account, some comfort can be taken from the Secretary of State for Justice's view that *"no one wants to stop firms getting to know their clients by taking them to events like Wimbledon and the Grand Prix"*. However, corporates should not become complacent in merely treating industry norms as acceptable if they are at risk of not being considered to be reasonable and proportionate. As a result of this, many corporates struggle with determining an acceptable level of corporate hospitality, which they often deem to be well below the price of a day at the tennis or the races.

With the impact of the Act becoming increasingly clear, corporates are advised to review their compliance programmes, so that they can demonstrate "adequate procedures" are in place to prevent bribery. Compliance programmes should cover a wide range of areas and go beyond written policies. Practical training, financial controls, due diligence on third parties and reporting and investigation procedures will all stand corporates in good stead in demonstrating compliance has been adequately addressed.

An earlier version of this article appeared on our Keeping It Real Estate blog: www.ukrealestatelawblog.com

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