Case No: U20150854

IN THE CROWN COURT AT SOUTHWARK
IN THE MATTER OF s. 45 OF THE CRIME AND COURTS ACT 2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 November 2015

Before :

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(THE RT. HON. SIR BRIAN LEVESON)

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Between :

SERIOUS FRAUD OFFICE	**Applicant**
- and -	
STANDARD BANK PLC	**Respondent**
(Now known as ICBC Standard Bank plc)	

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Sir Edward Garnier Q.C., Crispin Aylett Q.C. and **Allison Clare** (instructed by the Serious Fraud Office) for the Applicant
Nicholas Purnell Q.C. (instructed by **Herbert Smith Freehills LLP, London**) for the Respondent

Hearing date: 4 November 2015

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Approved Judgment

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Sir Brian Leveson P :

1. The traditional approach to the resolution of alleged criminal conduct is for a prosecution authority to commence proceedings by summons or charge which then proceeds in court to trial and, if a conviction follows, to the imposition of a sentence determined by the court. By s. 45 and Schedule 17 of the Crime and Courts Act 2013 ("the 2013 Act"), a new mechanism of deferred prosecution agreement ("DPA") was introduced into the law whereby an agreement may be reached between a designated prosecutor and an organisation facing prosecution for certain economic or financial offences. The effect of such an agreement is that proceedings are instituted by preferring a bill of indictment, but then deferred on terms: these terms can include the payment of a financial penalty, compensation, payment to charity and disgorgement of profit along with implementation of a compliance programme, co-operation with the investigation and payment of costs. If, within the specified time, the terms of the agreement are met, proceedings are discontinued; a breach of the terms of the agreement can lead to the suspension being lifted and the prosecution pursued.

2. By para. 7-8 of Schedule 17 to the 2013 Act, after negotiations have commenced between a prosecutor and relevant organisation, the prosecutor must apply to the court, in private, for a declaration that entering into a DPA in the circumstances which obtain is likely to be in the interests of justice and that the proposed terms are "fair, reasonable and proportionate". Reasons must be given for the conclusion expressed by the court and in the event of such a declaration (either initially or following further negotiation and review), formal agreement can then be reached between the parties. In that event, a further hearing is necessary for the court to declare that the agreement is, in fact, in the interests of justice and that the terms (no longer proposed, but agreed) are fair, reasonable and proportionate.

3. If a DPA is reached and finally approved, the relevant declaration, with reasons, must be pronounced in public. Thereafter, the prosecutor must also publish the agreement and the initial or provisional positive declaration (along with any earlier refusal to grant the declaration) in each case with the reasons provided. In that way, the entirety of the process, albeit then resolved, becomes open to public scrutiny.

4. On 24 February 2014, s. 45 and Schedule 17 of the 2013 Act came into force: see the Crime and Courts Act 2013 (Commencement No 8) Order 2014 (SI 2014/258). The application now before the court is the first example of its use and, having had the opportunity of studying the papers (with the background material) and hearing Sir Edward Garnier Q.C. for the Serious Fraud Office ("SFO") and Mr Nicholas Purnell Q.C. for Standard Bank Plc ("Standard Bank"), I made it clear that I was prepared to grant a declaration pursuant to para. 7(1) of Schedule 17 although I reserved my reasons in order to reduce them into writing and provide an analysis both of the requirements of the scheme and its application to this case. This judgment (which contains the reasons for my decision) will remain private unless and until agreement is reached and a further declaration made under para. 8 of Schedule 17.

5. Schedule 17 to the 2013 Act and Part 11 of The Criminal Procedure Rules 2015 ("the 2015 Rules") prescribe the terms and conditions of this scheme in considerable detail. In short, by a DPA, the organisation (a body corporate, a partnership or an unincorporated association, but not an individual) may reach an agreement with a designated prosecutor such as the Director of Public Prosecutions or the Director of

the SFO, who, in each case, must act personally. Until approved by the court, that agreement is inevitably provisional.

6. Every agreement must contain a statement of facts relating to the alleged offence which may include admissions made by the organisation and must specify an expiry date upon which it will cease to have effect if not already terminated by breach: see para. 5 of Schedule 17. A non-exhaustive list of potential terms and conditions is provided at para. 5(3) with provision for time limits for compliance with specific terms.

7. The designated prosecutor and any corporate entity considering entering into a DPA are assisted by the Code of Practice issued by the SFO and the Crown Prosecution Service in relation to the general principles to be applied along with the disclosure and use of information as required: see the requirements of para. 6 of Schedule 17. At this stage, neither it nor Part 11 of the 2015 Rules (which sets out the mechanics of the various applications that can be made in relation to DPAs) need further elaboration.

The Facts

8. Standard Bank Group Ltd is a publicly owned company registered in South Africa of which, at the relevant time, Standard Bank (a UK regulated bank) was a subsidiary. The Group was also the ultimate parent of Stanbic Bank Tanzania Ltd, a Tanzanian company based in Dar es Salaam ("Stanbic") which, significantly, was not licensed to deal with non-local foreign investors in the debt capital markets. That role had to be performed, if the work was to be undertaken, by Standard Bank.

9. In 2012, the Government of Tanzania needed to raise public funds in order to support Tanzania's ongoing "Five Year Development Plan" and to meet key infrastructure requirements within the country. Standard Bank and Stanbic put forward a proposal by which they would be mandated to raise those funds for the Government of Tanzania by way of a sovereign note private placement. The transaction was a significant one in terms of revenue for Standard Bank and Stanbic, and also in terms of reputation and future business opportunities in Tanzania. On the other hand, the potential for corrupt practices to affect this type of business was well known.

10. Negotiations began in February 2012 when Standard Bank and Stanbic quoted a combined fee of 1.4% of gross proceeds raised. The matter did not, however, progress until September 2012, when Stanbic increased the proposed fee to be paid by the Government of Tanzania to 2.4%. It transpired that 1% of that fee would be paid to a "local partner", a Tanzanian company called Enterprise Growth Market Advisors Limited ("EGMA"). EGMA's chairman and one of its three shareholders and directors, Mr. Harry Kitilya, was at all relevant times Commissioner of the Tanzania Revenue Authority and, as such, a serving member of the Government of Tanzania. EGMA's Managing Director, Dr. Fratern Mboya had been CEO of the Tanzanian Capital Markets and Securities Authority ("CMSA") between 1995 and 2011. The room for conflict and risk was evident but this issue was never addressed by Stanbic.

11. In the period which thereafter elapsed, there is no evidence that EGMA provided any services in relation to this transaction: no paperwork or notes of meetings were found. Further, the proposed involvement of a local partner (along with the increased fee) was only disclosed to Standard Bank sometime after it had been proposed to the

Government of Tanzania. The only inference is that both the Chief Executive Officer of Stanbic, Bashir Awale, and its Head of Corporate and Investment Banking, Shose Sinare, intended the 1% fee promised to EGMA to induce Harry Kitilya, and perhaps other members of the Government of Tanzania to show favour to Stanbic and Standard Bank's proposal.

12. At the end of September 2012, EGMA opened a bank account with Stanbic which obliged Stanbic to undertake regulatory checks ("Know Your Customer" or "KYC"); in the event, these consisted of an account opening form, bank checklist, company search identifying the directors, the provision of limited company and personal identification documents and a reference. The checklist acknowledged that the account was "high risk" (without making plain the basis for that conclusion). No documents have been provided which record or discuss the role of Mr Kitilya within the Government of Tanzania or the role in CMSA of Mr Mboya and, hence, any consideration of its connection with politically exposed persons ("PEPs"). These KYC checks do not appear to have been conducted in the same level of detail as would have been the case had Standard Bank conducted its own KYC and/or due diligence on EGMA. Further, the transaction was within Mr Kitilya's jurisdiction and, according to Stanbic's regulator, should have inhibited him from taking part as external consultant.

13. What is undeniable, however, is that after the addition of EGMA, the proposal proceeded quickly. In November, mandate and fee letters were signed, the former being between Standard Bank, Stanbic and the Ministry of Finance for the Government of Tanzania. This mandate did not mention any partner or third party and referred to a "total facilitation" fee of 2.4% which is said to constitute "total advisory, arranging coordinator participation and bookrunner fees" and to include "disbursement costs and agency costs". The fee letter refers to Standard Bank and Stanbic agreeing to act as lead manager and acting as lead "… in collaboration with its partner". Also important was the way in which the arrangement was structured: it allowed Tanzanian public funds to be paid to EGMA via Stanbic, without the payment having to be made directly by the Government of Tanzania.

14. Turning to the position of Standard Bank, despite the fact that it acted jointly with Stanbic on the transaction, the team at the Bank (led by its then Head of Global Debt Capital Markets, Florian Von Hartig), did not believe Standard Bank was required to conduct KYC and due diligence. In that regard, it is common ground that the applicable policies at Standard Bank were unclear and did not provide sufficient specific guidance. In this uncertainty, Florian Von Hartig interpreted them as not requiring Standard Bank to conduct any enquiry at all into EGMA. Further, despite the obvious red flags for bribery risk being present, Standard Bank's deal team do not appear to have raised any questions or concerns about the arrangement being corrupt and did not make any enquiry about EGMA or its role. Instead, it relied entirely on Stanbic to conduct KYC checks and raise any concerns as regards EGMA.

15. In November 2012, the Government of Tanzania formally granted Stanbic and Standard Bank the mandate to raise the funds. By completion of the financing in March 2013, the amount to be raised stood at US $600 million. In March 2013, EGMA's 1% fee of US $6 million was paid by Stanbic into an additional collection account opened with Stanbic earlier that month. Within 10 days of Stanbic's payment, the vast majority had been withdrawn in large cash amounts by Fratern Mboya, with

the consent and assistance of both Bashir Awale and Shose Sinare. The remaining balance was shortly after transferred to the account EGMA opened in September 2012 with the authorisation of Shose Sinare.

16. Staff at Stanbic raised their concerns about these withdrawals from 26 March 2013 onwards. These concerns were immediately escalated and referred to Standard Bank Group head office in South Africa. On 2 April, Standard Bank Group began an internal investigation. Between 2 and 17 April, Standard Bank in London was informed because, on 17 April, without yet having carried out their own internal investigation, Standard Bank instructed the law firm Jones Day immediately to report the matter to the authorities. On 18 April, Jones Day reported to the Serious and Organised Crime Agency and on 24 April to the SFO.

17. Jones Day was also instructed to commence an investigation on behalf of Standard Bank and to disclose its findings to the SFO on its behalf. This is exactly what transpired: its report was sent on 21 July 2014 after which the SFO reviewed the material obtained and conducted its own interviews. On this basis, the Director of the SFO was satisfied that there was a reasonable suspicion, based upon some admissible evidence, that Standard Bank had failed to prevent bribery contrary to section 7 of the Bribery Act 2010 ("the 2010 Act"), and there were reasonable grounds for believing that a continued investigation would provide further admissible evidence within a reasonable period of time, so that all the evidence together would be capable of establishing a realistic prospect of conviction in accordance with the full code test for prosecutions as set out in para. 1.2(i)(b) of the DPA Code of Practice.

18. The offence of failing to prevent bribery contrary to s. 7(1) of the 2010 Act is in these terms:

> "A relevant commercial organisation… is guilty of an offence under this section if a person… associated with [the organisation] bribes another person intending—
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> (a) to obtain or retain business for [the organisation], or
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> (b) to obtain or retain an advantage in the conduct of business for [the organisation]."

19. In this light, the particulars of the offence of what would be the draft indictment have been identified by the SFO as follows:

> "Standard Bank PLC, now known as ICBC Standard Bank PLC, between 1st day of June 2012 and the 31st day of March 2013, failed to prevent a person or persons associated with Standard Bank PLC, namely Stanbic Bank Tanzania Limited and / or Bashir Awale and/or Shose Sinare, from committing bribery in circumstances which they intended to obtain or retain business or an advantage in the conduct of business for Standard Bank PLC, namely by:

> (i) Promising and/or giving EGMA Limited 1% of the monies raised or to be raised by Standard Bank PLC and Standard Bank Tanzania Limited for the Government of Tanzania, where EGMA Limited was not providing any or any reasonable consideration for this payment; and
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> (ii) Intending thereby to induce a representative or representatives of the Government of Tanzania to perform a relevant function or activity improperly, namely, showing favour to Standard Bank PLC and Stanbic Bank Tanzania in the process of appointing or retaining them in order to raise the said monies."

20. Section 7(2) of the 2010 Act provides that it is a defence for a commercial organisation to have had in place adequate procedures designed to prevent persons associated with the commercial organisation from undertaking the bribery. On the basis of the material disclosed, the Director of the SFO has concluded that Standard Bank did not have a realistic prospect of raising this defence. The applicable policy was unclear and was not reinforced effectively to the Standard Bank deal team through communication and/or training. In particular, Standard Bank's training did not provide sufficient guidance about relevant obligations and procedures where two entities within the Standard Bank Group were involved in a transaction and the other Standard Bank entity engaged an introducer or a consultant.

21. In the event, Standard Bank engaged as joint lead manager with Stanbic in a transaction with the government of a high risk country in which a third party received US $6 million with the protection of only KYC checks relevant to opening a bank account. The checks in relation to that third party were conducted by Stanbic, a sister company in respect of which Standard Bank had no interest, oversight, control or involvement. It did not undertake enhanced due diligence processes to deal with the presence of any corruption red flags regarding the involvement of a third party in a government transaction, relating to a high risk country. There were also failings in terms in not identifying the presence of politically exposed persons and not addressing the arrival of a third party charging a substantial fee. In essence, an anti-corruption culture was not effectively demonstrated within Standard Bank as regards the transaction at issue.

22. As a result, it was concluded that the evidential test contained in para. 1.2(i)(b) of the DPA Code of Practice was satisfied. Moreover, having regard to all the circumstances, the Director of the SFO considered that the public interest would likely be met by a DPA with Standard Bank and negotiations were commenced accordingly.

23. Thereafter, the SFO and Standard Bank reached a provisional agreement as to the terms of a DPA and the SFO now seeks a declaration under para. 7(1) of Schedule 17 of the 2013 Act to the effect that entering into a DPA with the organisation is likely to be in the interests of justice, and the proposed terms of the DPA are fair, reasonable and proportionate. The assessment of the overall merits of the agreement must obviously be taken in the round, but given the fact that this is the first provisionally agreed DPA, I will analyse them individually and in some detail.

The Interests of Justice

24. Irrespective of the terms of the DPA, it must be in the interests of justice to proceed in this manner as opposed to prosecution and 11.3(3)(i)(i) of the 2015 Rules requires the application for a DPA to explain the way in which the interests of justice are served. The Director of the SFO has accordingly submitted a number of factors that led him to conclude that a DPA with Standard Bank is appropriate.

25. The first consideration must be the seriousness of the conduct for the more serious the offence, the more likely it is that prosecution will be required in the public interest and the less likely it is that a DPA will be in the interests of justice. This is a topic to which I shall return when considering the terms of the proposed DPA but it is right, at this stage, to recognise that although the predicate bribery offence was allegedly committed by two senior executives of Stanbic, and involved the intention to bribe a foreign public official, using public funds such as to make the intended bribe payment, such as could have compromised the integrity of a financial market, that is not the conduct in respect of which Standard Bank falls to be judged.

26. The criminality which Standard Bank potentially faces is the failure to prevent the intended bribery committed by senior officials of Stanbic (a sister company the management of which is unconnected to the Bank) arising out of the inadequacy of its own compliance procedures and its own failure to recognise the risks inherent in the proposal. The SFO has reached the conclusion that there is insufficient evidence to suggest that any of Standard Bank's employees committed an offence: whilst a payment of US $6 million was made available to EGMA, the evidence does not demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves.

27. The second feature to which considerable weight must be attached is the fact that Standard Bank immediately reported itself to the authorities and adopted a genuinely proactive approach to the matter: see para. 2.8.2(i) of the DPA Code of Practice and Joint Prosecution Guidance to the Bribery Act 2010 (page 7). In this regard, the promptness of the self-report and the extent to which the prosecutor has been involved are to be taken into account: see para. 2.9.2 of the DPA Code of Practice. In this case, the disclosure was within days of the suspicions coming to the Bank's attention, and before its solicitors had commenced (let alone completed) its own investigation.

28. Credit must also be given for self-reporting which might otherwise have remained unknown to the prosecutor: see para. 2.8.2(i) of the DPA Code of Practice. In this regard, the trigger for the disclosure was incidents that occurred overseas which were reported by Stanbic's employees to Standard Bank Group. Were it not for the internal escalation and proactive approach of Standard Bank and Standard Bank Group that led to self-disclosure, the conduct at issue may not otherwise have come to the attention of the SFO.

29. The weight given to an organisation's self-report depends on the totality of information that an organisation provides to the prosecutor: see para. 2.9.1 of the DPA Code of Practice. Specifically, the organisation must ensure in its provision of

material as part of the self-report that it does not withhold material that would jeopardise an effective investigation and, where appropriate, prosecution of individuals involved. In this regard, Standard Bank conducted a detailed internal investigation that had been sanctioned by the SFO and reported its findings; the Statement of Facts in the present DPA proceedings is substantially reliant upon the evidence voluntarily disclosed by Standard Bank.

30. Furthermore, co-operation includes identifying relevant witnesses, disclosing their accounts and the documents shown to them: see para. 2.8.2 (i) of the DPA Code of Practice. Where practicable it will involve making witnesses available for interview when requested. In this regard, Standard Bank fully cooperated with the SFO from the earliest possible date by, among other things, providing a summary of first accounts of interviewees, facilitating the interviews of current employees, providing timely and complete responses to requests for information and material and providing access to its document review platform. The Bank has agreed to continue to cooperate fully and truthfully with the SFO and any other agency or authority, domestic or foreign, as directed by the SFO, in any and all matters relating to the conduct which is the subject matter of the present DPA. Suffice to say, this self-reporting and co-operation militates very much in favour of finding that a DPA is likely to be in the interests of justice.

31. The third element relevant to the interests of justice test concerns the extent of any history of similar conduct involving prior criminal, civil and regulatory enforcement actions against the organisation: see para. 2.8.2 (ii) of the DPA Code of Practice. Standard Bank has no previous convictions for bribery and corruption nor has it been the subject of any other criminal investigations by the SFO. It has, however, been subject to regulatory enforcement action by the Financial Conduct Authority ("FCA") in respect of its failing in its anti-money laundering procedures. In the instant case failings arose in policy, procedure and training, specifically in respect of anti-bribery and corruption. Although there are features of similarity relating to compliance, they related to different processes and are not connected.

32. Weight is to be given to any corporate compliance programme in place at the time of the offence, at the time of reporting, and any improvement that has occurred (para. 2.8.2 (iii) of the DPA Code of Practice). In this regard, against this backdrop of Standard Bank's failings in its anti-money laundering and anti-corruption procedures, the SFO accept that the Bank has made significant enhancements to its compliance policies, procedures and processes since the risk and supervisory review conducted by the FCA in 2011.

33. In particular, after the FCA proceedings, Standard Bank was required to follow a "risk mitigation programme" and undertake significant actions in order to offer effective remedies to the deficiencies that were identified during the investigation. Consequently, the FCA commissioned a review of the effectiveness of Standard Bank's remedial actions under s166 of the Financial Services and Markets Act and, in April 2014, PricewaterhouseCoopers LLP ("PwC") submitted its Skilled Person Review. Although PwC still expressed significant concerns, it highlighted how Standard Bank had taken extensive steps in regard to recruitment, risk classification and due diligence on customers, and a very clear "tone from the top" to remediate the pre-existing failures. A DPA allows the court to oblige Standard Bank to enhance its anti-bribery and corruption policies and procedures and how they are practically

implemented and the Bank has agreed to an independent review of its anti-corruption policies, procedures and training.

34. Finally, relevant but by no means a necessary requirement for a DPA, the fact that the organisation in its current form is effectively a different entity from that which committed the offence weighs in favour of a proposed DPA being in the interests of justice: see para. 2.8.2 (v) of the DPA Code of Practice. On 1 February 2015, ICBC acquired a 60% majority shareholding in Standard Bank and, following the majority share acquisition, a new Board has been appointed the majority of whom are new appointments from outside of the pre-acquisition Standard Bank. Further, on the same date, the business group involved in the conduct which is the subject of the present DPA was transferred out of Standard Bank to a new entity, Standard Advisory London Limited, which remains a wholly owned subsidiary of Standard Bank Group (i.e. the South African parent). Standard Bank is therefore a substantially different entity to the one that failed to prevent the bribery.

35. For all these reasons, subject to the terms being fair, reasonable and proportionate, I am satisfied that it is in the interests of justice that the conduct of Standard Bank be resolved through the mechanism of a DPA. It is to these terms that I now turn.

The Terms

36. An application for a DPA is covered by paras. 11.3(f) and (g)(i) and (ii) of the 2015 Rules and requires a description of the proposed terms, an exposition of its compliance with the DPA Code of Practice and sentencing guidelines and an analysis of how they are fair, reasonable and proportionate. The essential basis of this DPA is that effective from the date of a declaration under paras. 8(1) and (3) of Schedule 17 to the 2013 Act for a period of three years, the SFO will agree, having preferred the indictment, to suspend it and, subject to compliance with the terms of the DPA, after three years, discontinue the proceedings. Conditions include the absence of any protection against prosecution of any present or former officer, employee or agent or against Standard Bank for conduct not disclosed by it prior to the date of the agreement (or any future criminal conduct) and provisions if the Bank provided information to the SFO which it knew or ought to have known was inaccurate, misleading or incomplete.

37. Taken together, the requirements falling upon Standard Bank are as follows:

   i) Payment of compensation of US $6 million plus interest in US $1,153,125;

   ii) Disgorgement of profit on the transaction of US $8.4 million;

   iii) Payment of a financial penalty of US $16.8 million;

   iv) Past and future co-operation with the relevant authorities (as further described) in all matters relating to the conduct arising out of the circumstances of the draft Indictment;

   v) At its own expense, commissioning and submitting to an independent review of its existing internal anti-bribery and corruption controls, policies and

procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws (as further described); and

vi) Payment of the costs incurred by the SFO.

It is also acknowledged that no tax reduction shall be sought in relation to the payments (i) to (iii) and (vi) above.

38. As to duration, the DPA must be of sufficient length that the proposed terms are effective and their aims accomplished; this is obviously dependant on the individual circumstances of the case. Given that Standard Bank has cooperated fully and from an early stage allowing for a thorough investigation to be carried out, and that there have already been improvements in its bribery and anti-corruption policies and procedures, three years appears to be sufficiently long successfully to implement the terms of the proposed DPA. I shall consider the remaining terms separately.

Compensation

39. A DPA may impose on an organisation the requirement to compensate victims of the alleged offence and to disgorge profits made from the alleged offence: see para. 5(3)(b) of Schedule 17. Further, the DPA Code of Practice states (at para. 7.2) that it "is particularly desirable that a measure should be included that achieves redress for victims, such as payment of compensation". This also reflects s. 130(12) of the Powers of Criminal Courts Act 2000 and the Definitive Guideline issued by the Sentencing Council in respect of Fraud, Bribery and Money Laundering Offences ("the Guideline"): in relation to corporate offenders, the first step requires priority to be given to the payment of compensation to victims over fines.

40. In the present DPA, Standard Bank would be required to pay the Government of Tanzania the amount of US $6 million plus interest of US $1,153,125. This sum represents the additional fee of 1% of the proceeds of the private placement, paid to EGMA the local partner engaged by Stanbic and very swiftly withdrawn in cash. The fee was paid from the US $600 million capital raised by the placement and the consequence was that the Government of Tanzania received US $6 million less than it would have received but for that payment. The interest figure of US $1,153,125 is calculated by reference to interest paid on the loan and, by the time of repayment, will amount to US $1,153,125.

41. Given that statute favours compensation and the policy considerations in its favour, and that the proposed compensation is commensurate with the loss suffered by the Government of Tanzania, without necessarily embarking on an analysis of the way in which interest has been calculated, this payment is a necessary starting point for any DPA. There is no suggestion that Standard Bank does not have the means and ability to pay compensation and interest in the amount proposed.

Disgorgement

42. The legislation specifically identifies disgorgement of profit as a legitimate requirement of a DPA: see para 5(3)(d) of Schedule 17 restated at para. 7.9 of the DPA Code of Practice. The provision is clearly underpinned by public policy which properly favours the removal of benefit in such circumstances. In this case, no

allowance has been made for the costs incurred by Standard Bank (to such extent as they can be put into money terms) and the proposal is that it should disgorge the fee which Standard Bank and Stanbic received as joint lead managers in relation to this transaction, namely 1.4% or US $8.4 million. Again, there is no suggestion that Standard Bank does not have the means and ability to disgorge this sum.

Financial Penalty

43. A DPA may impose on an organisation the requirement to pay a financial penalty: see para. 5(3)(a) of Schedule 17. Significantly, para. 5(4) provides:

> "The amount of any financial penalty agreed between the prosecutor and [the organisation] must be broadly comparable to the fine that a court would have imposed on [the organisation] on conviction for the alleged offence following a guilty plea".

44. Thus, although there is no question of a conviction, the legislation requires any financial penalty to demonstrate broad comparability with a fine following conviction. That exercise can only be undertaken by analysing and applying the approach adopted by the Sentencing Council Guideline; this follows that mandated by s. 143 of the Criminal Justice Act 2003 to the effect that when considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused. In connection with corporate offenders in relation to this type of offence, that then translates into a non-exhaustive hierarchy of culpability characteristics with harm represented by a financial sum related (in the case of offences under the Bribery Act 2010) to the gross profit from the contract obtained, retained or sought.

45. Dealing first with culpability (Step 3 of the Guideline), a relevant characteristic that militates in favour of placing an offence in the category of high culpability is that it involves the corruption of local or national government officials or ministers. The UK has committed to abide by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 3(1) of which obliges contracting parties to punish bribery of foreign public officials with effective, proportionate and dissuasive criminal penalties. Moreover, in *R v Innospec Ltd* (Southwark Crown Court, 26 March 2010, unreported), a case concerning the bribery of public officials in Iraq and Indonesia, Thomas LJ (as he then was) observed that:

> "30. There can be no doubt that corruption of foreign government officials or foreign government ministers is at the top end of serious corporate offending both in terms of culpability and harm... In the foreword to the 2004 UN Convention against Corruption Kofi Annan, the Secretary General described its effects:
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> > 'Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised

> crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries — big and small, rich and poor — but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.'
>
> It is no mitigation to say others do it or it is a way of doing business."

46. Although the facts in this case involve corruption, the specific allegation concerns a breach of s. 7 of the Bribery Act 2010 and is the failure to put in place appropriate mechanisms to prevent bribery of local or national government officials or ministers, namely member(s) of the Government of Tanzania. The Joint Prosecution Guidance in relation to the Bribery Act makes it clear (at page 11) that the s. 7 offence "is not a substantive bribery offence". Further, I repeat: the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe.

47. Having said that, the significant albeit not intentional role that Standard Bank played in the bribery suggests at least medium culpability within the Sentencing Council Guideline. Standard Bank was the joint lead manager in a transaction in respect of which US $6 million was paid by the associated (sister) entity (Stanbic) to a local partner from the sum raised on behalf of the Government of Tanzania. The inference is that it was well understood (at least by two senior executives of Stanbic and, thus, Stanbic) that it would induce public officials to act improperly. Further, the deal team at Standard Bank was fully aware that a significant payment was to be made to a local third party in circumstances where there were different understandings amongst the team as to what the precise role in the transaction of that third party was.

48. Although there were bribery prevention measures in place, these measures did not prevent the suggested predicate offence. Standard Bank's employees involved in the transaction did not express adequate awareness about the bribery risks in the transaction. Further, given that Standard Bank and its former sister company, Stanbic, were advising on a transaction involving the government of a country which international bodies have identified as having a high bribery risk, and given Standard Bank's experience in emerging markets, the risk of corruption of local and national government officials or ministers should have been anticipated in this transaction, including through Standard Bank's bribery prevention measures.

49. The culpability characteristics present in the conduct at issue therefore indicate that the correct culpability starting point should either be high culpability, which is later adjusted to the lower or middle part of that category range by the appropriate harm figure multiplier, or medium culpability, which is later adjusted to the higher part of that category range by the appropriate harm figure multiplier. The SFO have opted for the latter and, given that these categories are not intended to constitute watertight compartments but rather a continuum to be used by the court properly to assess culpability, that approach is entirely reasonable.

50. Turning to harm, as I have indicated, for offences of bribery, the appropriate figure will normally be the gross profit from the contract obtained, retained or sought as a result of the offending. As has been discussed in regard to appropriate disgorgement of profits, in this case, it has been taken as the total fee retained in respect of the transaction by Standard Bank and Stanbic as the Joint Lead Managers, that is to say, the sum of US $8.4 million. The Sentencing Council Guideline indentifies the starting point for a medium level of culpability as 200% of the 'harm' i.e. gross profit, with a range of 100% to 300% (cf. a starting point of 300% with a category range of 250-400% for high culpability).

51. It is then necessary to fix the level by reference to factors which increase and reduce the seriousness of the offending. As regards aggravation, although not an offence of bribery, there were serious failings on the part of Standard Bank in regard to the conduct at issue at a time when the Bank was well aware that further regulatory enforcement measures were in train: these led to a fine by the FCA for failings in internal controls relating to anti-money laundering. Further, in this context, it must be underlined that the predicate offending by Stanbic resulted in substantial harm to the public and, in particular, the loss of US$ 6m. from the money being borrowed by the Government of Tanzania for much needed public infrastructure projects.

52. On the other side of the coin, the mitigating features include the fact that Standard Bank (a company without previous convictions) volunteered to self-report promptly and both facilitated and fully cooperated with the investigation which the SFO conducted. Further, there is no evidence that the failure to raise concerns about anti-bribery and corruption risks (as opposed to money laundering concerns which led to the FCA regulatory action) was more widespread within the organisation. Finally, the transaction took place when the Bank was differently owned and, additionally, the business unit that carried it out is no longer owned by Standard Bank.

53. In the circumstances, I consider it appropriate that the provisional agreement is to take a multiplier of 300% which is the upper end of medium culpability and the starting point of higher culpability. This leads to a figure of US $25.2 million before the court must (following Step 5 of the Sentencing Council Guideline) 'step back' and consider the overall effect of its orders such that the combination achieves "removal of all gain, appropriate additional punishment and deterrence". Bearing in mind, *inter alia*, the value, worth or available means of the offender and the impact of the financial penalties including on employment of staff, service users, customers and local economy (but not shareholders), the guideline is clear that:

> "The fine must be substantial enough "to have a real economic impact which will bring home to both management and shareholders the need to operate within the law".

54. What should be the effect of 'stepping back' in this case, also bearing in mind the provisions of ss. 142 and 164 of the Criminal Justice Act 2003 (dealing with the need to have regard to the principles of sentencing, the seriousness of the offence and, when imposing a fine, the means of the offender)? In *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960, the court (Lord Thomas of Cwmgiedd CJ, Mitting and Lewis JJ) considered whether the level of fine set by the Crown Court achieved these objectives and the principles set out in the Definitive Guideline issued by the Sentencing Council in respect of Environmental Offences which (like the Guideline in

this case) require the level of fine to have regard to s. 164 and (i) achieve the removal of all gain, (ii) meet the objective of punishment, and (iii) meet the objective of deterrence. That guideline approaches the level of fine by reference to turnover; the court identified turnover as the starting point but went on to consider all the circumstances, including profitability (see para 41 (i) per Mitting J). In the same way that turnover cannot be the single denominator, neither, in this type of case, can profit (or, as here, fee).

55. That point is reinforced by a consideration of the observations of Thomas LJ in *Innospec Ltd* to which I have already referred. He said:

> "31. The courts have a duty to impose penalties appropriate to the serious level of criminality that are characteristic of this offence. For example, one of its many effects is to distort competition; the level of fines in cartel cases is now very substantial and measured in tens of millions. It is self evident that corruption is much more serious in terms both of culpability and harm caused. Similarly a fine in tens of millions has been imposed by a Regulator for deception of the Regulator. As is well known and evident from the facts of this case, fines in the US are substantial; the penalty that the US District Court could have imposed in this case for the Iraq corruption (which in my view was no more serious than the Indonesian corruption) would have been a range where the minimum would be $101.5m; on top of that there would have been a disgorgement of profits. Although there may be reason to differentiate the custodial penalties imposed for corruption between the US and England and Wales, no-one was able to suggest any reason for differentiating in financial penalties. Indeed there is every reason for states to adopt a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state. If the penalties in one state are lower than in another, businesses in the state with lower penalties will not be deterred so effectively from engaging in corruption in foreign states, whilst businesses in states where the penalties are higher may complain that they are disadvantaged in foreign states.
>
> 32. As fines in cases of corruption of foreign government officials must be effective, proportionate and be dissuasive in the sense of having a deterrent element, I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point, such a fine being quite separate from and in addition to depriving Innospec Ltd of the benefits it had obtained through its criminality."

56. Considering the financial position of Standard Bank, its interim accounts for the half year ending 30 June 2015 state that as of that date Standard Bank has equity of US $1.25 billion and total income of US $133.1 million. However, at that date, the Bank

was operating at a trading loss of US $60.8 million for the half year period. In the circumstances, having stepped back, I accept that the approach of 300% of the value of the transaction to Standard Bank represents a reasonable penalty.

57. Having reached a conclusion as to the appropriate financial penalty based on the Guideline, para. 5(4) of Schedule 17 of the 2013 Act mandates that the financial penalty must be broadly comparable to the fine that a court would have imposed for the alleged offence following a guilty plea: this is Step 7 in the Guideline and follows the exercise of 'stepping back'. It is necessary, therefore, to take into account the appropriate reduction following a plea of guilty in accordance with s. 144 of the Criminal Justice Act 2003 and the relevant guideline (which was issued by the Sentencing Guidelines Council). In particular, under s. 144(1)(a) and (b) of the Act, a court must take into account the stage in the proceedings the offender indicated his intention to plead guilty and the circumstances in which the indication was given. In the present case, Standard Bank promptly reported its own conduct and cooperated with the SFO's subsequent investigation: a full reduction of one third is therefore entirely justified and appropriate. Having accepted that the assessment of a financial penalty is reasonable prior to this discount, the sum, as discounted for the admission to US$ 16.8 million must also be reasonable.

58. Bearing in mind the observations of Thomas LJ in *Innospec Ltd*, a useful check is to be obtained by considering the approach that would have been adopted by the US authorities had the Department of Justice taken the lead in the investigation and pursuit of this wrongdoing. Suffice to say that the American authorities have been concerned with the circumstances and have been conducting an inquiry in connection with possible violations of the Foreign Corrupt Practices Act, 15 USC para. 78dd-1. Noting the co-operation of Standard Bank and Stanbic with them, the Department of Justice has confirmed that the financial penalty is comparable to the penalty that would have been imposed had the matter been dealt with in the United States and has intimated that if the matter is resolved in the UK, it will close its inquiry. In the circumstances, there is nothing to cast doubt on the extent to which these aspects of the proposed approach are fair, reasonable and proportionate.

Co-operation and Corporate Compliance

59. The DPA also covers co-operation with the authorities and future compliance. As to the former, the proposed DPA provides that Standard Bank shall continue to cooperate fully and honestly with the SFO and, as directed by the SFO, any other agency or authority, domestic or foreign, and Multilateral Development Banks, in any and all matters relating to the conduct arising out of the circumstances at issue in the present DPA. In particular, Standard Bank shall disclose all information and material in its possession, custody or control, which is not protected by a valid claim of legal professional privilege or any other applicable legal protection against disclosure, in respect of its activities and those of its present and former directors, employees, agents, consultants, contractors and sub-contractors, concerning all matters relating to the conduct at issue in the present DPA. This type of co-operation, and in particular, disclosure of this nature, is envisaged by para. 7.8 (iii) of the DPA Code of Practice and footnote thereto: it is obviously in the public interest that individuals involved in the conduct at issue are investigated and prosecuted and this term will obviously be critical to this (and any) DPA.

60. Turning to corporate compliance, Para. 5(3)(e) of Schedule 17 states that a DPA may impose on an organisation the requirement to implement a compliance programme or make changes to an existing compliance programme relating to the organisation's policies or to the training of the organisation's employees or both. In this regard, para. 7.9 of the DPA Code of Practice specifically draws the prosecutor's attention to the fact that putting in place a robust compliance and/or monitoring programme may be a term of a DPA.

61. In order to reduce the risk of future failings, the proposed DPA provides that Standard Bank should review existing internal anti-bribery and corruption controls, policies, and procedures regarding compliance with the Bribery Act 2010 and other applicable anti-corruption laws, enhance in particular its policies and processes in respect of third parties and improve its training in respect of anti-bribery and corruption policies. It also provides that in doing so, Standard Bank should engage the assistance of a qualified, agreed and independent specialist at its own expense to report on their findings and where appropriate advise and make recommendations which should be implemented. Once again, this term is clearly appropriate for a DPA in these circumstances.

Costs and Ancillary Provisions

62. The legislation provides that a DPA may impose on an organisation the requirement to pay any reasonable costs of the prosecutor in relation to the investigation and the subsequent resolution of the DPA: see para. 5(3)(g) of Schedule 17. Similarly, para 7.2 of the DPA Code of Practice provides that costs should ordinarily be sought. In this case, the proposed DPA provides that Standard Bank is to pay the costs incurred by the SFO in the investigation and resolution of this matter: at 30 September, those costs stood in the order of £290,000 although that figure will have increased to encompass this hearing and any future hearing. Once again, it is obviously reasonable and appropriate.

63. In relation to ancillary matters, the proposed DPA requires Standard Bank to pay the compensation, disgorgement of profits, financial penalty and costs within 7 days of the Court's final declaration under sections 8(1) and (3) of Schedule 17. The DPA also sets a variety of time limits in regard implementation of the proposed corporate compliance programme. Further, the DPA puts in place a procedure in the event of breach of the proposed DPA. This is entirely in accordance with the requirements of para. 5(3) and (5) of Schedule 17 to the 2013 Act and, bearing in mind that there is no suggestion that Standard Bank is not able to meet all the financial liabilities set out in the DPA and comply with its terms within the time frames imposed, it is also obviously reasonable and appropriate.

Conclusion

64. In this jurisdiction, a DPA requires the informed, independent opinion of a judge before it can be effected; the agreement of the parties is not enough. Thus, it has fallen to me to consider the proposal by the SFO and Standard Bank of a DPA and its prospective terms, both individually and collectively, in order to determine whether to grant a declaration pursuant to para. 7 of Schedule 13 of the 2013 Act that entering into it is likely to be in the interests of justice and that its proposed terms are fair, reasonable and proportionate. Having regard to all the circumstances

comprehensively set out in the material placed before me (which I have done no more than summarise in this judgment), I had no hesitation in making the declaration sought for the reasons which I have now endeavoured to elaborate.

65. If the agreement is finalised, I shall further consider the matter pursuant to para. 8. Having considered the matter following argument, I am also satisfied that the Statement of Facts which would then enter the public domain should identify those who are named in the proposed indictment, those said to be the recipients of the US $6 million paid to EGMA and the head of the corporate team responsible in the Bank, that is to say, the Head of Global Debt Capital Markets, (although, in his case, I emphasise that it is not suggested that there is sufficient evidence to justify his prosecution and nothing I have said should be read as implying the contrary). That is the policy I have followed in this judgment. Further than that, it is not necessary to go.

66. I add only this. It is obviously in the interests of justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business. It can also serve to underline the enormous importance which is rightly attached to the culture of compliance with the highest ethical standards that is so essential to banking in this country.