

New Charges for News Corp: Are FCPA Charges Just Around the Corner?

When you have eliminated the impossible, whatever remains, however improbable, must be the truth. ~ Sherlock Holmes in The Sign of the Four by Arthur Conan Doyle

Last Wednesday was the 125th anniversary of the first appearance of the world's greatest consulting detective – Sherlock Holmes when the first Holmes novel, *A Study in Scarlet*, appeared in Beeton's Christmas Annual in 1887. This week we will celebrate one of my favorite works of fiction, while trying to draw some compliance parallels, under both the US Foreign Corrupt Practices Act (FCPA) and the UK Bribery Act. We begin with *The Sign of the Four* because it is the one novel by Arthur Conan Doyle which has everything: swirling fog, a lost treasure, a chase, Holmes' cocaine use and a damsel in distress. It is also the novel in which Holmes' companion Dr. John Watson meets his bride Miss Mary Morstan.

Much like *The Sign of Four*, the News Corp matter would seem to have everything. Last week charges were brought against Rebekah Brooks, who ran Murdoch's newspaper holdings in Britain, Andy Coulson, former editor of the now defunct News of the World, and two other former News International employees. According to a Press Release from the Crown Prosecution Services (CPS), "We have concluded, following a careful review of the evidence, that Bettina Jordan-Barber, John Kay and Rebekah Brooks should be charged with a conspiracy to commit misconduct in public office between 1 January 2004 and 31 January 2012. This conspiracy relates to information allegedly provided by Bettina Jordan-Barber for payment, which formed the basis of a series of news stories published by The Sun. It is alleged that approximately £100,000 was paid to Bettina Jordan-Barber (a Ministry of Defence [MOD] employee) between 2004 and 2011."

Dan Sabbagh, in a Guardian article entitled "*Rebekah Brooks and Andy Coulson charges set new context for Leveson*", noted that "Significantly, the CPS said that the charges against the two for alleged misconduct in a public office cover the period between 2004 and as recently as 2011 – when payments to MoD official Bettina Jordan-Barber totalling about £100,000 are alleged to have been made." This means that the payments lasted beyond the date that was alleged to have been for the phone-hacking scandal, "Hacking charges laid by the CPS against Brooks, Coulson and others range from October 2000 to August 2006, before the younger (James) Murdoch arrived at Wapping." These payments to Jordan-Barbara were alleged to be in excess of £100,000.

These charges may mean significantly more international legal problems for News Corp, specifically regarding liability under the FCPA. Ed Pilkington and Dominic Rushe, also writing in the Guardian in an article entitled "*News Corp exposed to growing legal threat following charges for tabloid duo*", quoted Professor Mike Koehler (the "FCPA Professor") who said "the charges would be hard for the Department of Justice and the Securities and Exchange Commission to ignore [regarding a violation of the US FCPA]. We have been hearing allegations

for a year and a half now, now we clearly have charges against high ranking officials at a foreign subsidiary."

So how might Brooks and Coulson be liable under the FCPA? The recently released US Department of Justice (DOJ) and Securities and Exchange Commission (SEC) "*A Resource Guide to the U.S. Foreign Corrupt Practices Act*" explains that an individual may be liable for conspiracy to violate the FCPA without having committed a substantive FCPA violation.

Under US law, individuals or companies that aid or abet a crime, including a FCPA violation, are as guilty as if they had directly committed the offense themselves. The aiding and abetting statute provides that whoever "commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission," or "willfully causes an act to be done which if directly performed by him or another would be an offense against the United States," is punishable as a principal. Aiding and abetting is not an independent crime, and the government must prove that an underlying FCPA violation was committed.

Both individuals, who are foreign nations and companies, may also be liable for conspiring to violate the FCPA, i.e., for *agreeing* to commit an FCPA violation, even if they are not, or could not be, independently charged with a substantive FCPA violation. So both a foreign national such as Brooks and Coulson could be convicted of conspiring with a domestic concern to violate the FCPA. Under certain circumstances, they could also be held liable for the domestic concern's substantive FCPA violations under *Pinkerton v. United States*, which imposes liability on a defendant for reasonably foreseeable crimes committed by a co-conspirator in furtherance of a conspiracy that the defendant joined.

A foreign individual may be held liable for aiding and abetting a FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the US. In conspiracy cases, the US generally has jurisdiction over all the conspirators where at least one conspirator is an issuer, such as the US Corporation News Corp, who commits a reasonably foreseeable overt act within the US. For example, if a foreign company or individual conspires to violate the FCPA with someone who commits an overt act within the US, the US can prosecute the foreign company or individual for the conspiracy. The same principle applies to aiding and abetting violations. For instance, even though they took no action in the US, Japanese and European companies were charged with conspiring with and aiding and abetting a domestic concern's FCPA violations.

Pilkington and Rushe predicted that "the new charges will increase pressure on the company. They cited a further quote from the FCPA Professor "This latest news is an escalation of the FCPA case." Further, he told them that "US authorities would be looking to see how high up the chain of command the bribery scandal reached. The question will be what did James know and when did he know it."

Even more ominously for News Corp, Pilkington and Rushe reported that “This week the Daily Beast alleged that the Murdoch tabloids the Sun and the New York Post may have made payments to a US official on American soil in order to obtain a photo of a captive Saddam Hussein, the deposed Iraqi leader, in his underwear. News Corporation has denied the claims.”

Where does this leave News Corp? It may be in quite a precarious position now. First there are the two high ranking former News Corp employees charged with conspiracy to commit bribery of a UK government official. Brooks was the former Sun editor and later ran the Murdoch’s holdings in the UK. Coulson was the former editor of the now defunct News of the World and later Director of Communications for UK Prime Minister David Cameron. As stated by the FCPA Professor in the article, what about the knowledge of James Murdoch? While the phone hacking charges may have occurred before he was involved in News Corp’s UK operations, the dates of the alleged payments may certainly impact him as well. All we can say with certainty is...watch this space.

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