Case No: S2010565

IN THE CROWN COURT AT SOUTHWARK

1 English Grounds
(off Battlebridge Lane)
Southwark London
England
SE1 2HU

Date: 21/12/2010

Before:

MR. JUSTICE BEAN

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Between:

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- and -
BAE SYSTEMS PLC

Victor Temple QC, Timothy Cray and Louis Mably for the prosecution

David Perry QC and Miranda Hill for the defendant

Mr. Justice Bean:

1. On 23rd November 2010 at the City of Westminster Magistrates Court. BAE Systems PLC ("the Company") pleaded guilty to one offence of failing to keep accounting records "sufficient to show and explain the transactions of the company" contrary to Section 221 of the Companies Act 1985. District Judge Tubbs committed the case to the Crown Court for sentence.

2. The laying of the information on 5th November 2010 came after a Settlement Agreement between the Company and the Serious Fraud Office. This provided, so far as material, as follows:-

    2) The Company shall plead guilty to a charge in the form attached of one count under section 221 Companies Act 1985.

    3) The basis of plea in relation to that charge shall be in the form attached. The Company shall admit the facts set out therein and enter a plea in mitigation. The SFO will provide a copy of its opening note by 19 February 2010.

    4) The fine for the offence admitted shall be imposed by the Court.

    5) The Company shall make an ex gratia payment for the benefit of the people of Tanzania in a manner to be agreed between the SFO and the Company. The amount of the payment shall be £30 million less any financial orders imposed by the Court.

    6) The SFO shall not prosecute any person in relation to conduct other than conduct connected with the Czech Republic or Hungary.

    7) The SFO shall forthwith terminate all its investigations into the BAE Systems Group.

    8) There shall be no further investigation or prosecutions of any member of the BAE Systems Group for any conduct preceding 5 February 2010.

    9) There shall be no civil proceedings against any member of the BAE Systems Group in relation to any matters investigated by the SFO.

    10) No member of the BAE Systems Group shall be named as, or alleged to be, an unindicted co-conspirator or in any other capacity in any prosecution the SFO may bring against any other party.

3. The basis of plea attached to the Settlement Agreement included the following:-

> "2.1 The SFO commences its investigation into BAE Plc in July 2004. The SFO has investigated a number of issues as part of that investigation."
>
> 2.2 One of the transactions that the SFO has investigated is the sale of a radar system to the government of Tanzania, (the radar contract)…

3.4 On 10 September 1999 a new contract for the sale was signed between the government of Tanzania and British Aerospace Defence Systems Limited with a price of $39.97m.

4.1 From the outset of the negotiations, Siemens Plessey Electronic Systems Ltd had retained a third party marketing advisor, Shailesh Vithlani ("Vithlani") in Tanzania to assist with the negotiation and sale process. The agreement was between Vithlani personally and a Siemens Plessey subsidiary, Plessey Systems Export SA.

4.2 Following the acquisition of Siemens Plessey Electronic Systems Ltd by the BAE Systems group, in spring 1998, the BAE Systems group also engaged Vithlani as a marketing advisor. From October 1999, the written agreement was between two companies controlled by BAE plc and two companies controlled by Vithlani called Merlin International Ltd (Merlin) and Envers Trading Corporation (Envers). Merlin was a Tanzanian company and Envers was incorporated offshore. Under these arrangements, Merlin was to receive 1% of the Radar Contract price and Envers was to receive 30% of the Radar Contract price. The appointment of Merlin and Envers was approved by senior BAE employees.

4.3 After signature of the Radar Contract, payments of approximately $12.4 million were made to Merlin and Envers. [I interpose that in the case of Envers, payments were made by Red Diamond Trading Ltd, a company registered in the British Virgin Islands and controlled by the Defendants.]

4.4 These payments were recorded in accounting records of British Aerospace Defence Systems Ltd as payments for the provision of technical services by Vithlani.

4.5 Although it is not alleged that BAE plc was party to an agreement to corrupt, there was a high probability that part of the $12.4 million would be used in the negotiation process to favour British Aerospace Defence Systems Ltd. The payments were not subjected to proper or adequate scrutiny or review. Further, British Aerospace Defence Systems Ltd maintained inadequate information to determine the value for money offered by Vithlani and entities controlled by him.

4.6 The case is that the financial position of British Aerospace Defence Systems Ltd was not stated with reasonable accuracy, since it was not possible for any person considering the accounts to investigate and determine whether the payments were properly accounted for and were lawful. The failure to record the services accurately was the result of a deliberate decision by one or more officers of British Aerospace Defence Systems Ltd. In the circumstances in which the British

> Aerospace Defence Systems Ltd was carried out, this default was inexcusable.
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> 4.7 It is not known who at British Aerospace Defence Systems Ltd was responsible for creating the relevant inaccurate accounting records or for the commission of the offence. However, it was known by BAE plc that such inaccurate accounting records were in existence and BAE plc failed to scrutinise them adequately to ensure that they were reasonably accurate and permitted them to remain uncorrected. BAE plc is therefore also guilty of a section 221(1)(a) offence."

4. The form of words in paragraph 4.5 of the basis of plea echoes paragraph 29 of the information laid against BAE by the United States Department of Justice. This alleged that "BAES paid payments to certain advisors through offshore shell companies, even though in certain situations there was a high probability that part of the payments would be used in order to ensure that BAES was favored in the foreign government decisions regarding the sales of defense articles".

The Settlement Agreement

5. The Settlement Agreement is, with respect, loosely and perhaps hastily drafted. In paragraph 6 "any person" is not defined, and paragraph 10 is not, at least expressly, confined to conduct preceding the agreement. But the heart of the matter is paragraph 8, whereby the SFO agreed that there would be "no further investigation or prosecutions of any member of the BAE Systems Group for any conduct preceding 5 February 2010." It is relatively common for a prosecuting authority to agree not to prosecute a defendant in respect of specified crimes which are admitted and listed in the agreement: this is done, for example, where the defendant is an informer who will give important evidence against co-defendants. But I am surprised to find a prosecutor granting a blanket indemnity for all offences committed in the past, whether disclosed or otherwise. The US Department of Justice did not do so in this case: it agreed not to prosecute further for past offences which had been disclosed to it.

6. I have no power to vary or set aside the Settlement Agreement. Indeed, an attempt by the pressure group Campaign Against the Arms Trade to challenge it by way of judicial review, arguing that the SFO should have brought corruption charges, was rejected by Mr Justice Collins on 24 March 2010. The judge held that it was not arguable that the decision to limit the charge to one under s 221 was unlawful.

7. I also cannot sentence for an offence which the prosecution has chosen not to charge. There is no charge of conspiracy to corrupt, nor of false accounting contrary to section 17 of the Theft Act 1968. More obviously still, the Court does not decide who should be prosecuted. Although in opening the case for the SFO Mr Victor Temple QC submitted that the default by BAEDS, authorised by its parent company BAE Systems plc, "was the result of a deliberate decision by one or more officers" of BAEDS, and the reappointment of Mr Vithlani in November 1998 was approved personally by the chairman of BAE, no individual has been charged.

8. The basis of plea records in paragraph 4.5 that "although it is not alleged that BAE plc was party to an agreement to corrupt, there was a high probability that part of the $12.4m would be used in the negotiation process to favour BAEDS". Indeed there was. Otherwise, it is inexplicable, on the material before me, why the payments to Mr Vithlani's companies exceeded $12m; and even more inexplicable why 97% of that money should have been channelled via Red Diamond, an offshore company controlled by BAE, and paid to Envers, another offshore company controlled by Mr Vithlani.

9. That being so, I was astonished to find that the prosecution opening, after citing paragraph 4.5 of the basis of plea, went on:

> "Accordingly, BAE has accepted that there was a high probability that the payments to Vithlani were intended to compensate him for work done in seeking to persuade relevant persons to favour BAEDS in respect of the radar project. It is not now possible to establish precisely what Vithlani did with the money that was paid to him. However, it is no part of the Crown's case that any part of those payments were <u>in fact</u> improperly used in the negotiation process to favour BAEDS nor is it any part of the Crown's case that BAE was party to any agreement to corrupt. To lobby is one thing, to corrupt another."

10. I accept the second of these four sentences, namely that it is not now possible to establish precisely what Mr Vithlani did with the money that was paid to him. But on the basis of the documents shown to me it seems naïve in the extreme to think that Mr Vithlani was simply a well-paid lobbyist.

11. I also accept that there is no evidence that BAE was party to an agreement to corrupt. They did not wish to be, and did not need to be. The fact that money was paid by them to Red Diamond, by Red Diamond to Envers and by Envers to Mr Vithlani placed them at two or three removes from any shady activity by Mr. Vithlani.

12. In any event, the suggestion that Mr. Vithlani was merely a well paid lobbyist using his valuable time to hold legitimate meetings with decision-makers in Tanzania with no money changing hands is inconsistent, in my view, with the wording of the basis of plea that "there was a high probability that part of the $12.4m would be used in the negotiation process to favour BAEDS".

13. The Consolidated Criminal Practice Direction section IV.45 and the decision of the Court of Appeal in *R v Underwood [2004] EWCA Crim 2256* establish that whether or not pleas have been agreed the judge is not bound by any such agreement, and that any view formed by the prosecution on a proposed basis of plea is deemed to be conditional of the Judge's acceptance of the basis of plea. Once the criminal courts are involved, sentence cannot be passed on an artificial basis. I accept the basis of plea itself. I remind myself that were I to hold a *Newton* hearing the criminal burden and standard of proof would apply. However, I indicated that I could not, without hearing evidence, accept any interpretation of the basis of plea which suggested that what BAE were concealing by the Section 221 offence was merely a series of payments to an expensive lobbyist. Such evidence might, for example, have involved

witnesses who could testify, if it really is the case, that legitimate lobbyists could be paid 30% of the value of a $40 million contract simply as recompense for their time and trouble. Neither side sought to call evidence, although I indicated that I was prepared to grant an adjournment for them to do so.

14. I asked Mr. Temple what should have been in the accounting records instead of the phrase "provision of technical services". He replied that something along the lines of "public relations and marketing services" would have been a more accurate description. If that had been a true and accurate description of the services which Mr. Vithlani was going to provide then I question whether it would have been appropriate to prosecute at all. Certainly the s 221 offence would have been suitable for being sentenced in the magistrates' court. I would myself have imposed a fine of at most £5,000.

15. I therefore propose to sentence on the basis that by describing the payments in their accounting records as being for the provision of "technical services" the Defendants were concealing from the auditors and ultimately the public the fact that they were making payments to Mr Vithlani, 97% of them via two offshore companies, with the intention that he should have free rein to make such payments to such people as he thought fit in order to secure the Radar Contract for the defendants, but that the defendants did not want to know the details.

16. For the defendants Mr. David Perry QC made some important points in mitigation:

    1) The company is charged with a single offence, not stated to be a specimen charge (though it continued for a 7 year period).

    2) The Defendant cannot be sentenced for an offence, such as conspiracy to corrupt, which it has not admitted.

    3) The company was prosecuted and fined the sum of $400m in the United States for offences in countries other than Tanzania.

    4) The period over which the offence took place ended in December 2005. In 2007, by which time the SFO had been investigating the BAE Group's affairs for some time, the company appointed a distinguished committee chaired by Lord Woolf, the former Lord Chief Justice, to identify the high ethical standards to which a global company should adhere, identify the extent to which BAE may currently meet these standards and recommend the action that BAE should take to achieve them. The committee reported in May 2008. The BAE Code of Conduct, which has been in effect since January 2009, now states that "we will not make facilitation payments and will seek to eliminate the practice in countries in which we do business".

    5) Both Mr. Temple and Mr. Perry emphasised the significance of the voluntary reparation which the company agreed to make "for the benefit of the people of Tanzania" as part of the settlement agreement. This payment will be £30 million, less any financial orders imposed by the Court". The victims of this way of obtaining business, if I have correctly analysed it, are not the people of the UK, but the people of Tanzania. The airport at Dar-es-Salaam could no doubt have had a new radar system for a good deal less than $40million if

$12million had not been paid to Mr. Vithlani. The structure of this Settlement Agreement places moral pressure on the Court to keep the fine to a minimum so that the reparation is kept at a maximum.

17. I have no power in this case to order confiscation or compensation.

18. Both Mr Temple and Mr Perry have decades of experience at the Criminal Bar. Neither of them was able to point me to any previous decision on the proper sentence for a case of this kind under s 221. Perhaps this is because there has never been one.

19. Taking the mitigating factors identified by Mr Perry into account I consider that the appropriate fine is £ 500,000. In addition, by consent, I order the Defendants to pay £225,000 towards the prosecution's costs.