In the Crown Court at Southwark

Regina v Innospec Limited

Lord Justice Thomas

1. On 18 March 2010, Innospec Ltd, a UK company and a wholly owned subsidiary of a Delaware company, Innospec Inc, pleaded guilty in this court to conspiracy to corrupt contrary to s.1 of the Criminal Law Act ~~1997~~ 1977. Innospec Ltd had conspired with its directors and others to make corrupt payments, contrary to s.1 of the Prevention of Corruption Act 1906, to public officials of the Government of Indonesia to secure contracts from the Government of Indonesia for the supply of Tetraethyl lead (TEL).

2. The plea by this company raised important issues relating to:

   i) The level of criminality in the offence of corruption of a foreign government.

   ii) The way in which a prosecutor and a court should approach sentencing in cases where there had been a joint investigation of offences by authorities in the US and prosecution authorities in the UK, a decision to prosecute different offences in each jurisdiction and an agreement which had been reached with the offender as to the penalties to which the offender would submit.

The facts relating to the conspiracy to corrupt in Indonesia

3. Before turning to set out the details of the agreements reached and to consideration of the duties and powers of the prosecuting authorities in the UK, it is necessary to set out the facts relating to the count to which Innospec Ltd pleaded guilty.

4. Although Innospec Inc was a Delaware company, its executive offices were in Cheshire and the corruption in Indonesia was organised by the directing minds of Innospec Ltd based in the UK. Innospec Ltd had for many years manufactured an antiknock fuel additive, TEL. Steps to phase out the use of TEL began in the 1970s because of health and environmental concerns. By 2000 Indonesia was one of the four remaining principal customers for TEL. Through agents in Indonesia, the directing minds of the company engaged in systematic and large-scale corruption of senior Government officials. Those corrupted in this way included Rachmat Sudibyo, Director-General of Oil and Gas in the Ministry of Energy and Mineral Resources in Indonesia and subsequently Chairman of Migas, an authority that regulated oil and gas in

Indonesia, and Suroso Atmomartoyo, a Director of Pertamina, the Indonesian state oil company, and one of the most senior members of its management. The bribes paid to Rachmat Sudibyo exceeded $1 million.

5. It is not possible to calculate precisely the total amount of the bribes, but the best estimate is approximately 5% of $160 million, namely $8 million. The payments were carefully concealed from the auditors, one of the leading firms of accountants. The seriousness of the corruption in which the company was engaged was aggravated by the explicit purpose of some of the corruption which was to block legislative moves to ban or enforce the ban of TEL on environmental grounds in Indonesia. These matters came to light in the following way.

The investigation of the corruption and the plea agreements made

6. From July 2005, authorities of the US Government (including the Department of Justice (DOJ), the Securities and Exchange Commission (SEC) and the Office of Foreign Asset Control (OFAC) began to investigate Innospec Inc. The SFO were notified in October 2007 and began their investigation in May 2008. The investigation by all these authorities included Innospec Inc's involvement in the UN Oil for Food Programme for Iraq (OFFP). The facts in relation to the OFFP as they emerged were that between 2001 and 2004 Innospec entered into five contracts under the OFFP with the Iraq Ministry of Oil to sell them TEL, paying approximately 10% of the contract price as a bribe. After the termination of the OFFP, Innospec agreed with the post Saddam Ministry further contracts under which further bribes were paid. The total paid or promised to be paid as bribes was $5.8m. The investigation also showed that Innospec had sold fuel additives to Cuba in violation of the US Trading with the Enemy Act and Cuba Embargo Regulations, though there was no allegation that bribes were paid.

7. The investigation which revealed the criminal conduct was carried out by the prosecuting authorities with the full co-operation of the independent directors of Innospec assisted by another leading firm of accountants. The independent directors of Innospec took the view that they should admit criminal offences. In September 2008 discussions began with the US prosecuting authorities with a view to achieving what was to be described as "a global settlement". The SFO became party to those discussions. Much of the time was taken in investigating the financial position of Innospec Inc and its subsidiaries and its ability to pay. Both the SFO and DOJ agreed that the fines and other penalties which might be imposed in the US and UK might exceed $400m in the US and $150m in the UK. This would exceed by many times the ability of Innospec to pay, if it was to continue to trade. Both the SFO and the DOJ agreed that, in the light of Innospec's full admission and full co-operation, they should not seek to impose a penalty which would drive the company out of business.

8. The discussions culminated on 8 December 2009 in an offer by Innospec Inc to pay in cash $25.8m over the period to 31 December 2013 and a further $14.4m contingent upon the performance of contracts to sell TEL to Iraq over a three year period beginning 1 January 2010. This sum was put forward in

full and final settlement of all outstanding issues with the DOJ, SEC, the OFAC and the SFO. The offer was accepted, subject to the approval of the courts in the US and the UK.

9. In September 2009, when it was anticipated that an acceptable settlement would be reached, discussions began between the SFO and the DOJ about the manner in which the authorities in the US and the SFO should proceed to implement any settlement and divide up the monetary amount to be paid. The discussions took place against the background that it had been agreed that the SFO would have primacy in respect of the Indonesian corruption and the DOJ in respect of the Iraq corruption. The SFO had taken the view that, although part of the Iraq corruption could have been prosecuted in the UK, it was more logical to split the criminal liability of Innospec Inc and Innospec Ltd in this way.

10. As this was the first case where a "global settlement" had been sought in respect of concurrent criminal proceedings in the UK and the US both the SFO and the DOJ sought to approach the issue as a matter of principle. However it was appreciated that the case was highly unusual, because only a small fraction of the penalties that properly could be imposed would be sought in the light of Innospec's ability to pay.

11. The SFO began by suggesting a 50:50 split based upon the fact that the criminality had been orchestrated and arranged from the UK in respect of the corruption in both Iraq and Indonesia. Although the SFO had accepted the US authorities should investigate and prosecute corruption in Iraq as it was an issue in which the US had a primary interest, the connection with the UK should not be overlooked. A suggestion was also made that the prosecuting authorities should enter into an asset sharing proposal under which the SFO would secure the assets and remit half to the US authorities.

12. The DOJ would not accept this. It proposed a methodology that in the result produced a split which was approximately one third to the DOJ, one third to the SFO and one third to the SEC and the OFAC. The DOJ's methodology was based on what it contended were a number of principles to be taken into account:

    i) Under US criminal law where a company had insufficient funds, restitution to victims was important; this was a significant factor for the SEC in relation to the offending under the Iraq corruption.

    ii) There was a need to ensure that trading with Cuba was penalised.

    iii) Innospec Inc was a US company and the US were its primary regulators.

    iv) In any assessment the value of the contracts, the profit on the contracts and the amount of corrupt payments had to be taken into account.

    v) The investment in investigation had to be taken into account; in the US prosecutors could not recover their costs.

vi) The fine had to have a deterrent element.

13. After much further discussion, on 28 January 2010 the SFO agreed to a split that was approximately one third to the DOJ, one third to the SEC and OFAC and one third to the SFO. It was agreed that the DOJ would ask the court to approve a fine of $14.1m with the balance of the US proportion going to the SEC ($11.2m) and OFAC ($2.2m); $12.7m would be the SFO's share.

14. There was subsequent discussion between counsel on behalf of Innospec Ltd and the SFO as to the way in which the $12.7m share would be paid. It was agreed that $6.7m would be allocated to a fine or confiscation to be imposed in the Crown Court with the balance being the subject of a civil settlement.

The presentation of the plea agreements to the Courts in the UK and US

15. On 19 February 2010, a 10-K regulatory filing with the SEC in the US made public the fact that "a global settlement" was anticipated at a sum of between $28.8m and $40.2m.

16. A few days later, on 24 February 2010, Innospec Ltd agreed to the service of a summons upon them for the offence of conspiracy. A hearing took place that day at the City of Westminster Magistrates' Court and the case was immediately transferred to Southwark for a hearing.

17. By that time there was in existence as between Innospec Ltd and the SFO the following:

i) A plea agreement under which Innospec Ltd agreed it would plead guilty, there would be a joint submission on sentencing in agreed terms and Innospec Ltd would enter into a monitoring agreement.

ii) An agreed case statement setting out the facts.

iii) An admission by Innospec Ltd under which it undertook to plead guilty and admitted the facts set out in the agreed case statement.

iv) A mitigation note prepared by Innospec Ltd and agreed by the SFO.

v) A joint submission on the sentencing process. This made clear that of the $12.7m that would be available for the SFO:

a) a confiscation penalty of $6.7m would be made in respect of the Indonesian corruption and

b) there would be a civil recovery order of $6m of which $5m would be paid to the UN Development Fund for Iraq.

It was accepted that it was for the court to determine the appropriate sentence, but the parties submitted that the approach upon which they were agreed should commend itself to the court as it was compatible with the approach being adopted in the US.

vi) An agreement in the form of draft undertakings with respect to compliance and monitoring and the appointment of a compliance monitor. Innospec would pay the costs of the Monitor.

18. Simultaneously in the US a plea agreement was entered into; this acknowledged that the minimum fine payable under the Federal Sentencing Guidelines for the offence in respect of the Iraq corruption was $101.5m with a range of up to $203m but, because of Innospec's inability to pay the amount, this would be reduced to those which I have set out. It was made clear that the court had to approve the agreement and was not bound by it. It was also a term of the agreement that Innospec would put in place a compliance and ethics programme and submit to monitoring by a corporate monitor for a period of not less than three years, the monitor to be chosen in agreement with the SFO.

19. It was also agreed between the authorities in the US and the SFO that the courts in the US and the UK would be asked to sentence on the same day, namely 18 March 2010 so that an announcement could be made which would avoid a disorderly market in Innospec shares.

20. The plea agreement made in the US, together with a statement of facts, the DOJ's memorandum on sentencing, an affidavit from Innospec Inc's Chief Financial Officer and the papers on compliance and monitoring, were submitted to The Hon Ellen Segal Huvelle, a Judge of the Federal District Court for the District of Columbia, prior to the hearing on 18 March 2010. At the hearing on 18 March 2010 the Court sentenced Innospec Inc to 60 months probation, a fine of $14.1m and a special assessment totalling $4,800. The Judge examined the role of the monitor and required further information. The plea agreement in the US was made under the Federal Rules of Criminal Procedure in a well recognised procedure. I wish to express my gratitude to Judge Huvelle and her law clerk for providing this court with the necessary information about the US proceedings.

21. However, it became quickly apparent, upon transfer of the case to Southwark Crown Court, that a number of difficult issues was raised by the process adopted. I am grateful to Mr Andrew Mitchell QC who appeared for the Crown and Mr Nicholas Purnell QC who appeared for Innospec Ltd for the considerable assistance I received; some of the difficulties were indeed apparent from a paper delivered by Mr Purnell QC in June 2009, "The risk of abusing a dominant position".

The duties of the prosecutor

22. The Director of the SFO has commendably adopted a vigorous policy of investigating corruption and other serious corporate crime whilst at the same time encouraging co-operation by companies and individuals in the investigation of such serious criminality and the provision of evidence against others. The investigation of the serious corruption by Innospec, the provision of their co-operation and the securing of clear evidence of serious corruption of foreign governments has been a welcome manifestation of vigorous prosecution by the SFO under his direction.

23. However, there were two significant difficulties:

i) There was a concurrent investigation in the US where the provisions of the Federal Rules of Criminal Procedure and other provisions of US law (including its highly prescriptive Federal Sentencing Framework) provide a basis for plea agreement, but the procedure under the laws of England and Wales is different;

ii) Innospec Inc, as I have set out, plainly did not have funds that could satisfy the penalties that would be imposed in the US and those that would be imposed in the UK.

24. The Director attempted to solve the difficulties by the course of conduct which I have set out. However the question has arisen as to the extent of his powers and duties in the light of the constitutional position of a prosecutor, the role of the courts in the UK and the rules relating to plea agreements in the UK.

25. A number of matters are common ground as to the duties of a prosecutor:

i) A prosecutor must, in accordance with the relevant Attorney-General's guidelines, including those applicable where criminal cases affect the UK and the USA, exercise his discretion as to charges to be preferred. No question arises in this case as to the extent to which his decision may be challenged, as the charge of conspiracy preferred properly reflects the criminality.

ii) The prosecutor may also, subject to the provisions of the Consolidated Criminal Practice Direction, paragraph IV.45.5-45.9 indicate his acceptance of a plea. In this case, the criminality disclosed by the evidence is properly reflected in the plea of guilty and no issue arises under the paragraphs to which I have referred.

iii) The prosecutor may also discuss a basis of plea and agree it, subject to the principles set out in paragraphs IV.45.10-45.15 of the Consolidated Criminal Practice Direction; these paragraphs codify the principles set out in the well known decision in *R v Underwood* [2005] 1 Cr App R (S) 90 and make clear that the court is not bound by any agreement and must itself consider whether evidence is called to establish the basis on which it is to sentence.

iv) In cases involving serious fraud the prosecutor may also enter into a plea agreement in accordance with the procedure set out in paragraphs IV.45.16-45.28. This part of the Consolidated Criminal Practice Direction was introduced into the Direction in May 2009 after consultation and was published at the same time as the Attorney-General's guideline on Plea Discussions in Cases of Serious or Complex Fraud. The provisions of the Consolidated Criminal Practice Direction make it quite clear that the judge must be provided with full details so that he can understand the facts of the case and the history of the plea discussions. This is to enable the judge to make an assessment of whether the plea agreement is fair and in the interests of justice and

to decide the appropriate sentence. Paragraph IV.45.24 makes it clear that although sentencing submissions should draw the court's attention to any applicable range in any relevant guideline or to any ancillary orders that may be applicable, sentencing submissions should not include a specific sentence or agreed range, other than the ranges set out in the Sentencing Guidelines or authorities.

v) Although it is primarily the duty of the offender to provide detailed financial information about his means (see for example the information provided in an appeal in *R v Milford Haven Port Authority* [2000] 2 Cr App R(S) 423) the court is greatly assisted by an analysis of the financial means by the prosecutor: see for example paragraph 17 of the SGC Guidelines on Corporate Manslaughter. The prosecutor's analysis can most usefully be set out in a report to the court.

26. It is clear, therefore, that the SFO cannot enter into an agreement under the laws of England and Wales with an offender as to the penalty in respect of the offence charged. One reading of the joint sentencing submission and plea agreement in the light of the surrounding circumstances would suggest that a penalty had in fact been agreed. However, as was made clear by Mr Mitchell QC, the Director assured the court that, although the SFO and Innospec were agreed on the approach (as the joint submission made clear), no penalty had been agreed, and that it was for the court to decide on the penalty. Although the sentencing submission proceeded to put forward a specific proposal as opposed to the range as set out in the authorities, that must have been because the provisions of the Consolidated Criminal Practice Direction had not been fully appreciated.

27. The Practice Direction reflects the constitutional principle that, save in minor matters such as motoring offences, the imposition of a sentence is a matter for the judiciary. Principles of transparent and open justice require a court sitting in public itself first to determine by a hearing in open court the extent of the criminal conduct on which the offender has entered the plea and then, on the basis of its determination as to the conduct, the appropriate sentence. It is in the public interest, particularly in relation to the crime of corruption, that although, in accordance with the Practice Direction, there may be discussion and agreement as to the basis of plea, a court must rigorously scrutinise in open court in the interests of transparency and good governance the basis of that plea and to see whether it reflects the public interest.

28. This has always been the position under the law of England and Wales. Agreements and submissions of the type put forward in this case can have no effect. It is a necessary consequence of the rule of law that procedures, particularly those relating to criminal justice, cannot be amended save in accordance with amendments to Practice Directions or Rules of Criminal Procedure or by decisions of the Court of Appeal. No doubt, as a result of this case, the issues raised can be considered by the Lord Chief Justice in the light of the current provisions as to procedure.

29. Against that background, I turn to general considerations as to the sentence and other penalties the court should impose.

The approach to sentence

(i) A fine

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. It is deliberate and intentional wrongdoing. It causes serious harm. In the foreword to the 2004 UN Convention against Corruption Kofi Annan, the Secretary General described its effects:

> "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. The international community has taken its stand in the OECD Convention on Combating Bribery of Foreign Public Officials 1997 to which the UK is a party. Article 3.1 requires State parties to the Convention to apply criminal penalties which are "effective, proportionate and dissuasive".

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.

(ii) Confiscation

33. Under the law applicable to this case, namely the provisions of the Criminal Justice Act 1988 as amended, if the prosecutor gives written notice to the court that he considers it would be appropriate for the court to make a confiscation order, then confiscation takes primacy over a fine. In a case where a company was in a position to pay both a fine and have the benefits of its criminal conduct confiscated, no problem would arise as the company could pay both the fine and the confiscation amount.

34. However in the present case as the benefits were not merely profits derived from the contracts obtained by corruption but the very contracts themselves, the benefit to Innospec Ltd may have been as high as $160m.

35. Very properly, in the circumstances which emerged, the Director of the SFO accepted in the course of the open hearing the view that the court should determine whether to impose a fine in preference to a confiscation order.

36. There are two reasons why, in my judgement, the Director was right in accepting that position.

i) It is very important in the public interest and as a signal of deterrence to others that a fine of very considerable magnitude is imposed and is seen to be imposed as a mark of the serious criminal conduct of which the company is guilty. The offending itself must be severely punished quite irrespective of whether it has produced a benefit. The deprivation of any benefits obtained follows, as no person can be allowed to retain the benefit of his criminal conduct, but that is simply an additional consequence.

ii) For the Director to have preferred confiscation to a fine, in circumstances where Innospec Limited was unable to pay both a fine and the confiscation amount, would have given rise to a very considerable conflict of interest incompatible with his independent duties as a prosecutor. Under what is somewhat surprisingly called an "incentive scheme", the proceeds obtained from a confiscation order are, once collected by the Ministry of Justice, distributed to the Home Office in accordance with an agreed protocol with the Treasury. That confiscation income is then distributed by the Home Office who retain 50% passing 18.75% to the prosecuting authority and 18.75% to the investigating authority and 12.5% to Her Majesty's Court Service. As

the Serious Fraud Office is both the investigating and prosecuting authority, 37.5% of the confiscation amount in this case would go to the SFO, it would form part of the income of the Office. In those circumstances, although in general this would not affect the duty of a prosecutor to initiate confiscation proceedings, there would be a clear conflict of interest, if a prosecutor were to give notice requiring a court to proceed to confiscation rather than a fine, as fines are paid to and retained by HM Treasury. No independent prosecutor, exercising the quasi judicial function in determining whether to issue a notice, could properly issue one in such circumstances. The position of the court administration is quite different; for example, no benefit to the court administration is in fact provided by this scheme, as the income of Her Majesty's Court Service is guaranteed by the Ministry of Justice, irrespective of the amounts paid to it under the so called "incentive scheme".

(iii) The civil settlement order

37. Under ss.240 and following of the Proceeds of Crime Act 2002, the SFO and other bodies have power to recover in proceedings before the High Court, property obtained through unlawful conduct. By s.276 a court can stay proceedings for recovery on terms agreed by the parties. As is clear from what I have set out, it was contemplated as between the SFO and Innospec that a civil recovery order would be made in the sum of $6m. There were three reasons why it was thought desirable to consider such an order as part of the overall penalties in this case:

i) Although the criminality in respect of the corruption in relation to Iraq was the subject of criminal proceedings in the US and not in the UK, it was thought desirable to mark by a penalty that criminal conduct which had substantially been organised in the UK. It was considered that this could only be done by civil penalty because a criminal penalty would, in the light of the charge in the US relating to the same matter, infringe the principle of *ne bis in idem* or double jeopardy. However, it seems to me that in circumstances where the Federal District Court has imposed a fine of $14.1m for the criminality in relation to Iraq, it would not be right or in the public interest to reduce the available amount to this court in relation to a fine for the Indonesian corruption by making a further penalty referable to the Iraq conduct even if a civil sanction was appropriate. As I have set out above, the corruption in relation to Indonesia was as at least as serious as that in respect of Iraq.

ii) It was desirable that some compensation be paid in respect of Iraq. I would accept that if funds were available, this might be desirable. However, there are insufficient funds for an appropriate fine. Moreover no thought was being given to compensating those who had been wronged in Indonesia; it was not necessary to explore this issue, but it is difficult to see why no compensation was being paid in respect of the corruption in Indonesia which was charged and punished in the UK, whilst paying compensation in respect of the corruption in Iraq which was charged and punished in the US.

iii) It was easier to deal with payments that depended on a contingency under a civil recovery order than under a fine. However, on analysis, this is no impediment to a fine. Many fines imposed in criminal courts are, in effect, contingent upon the future earnings of individuals. The fact that the offender is a corporation makes no difference.

38. However there is a more important general principle. Those who commit such serious crimes as corruption of senior foreign government officials must not be viewed or treated in any different way to other criminals. It will therefore rarely be appropriate for criminal conduct by a company to be dealt with by means of a civil recovery order; the criminal courts can take account of co-operation and the provision of evidence against others by reducing the fine otherwise payable. It is of the greatest public interest that the serious criminality of any, including companies, who engage in the corruption of foreign governments, is made patent for all to see by the imposition of criminal and not civil sanctions. It would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil as opposed to a criminal sanction. There may, of course, be a place for a civil order, for example, as a means of compensation in addition to a fine. It is therefore plainly desirable that the Lord Chief Justice should consider directions that ensure any civil penalties are heard in conjunction with criminal proceedings.

The sentence imposed

39. I therefore turn to the sentence the court will impose.

40. From what I have already stated, I consider that a fine of $12.7m would have been wholly inadequate as a fine to reflect the criminality displayed by Innospec Ltd. This was corruption involving the payment of very substantial amounts to the most senior officials of the government of Indonesia over a long period of time. A major part of the purpose was not merely to procure contracts that benefited the company, but to delay the phasing out of TEL in Indonesia and therefore to prolong damage to the people of Indonesia and the environment. In reaching my view that $12.7m is wholly inadequate I have taken into account:

i) The fact that the company is entitled to a credit well in excess of 50% for its early guilty plea and its co-operation with the SFO and others in investigating and providing the evidence of this large scale corruption. Admitting a serious crime and providing evidence against others is a matter that on well established principles should be marked in this way.

ii) The fact that the management of Innospec has changed and that there is now an enhanced compliance programme.

41. I indicated on 18 March 2010, after Innospec had pleaded guilty, I would not impose a total financial penalty in excess of $12.7m, if the US Federal District Court approved the plea agreement entered into. As it has done so, $12.7m will therefore be the fine I will impose. However, beyond this it is neither necessary nor desirable for me to go in stating the amount of the fine I would

have imposed if I was not limited to $12.7m. Many of the detailed matters that would have been necessary to explore were not gone into; it is sufficient to say that the fine would have been measured in tens of millions.

42. I gave the indication, with considerable reluctance, because in all the circumstances and given the protracted period of time in which the agreement had been hammered out, I do not think it would have been fair to impose a penalty greater than that. In reaching that conclusion I have had regard to the following:

i) Innospec had admitted to a very serious offence that I am satisfied reflected the full criminality of their conduct.

ii) Innospec had made a full confession and had provided evidence that would be of significant assistance to the prosecutions of others.

iii) There was a detailed examination of its ability to pay. It would, of course, have been possible to impose a fine that would have resulted in the immediate insolvency of the company. That would, however, have affected the innocent employees of the company, caused considerable difficulties for the unfunded pension liabilities of the company and been detrimental to the agreed "clean up" programme the company has in place in the UK in respect of pollution it has caused here. The level of fine would have been influenced in any event by limiting the fine to an amount which would have enabled the company to remain in business and to pay the fine over a period of years.

iv) The prospect of a "global settlement" at the level agreed had been announced to the markets by a company where its inability to pay more was an issue.

v) The Federal District Court for the District of Columbia had agreed to the plea agreement made in the US.

I have reluctantly concluded that, on this occasion, it would neither be just nor fair in the unusual circumstances of this case for this court to impose a penalty greater than the amount allocated to the UK. As in *R v Whittle & Others* [2008] EWCA Crim 2560, this court was placed in a position where it had little alternative but to agree to the limit of $12.7m, if it was to avoid injustice. It must, however, be appreciated that the circumstances of this case are unique. There will be no reason for any such limitation in any other case and the court will not consider itself in any way restricted in its powers by any such agreement.

43. The court was faced with an agreement made between the DOJ, the SEC, the OFAC and SFO as to the division of the sum these bodies had considered Innospec was able to pay. This was not a matter that received judicial determination in either the UK or the US (save that inherent in the Federal District Court's approval of the plea agreement). As it is the position in both the US and the UK that it is for the court ultimately to determine the sanction to be imposed for the criminal conduct, an agreement between prosecutors as

to the division, even if it had been within the power of the Director of the SFO (which as I have explained it was not), cannot be in accordance with basic constitutional principles. Nor in my view was the division an agreed one which on the facts of the case accorded with principle. The gravamen of the criminality was centred in the UK, the criminality of the corruption in Indonesia was no less serious than that in Iraq and there was no reason to prefer compensation to Iraq over compensation to both Iraq and Indonesia. My provisional view is that the amount should have been divided 50:50.

44. It is clear that although cases will be rare where a company is not able to pay fines and other penalties that should properly be imposed in cases where there are concurrent prosecutions, there will be other cases where it is just to limit fines and penalties so that a company can continue to trade. It is important there be some resolution of principle not only as to how courts approach the allocation, but the principles upon which courts should allocate. I was helpfully referred to the Eurojust Guidelines for deciding "which jurisdiction should prosecute" set out in an annex to Eurojust's 2003 Annual Report. Although these are helpful, they do not provide an answer to the difficult questions. Deciding where to prosecute is not the same question as to the division of penalties by courts of a limited amount where two or more different but related crimes are prosecuted in different jurisdictions at the same time.

45. It is important to record the court's appreciation of the fact that by his vigorous prosecution of Innospec Ltd in this case, the Director of the SFO has shown a determination as a prosecutor to see that corruption of foreign government officials is brought to court in a manner in which a plea of guilty was inevitable. He has ensured that the facts are laid before the court in such a way that a sentence could be passed by the court which has in all the circumstances tried to reflect the serious criminality of such conduct. However, I have concluded that the Director of the SFO had no power to enter into the arrangements made and no such arrangements should be made again

46. It is essential for the future that, unless any change is made to the rules of procedure or to the practice direction, it is appreciated this court must and will sentence in the way set out in the law, as that is what the rule of law requires. This applies as much to companies as to individual defendants; in the case of individual defendants, a suggested agreed sentence is not only impermissible, it can raise false hopes. Furthermore, although it is very helpful for the prosecution to assist the court in relation to the financial means of a corporation or with any sentencing guidelines, it is for the court to decide on the sentence and to explain that to the public, as I have endeavoured to do, in a manner that is both open and transparent, as that is what justice requires.

Conclusion

47. In the result, therefore, the company will be fined the Sterling equivalent of $12.7m. As I indicated on 18 March 2010, subject to further submissions from counsel, it may be paid in instalments in accordance with a schedule which I will initial, provided that a suitably worded guarantee is given by Innospec Inc which can differentiate between the cash and contingent

amounts. The conversion is to be at a designated rate of exchange prevailing at the date payment is due. There are no further funds available either for a compensation order, a civil recovery order or prosecution costs.

48. As the details of the compliance and monitoring agreement are still to be finally approved as part of the US plea agreement, I will approve the terms of any compliance and monitoring which embodies what may be agreed in the US. I do so on this occasion for similar reasons to those I have expressed in relation to the financial penalties, but it should be no precedent for the future. Two points arise:

i) It will be necessary to consider the extent to which the compliance and monitoring order requires supervision in both the US and the UK, or whether a mechanism can be approved by the courts which will result in one jurisdiction having the lead role and liaising as necessary with the other. In this case plainly the US should take the lead. Having two compliance and monitoring agreements will unnecessarily increase cost. If such agreements are to be a feature of future orders, discussion between the courts is plainly necessary.

ii) It will also be necessary to consider how best any arrangements should be embodied in an order of the UK court – whether this should be a civil or criminal order. This can be dealt with when the position in relation to the compliance and monitoring order is clear.

49. However, unless I had been satisfied that the new management of the company would not engage in similar conduct in the future, I would not have assented to a fine or other penalty that would have enabled the continuing survival of this company. If a company cannot pay the applicable fine without becoming insolvent, then it is for that company to show that the new management has put that past behind them and will not engage in criminality in the future. As the new management have satisfied me of this, imposing an expensive form of "probation order" seems to me unnecessary for a company which will also be audited by auditors well aware of the past conduct and whose directors will be well aware of the penal consequences of any similar criminal conduct. The justification and cost effectiveness for such an agreement was raised by Judge Hurelle. In my view, there is a real case for saying that the resources allocated to this should more properly have been made available for fines, confiscation or compensation. For the future, the request for such an order will have to be fully explained in terms of its cost effectiveness.

50. There is one final footnote I should add. There was at some stage a suggestion that a press notice in a form approved could be issued by Innospec. This is not a practice which should be adopted in England and Wales. Publicity Orders are very different as they are made under the direction of the Court to ensure that in appropriate cases the conviction of the company is properly publicised. It would be inconceivable for a prosecutor to approve a press statement to be made by a person convicted of burglary or rape; companies who are guilty of corruption should be treated no differently to others who commit serious crimes.