Client Update
Officers and Employees of Private Sector Banks Deemed "Public Servants" Under India's Anti-Corruption Law

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Corruption is prolific in India's banking sector, yet India's anti-corruption regime contains no express offences in relation to private sector corruption and bribery.

However, in a landmark judgment handed down on 23 February 2016, India's Supreme Court ruled[1] that officers and employees of banks are "public servants" for the purposes of prosecution under the Prevention of Corruption Act 1988 (the "PCA"). In order to reach this decision, the Court adopted a highly purposive approach to legislative interpretation in order to remedy "unintended omissions" in relation to the application of the PCA to officers and employees of a bank. The decision is another important example of judicial activism to tackle India's corruption issues.

In this e-bulletin we take a look at the key points of the judgment and some practical considerations for businesses with operations in India's banking sector.

BACKGROUND

The case involved corruption charges against a number of senior executives from Global Trust Bank ("GTB"), which was licensed under the Banking Regulation Act 1949 by the Reserve Bank of India. In essence, the individuals concerned entered into a conspiracy to cheat GTB, resulting in a wrongful gain of over US$2 million.

India's Central Bureau of Investigation (the "CBI") brought charges against the individual for offences under the PCA (among other things). However, the claims were quashed by the High Court of Judicature at Bombay on the basis

[1] Indian Supreme Court

that executives of a private sector bank were not "public servants". The CBI appealed to the Supreme Court.

THE DECISION BY THE SUPREME COURT

In order to decide the question of whether the officers and employees of a private bank were "public servants" for the purposes of offences punishable under the PCA, the Supreme Court analysed the legislative history of the Banking Regulation Act 1949 and the purpose of the PCA.

Section 46A of the Banking Regulation Act 1949 stated that bankers were "public servants" for the purposes of the offences under chapter XI of the Indian Penal Code (the "IPC"). Chapter XI of the IPC was subsequently repealed and the relevant offences were consolidated into the PCA. However, the provisions of the IPC relating to officials / employees of a Banking Company were not incorporated into the PCA. Accordingly, private sector bankers were not expressly identified as "public servants" under the PCA.

The common law rule relating to the interpretation of statute is that *"what has not been provided for in the statute cannot be supplied by the Courts"*. However, the Supreme Court referred to an exception to this strict rule of interpretation as expressed by the renowned English judge, Lord Denning *"We sit here to find out the intention of Parliament and carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis"*. Notwithstanding the fact that this liberal approach to legislative interpretation was immediately disapproved by England's highest court, India's Supreme Court found that it had been adopted as good law by India's courts. Accordingly, the Supreme Court set about *"filling in the gaps"* in the PCA.

The Supreme Court observed that the legislature had specifically intended the PCA to widen the scope of the definition of "public servant". It followed that the omission of S. 46A of the Banking Regulation Act 1949 from the PCA was a *"wholly unintended legislative omission"*. The Court then reasoned that, were it to express *"judicial helplessness to rectify the omission"* (thereby upholding the quashed charges), it would have the opposite effect of the intention of the PCA. The Supreme Court therefore decided that the intent of the PCA could not be allowed to be defeated and hence the omission was capable of being "filled up". This reasoning led to the finding that private sector bankers were public servants for the purposes of the PCA by virtue of the provisions of section 46A of the Banking Regulation Act 1949 and accordingly the prosecutions by the CBI under the PCA were allowed to proceed.

COMMENT

India's drive against corruption is perceived to be hampered by the general weakness of the country's anti-corruption institutions. However, India's Supreme Court is regarded as one of the key institutions which has been effective in fighting corruption. This decision is consistent with this view, notwithstanding any misgivings about the judicial activism required to reach the decision.

The case could further be seen in the context of an international trend of courts demonstrating a willingness to stretch public sector anti-bribery legislation in order to tackle corruption in the private sector. Another notable recent example was the 2014 conviction of a former Deutsche Bank employee in Japan in relation to the payment of bribes to a client, who was a pension fund manager. In that case, the court found that the pension fund manager was a public servant because the money his pension oversaw included public funds. Accordingly, both the banker and the fund manager were subject to Japan's public sector anti-corruption legislation.

PRACTICAL POINTS

- Financial institutions licensed under India's Banking Regulation Act 1949 should be aware that its officers and employees are subject to the anti-corruption offences under the PCA.
- Banks may need to adapt their anti-corruption and bribery policies to ensure compliance with this decision.
- Banks may also need to consider any further training requirements for officers and staff.

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