33CL Lecture -Innospec: *[“Good job Mr. Alderman; - don’t do it again?”]*

PART 1: - THE INNOSPEC CASE

Background

1. Innospec Limited, is a subsidiary of Innospec Inc., a NASDAQ listed company based in the U.S., and is a manufacturer of a lead based anti knock fuel additive called tetraethyl lead ("TEL"). Innospec Limited is based in Ellesmere Port, Cheshire and is the last manufacturer of TEL. TEL cannot be sold in Europe or the USA for motor vehicles on health and environmental grounds, however the company continued the production and sale of TEL in regions where it remained lawful, such as Indonesia.

2. Innospec admitted to bribing employees of Pertamina (an Indonesian state owned refinery) and other Government Officials in Indonesia in order to secure sales of a fuel additive, TEL.

3. Following the publication of the report from the United Nations Independent Inquiry Committee into the Oil for Food Programme on 27 October 2005, the US Department of Justice ("DOJ") commenced an investigation into Innospec Inc. for both sanctions offences and corruption offences. The investigation was referred to the SFO by the DOJ in October 2007 and on 23 May 2008 the SFO formally accepted the corruption case for investigation. Subsequently, the company disclosed to the SFO evidence it had sought to influence decision-makers in public contracts for the purchase of TEL in Indonesia between 1999 and 2006. The company provided the SFO with a high level of co-operation throughout the investigation.

4. In order to conduct its business in Indonesia, the company appointed agents to act on its behalf in seeking to win or continue contracts to supply TEL. Between 14 February 2002 and 31 December 2006 (the indictment period), the company paid US$ 11.7 million to its agents. From these commissions, bribes were paid by the agents to staff at the state-owned petroleum refinery, Pertamina, and other public officials who were in a position to favour the company by purchasing orders of TEL.

5. Payments were made in an attempt to ensure that Pertamina favoured TEL over unleaded alternatives.

6. The agents acted under the instruction of the company and the commission fees paid were authorised by the company. The company accepts that it knew that a proportion of the commission funds would be used to bribe both Pertamina officials and other public officials at higher regulatory or ministerial levels, with influence over the purchase of TEL.

7. In addition to commissions, the company also created 'ad hoc' funds. These funds assisted specific or 'one-off' arrangements with particularly influential individuals within Pertamina or at a political level.

8. One particular fund was structured to protect the interests of the lead based additives industry, whereas in truth and reality, it was no more than a slush fund to corrupt senior officials in various Ministries with the intention of blocking legislative moves to ban or enforce the ban on TEL on environmental grounds and/or seeking a higher level buy-in to continued yearly supplies of TEL to Pertamina.

9. The Indonesian Government's intention to go lead-free, initially conceived in 1999, was not realised until 2006.

Proceedings

10. The case is part of the first "global settlement" reached with a co-operating Company and has been resolved in cooperation with US government authorities - DOJ, SEC and OFAC.

11. The SFO was given consent by the Attorney-General to bring these proceedings on 2 November 2009. The company was indicted with a conspiracy to corrupt (s.1 Criminal Law Act 1977)"

12. The Particulars read as follows:

"Innospec Limited, between the 14th day of February 2002 and the 31st day of December 2006, conspired with certain of its directors, executives,

employees and agents to give or agree to give corrupt payments [contrary to section 1 of the Prevention of Corruption Act 1906] to public officials and other agents of the Government of Indonesia as inducements to secure, or as rewards for having secured, contracts from the Government of Indonesia for the supply of Tetra Ethyl Lead to the said Government of Indonesia by Innospec Limited."

Sentence

13. The company "agreed" that it would be subject to financial penalties and the SFO carried out an investigation into the Company's ability to pay. This exercise involved the SFO's investigators working with SEC staff in coming to a fair and true assessment of the Company's means to pay financial penalties.

14. The SFO concluded that the amount available in the UK was a total of $12.7 million. At the plea and case management hearing, Lord Justice Thomas indicated that the company will be sentenced to pay $12.7 million or the sterling equivalent, however, he had a number of remarks to make in respect to the joint nature of the investigation and prosecution:

    a. *"…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* <u>*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…*</u>

    b. *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.* <u>*It is in the*</u>

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.

c. *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…"*

d. *"it is essential for the future that, unless any change is made to the rule 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" and that "this applies as much to companies as to individual defendants."*

15. In any event, Thomas LJ came to the same conclusion as to he level of appropriate fine: $12.6m. The SFO did not make an application to begin confiscation proceedings.

Monitoring

16. The DOJ and SFO proposed the appointment of a joint monitor, to be acceptable in both the UK and US. The company has also agreed to pay the costs of a monitor for up to three years.

Breach of UN sanctions

17. The company was prosecuted by the DOJ for offences in relation to the breach of United Nations sanctions from 2000 to 2003, as they applied to

contracts in the UN Oil For Food programme. As part of the U.S. plea agreement for this conduct, the company agreed to pay a $14.1 million criminal fine.

Regulatory Action

18. As a consequence of Innospec Inc's listing on the NASDAQ, the parent company is regulated by the SEC. Innospec Inc has settled a civil complaint filed by the SEC, charging the parent company with violating the Foreign Corrupt Practices Act's anti-bribery and books and records provisions relating to conduct in Iraq. A fine of $11.2 million in profits will be paid to the SEC.

19. Finally, the company has agreed to pay an administrative fine of $2.2 million to OFAC, relating to matters regarding the US embargo against Cuba.

PART 2: - JOINT INVESTIGATIONS AND DISPOSAL

Agreed Basis of Plea – Allowed and Encouraged

20. Where the Prosecution believes it advantageous they may initiate plea discussions with any person who is being prosecuted or investigated with a view to prosecution in connection with a serious or complex fraud.

21. The Attorney General's Guidance on Plea Discussions in Cases of Serious and Complex Fraud[1] points to 'clear advantages' in offering parties in fraud cases the opportunity to consider reaching a court sanctioned agreement and avoid a contested trial at the earliest possible stage. These are said to include: potentially large savings to the public purse; the easing of strain on defendants, victims and witnesses caused by delay; and freeing up resources used to detect and prosecute large, complex fraud cases. The paper notes that, at present, only 66% of criminal defendants in England and Wales plead guilty before trial, with 10% of the remainder waiting until the first day of trial. The aim of introducing a more formal plea bargaining system in England and Wales is to encourage more and earlier pleas. The Attorney General says

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[1] http://www.attorneygeneral.gov.uk/Publications/Pages/AttorneyGeneralsGuidelines.aspx

that the proposals do not represent an attempt to replicate the systems in the US or elsewhere in the world.

22. The court must not participate in these discussions. Nothing said by the suspect will be subsequently used against them, although prosecutors will be able to agree with the suspect circumstances in which anything said by them in the discussions can be used by the prosecution. The prosecutor must provide to the defence any material that they do not intend to use, but which the prosecutor recognises should be disclosed at an early stage. The decision as to whether a person should be charged and with what offence rests with the prosecutor.

23. A written plea agreement will usually be submitted to the court at the defendant's first appearance; the court will then read it and adjourn consideration of the matter to a separate hearing. This hearing will usually take place in open court and in the defendant's presence. The judge may accept or reject the plea agreement, or defer a decision until the court has obtained further information, or can indicate their own view of the maximum sentence, if requested by the prosecution or defence.

24. Thomas LJ set out the duties of a Prosecutor (page 6, paragraph 25):

    a. Must, in accordance with the relevant AG's guidelines, including those applicable in US-UK cases, exercise his discretion as to the charges preferred.

    b. May, subject to the provisions of the consolidated Criminal Practice Directions (IV 45.5-45.9) indicate his acceptance of a plea[2].

    c. May also discuss a basis of plea and agree it, subject to the principles set out in paragraphs IV 45.10-45.15. These paragraphs… …make it clear that the court is not bound by any agreement and must consider

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[2] http://www.justice.gov.uk/criminal/procrules_fin/contents/practice_direction/part4.htm#id6178240

itself whether evidence is called to establish the basis on which it is to sentence.

d. In cases involving serious fraud, may also enter a plea agreement in accordance with the procedure set out in IV 45.16-45.28. This part of the Practice Direction was introduced in May 2009 after consultation and was published at the same time as the AG's guidance on plea discussions in cases of serious or complex fraud[3]. The provisions 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 a judge to make an assessment of whether the plea agreement is fair and in the interests of justice and to decide the appropriate sentence.

e. Sentencing submissions should not include a specific sentence or agreed range, other than the ranges set out in the Sentencing Guidelines of authorities.

25. In addition to the Attorney General's guidance, SFO director Richard Alderman announced that the SFO is to adopt a plea bargaining system. This is one of several changes to the SFO being considered, which draw heavily on recommendations in a critical report issued by former New York prosecutor Jessica de Grazia[4]. The report compares the SFO with two prosecutors' offices in the US. The FSA has also long been lobbying for plea bargaining powers similar to a US-style whistleblower system.

26. In May 2008 it published a consultation paper that included a proposal to add a new leniency factor to the list of factors that may be taken into account when deciding whether to prosecute market misconduct offenders who have co-operated with an investigation. The purpose of the new factor is to provide those guilty of financial crime with an incentive to come forward at an early stage with information and assistance. At present, the FSA only has a

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[3] http://www.attorneygeneral.gov.uk/Publications/Pages/AttorneyGeneralsGuidelines.aspx

[4] http://www.sfo.gov.uk/about-us/our-policies-and-publications/jessica-de-grazia-review-.aspx

common law power to offer protection from prosecution, which cannot bind other prosecuting authorities. The FSA also recently told the Treasury Select Committee that it was determined to crack down on so-called market abuse and clearly sees the tools of plea bargaining and immunity as being key to this objective.

Global Settlements - Use Caution

27. The BAE Systems and Innospec settlements are part of an emerging trend: global negotiated settlements for multinational companies that uncover misconduct which potentially violates US and other countries' anti-corruption laws.

28. BAE Systems were able to successfully negotiate a global settlement that simultaneously resolved pending matters with the DOJ and the UK Serious Fraud Office ("SFO").

29. Such an arrangement allowed both US and UK enforcement authorities to expend fewer resources of their own by drawing on each other's enforcement resources In the case of BAE, this permitted the defendant to resolve all potential liabilities related to the same alleged misconduct and announce settlement of these matters at the same time, thus minimizing the scope of the potential reputational damage of such a settlement.

30. The **"Guidance for handling criminal cases with concurrent jurisdiction between the United Kingdom and the United States of America[5]"** 2007 was issued jointly by then Attorneys-General of the UK and the US and the Lord Advocate for Scotland. It purports to set down advice for cases which have the potential to be prosecuted in both the UK and the US. *"The aim of such a co-operative approach is to agree a co-ordinated strategy in relation to the particular case that respects the individual jurisdictions but recognizes the benefits of co-operation in these areas."*

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[5] http://www.cps.gov.uk/legal/h_to_k/jurisdiction/#Concurrent

31. However there is a definite line in the sand. Where joint investigations are (no doubt) encouraged, an agreed disposal is still very much unacceptable. In contrast to US 'plea culture' there can be no guarantee of what a company will receive by way of a punishment. That uncertainty is always a risk; no promises can ever be made in respect of keeping directors out of prison, a fine that may force a company into administration or, conversely, a sentence which is too lenient, triggering a breach of any US plea deal which could cause the company to be resentenced by the American Court.

Agreed Disposals - Not Allowed

32. The 'Marine Hose' Case (*R v Whittle* and others 2008[6]) tested the waters in the Court of Appeal. The defendants negotiated simultaneous plea bargains for offences prosecuted by the DoJ in the US and the OFT in the UK. The deal was that they were to be sentenced in the US, returned to the UK, and plead guilty to offences in England. They would only return to serve the US sentences were they to receive sentences in the UK which were shorter than the sentences imposed in the US.

33. The one unknown was the sentence that the English Court might impose for a cartel offence which had never before been prosecuted. In the event, the Sentencing Judge imposed a considerably higher sentence. The defendants appealed the sentences and argued that the additional period was excessive. Their dilemma was that a worse outcome might be achieved if the Court of Appeal were to reduce the sentence to a tariff below the US court. In those circumstances they would be rendered liable by their US plea agreement to be shipped back to the US to serve the difference in a US jail.

34. The Court noted that *"Part of the agreement"* (with the DoJ) *"was that each applicant would ... not seek from the UK Court a sentence of imprisonment less than that provided for by the agreement."* Giving the judgment of the Court, Lady Justice Hallett said: *"It follows that this court has not had the benefit of the kind of argument from counsel to which it is accustomed ... their*

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[6] www.bailii.org/ew/cases/EWCA/Crim/2008/2560.html

instructions were imposed upon them by the terms of the plea agreements. We have our doubts as to the propriety of a US prosecutor seeking to inhibit the way in which counsel represent their clients in a UK court but having heard no argument on the subject we shall express no concluded view... .We have considerable misgivings about disposing of these applications in the way in which we intend but, if we are to avoid injustice, we feel we have no alternative."

35. The Court thus reduced the sentence to match the terms of imprisonment imposed in the US but by clear implication was expressing that this may have been a more severe sentence than might, but for the constraints of the US plea agreement, otherwise have been in the Court's sights.

Conclusion

36. The SFO may have been testing the waters with Innospec, or it may be that the offer of co-operation and encouragement by the US to pursue a joint settlement led to talk about the exact level of fine that ought to be imposed. In any event, the Court has taken the opportunity to remind defendants and state agencies, in no uncertain terms, that sentencing takes place in Court and is not agreed beforehand; there are important constitutional reasons for that. Certainly in cases of bribery and corruption, it would be deeply unattractive for the defendant to try and reach a favorable outcome with a state body in private and without the scrutiny of a court hearing.

[From K-10]

Item 3 Legal Proceedings

Oil for Food Program and related investigations

On February 7, 2006, the Securities and Exchange Commission ("SEC") notified the Company that it had commenced an investigation to determine whether any violations of law had occurred in connection with certain transactions conducted by or involving the Company, including those conducted by its wholly owned indirect Swiss subsidiary, Alcor Chemie Vertriebs GmbH ("Alcor"), under the United Nations Oil for Food Program ("OFFP") between June 1, 1999 and December 31, 2003.

As part of its investigation, the SEC issued a subpoena requiring the production of certain documents, including documents relating to these transactions, by the Company and Alcor. Upon receipt of the SEC's notification and initial subpoena, the Company undertook a review of its participation in the OFFP.

On October 10, 2007 and November 1, 2007, the SEC served two additional subpoenas on the Company. These additional subpoenas required the production of documents relating primarily to the OFFP, but also relating to transactions conducted by the Company or its subsidiaries with state owned or state controlled entities between June 1, 1999 and the date of such subpoenas, concerning the use of foreign agents and the possibility of extra-contractual payments to secure business with foreign governmental entities in the context of the U.S. Foreign Corrupt Practices Act ("FCPA") and other laws. In a co-ordinated investigation, the Company was also notified by the U.S. Department of Justice ("DOJ") regarding the possibility of violations by the Company or its subsidiaries arising under other laws stemming from matters covered by the SEC investigation as well as certain preliminary inquiries regarding compliance with anti-trust laws applicable to the U.S. and international tetra-ethyl lead markets. The subjects into which the SEC and DOJ have inquired include areas that concern certain former and current executives of the Company, including the current CEO.

The Company, and its officers and directors, are cooperating with the SEC and DOJ investigations.
On February 19, 2008, the Board of Directors of the Company formed a committee comprised of the chairmen of the Board, the Audit Committee and the Nominating and Governance Committee, all of whom were independent directors. (The chairman of the Nominating and Governance Committee retired as a director of the Company effective May 6, 2008, but his services have been retained in an independent capacity as a member of the committee). External counsel to the Company, reporting to the committee has, on behalf of the committee, conducted and will continue to conduct an investigation into the circumstances giving rise to the SEC and DOJ investigations. External counsel reports directly to the committee and assists in connection with communications and interactions with the SEC and DOJ.

On March 5, 2008, a letter was received by the Company from the DOJ in which a request for a wider and more detailed range of documents was made. The Company and its officers and directors intend to continue to co-operate with the SEC and DOJ.
Separately, on May 21, 2008, the United Kingdom's Serious Fraud Office ("SFO") notified Innospec Limited, a wholly owned subsidiary of the Company, that it had commenced an investigation into certain contracts involving British companies under the OFFP. As part of this investigation, the SFO has asked the Company to produce documents in respect of the Company's participation in the OFFP between January 1, 1996 and December 31, 2003.

Following receipt of the SFO's notice the Company has instructed external legal counsel to advise and assist in relation to the investigation and the Company and its directors and officers intend to co-operate with the SFO. On October 16, 2008, the Company was further notified that the scope of the SFO's investigation would extend to matters relating to potential bribery involving overseas commercial agents that are already in the large part the subject of the ongoing DOJ and SEC investigations.

The outcome of these investigations remains uncertain to the Company. On the facts available to us it is not yet possible to form any reasonable estimate of the potential disgorgement, penalties and fine payments, either by reference to a range of possible outcomes or by reference to the lower end of such a range of outcomes. The amount of any disgorgements, penalties or fines that the Company could face would depend on a number of eventual factors which are not currently known to the

Company, including findings by relevant authorities regarding the amount, nature and scope of any improper payments, the amount of any pecuniary gain involved, the Company's ability to pay, and the level of co-operation provided to government authorities during the investigations. Because of the uncertainties associated with the ultimate outcome of these investigations and the costs to the Company of responding and participating in them, no assurance can be given that the ultimate costs incurred and sanctions that may be imposed will not have a material adverse effect on the Company's results of operations, financial position and/or cash flows from operating activities.

At December 31, 2007 we had accrued $3.7 million in respect of estimated probable future legal and other professional expenses and provided no additional accruals in respect of the investigations. As part of our continuing commitment to co-operate and comply with the SEC and DOJ investigations, including the request for documents set out in the DOJ letter dated March 5, 2008, we accrued a further $6.8 million during the quarter ended March 31, 2008 in respect of estimated probable future legal and other professional expenses. During the quarter ended June 30, 2008, the Company provided no additional accruals in respect of these matters.

During the quarter ended September 30, 2008 the Company accrued an additional $8.7 million in respect of estimated probable legal and other professional fees and expenses. The provision for probable future legal and other professional fees and expenses amounted to $3.4 million at December 31, 2008. These accruals are made on the basis of the Company's then current best estimate, working in consultation with the committee of the Board of Directors, external legal counsel to the Company and its other professional advisors. Should any underlying assumptions prove incorrect or should any of the DOJ, SEC and/or the SFO alter the scope of the investigations, then the actual costs incurred by the Company could differ materially from current estimates.

The Company continues to keep the amount of such accrual provisions under review as it has been doing, including through working with the committee of the Board and external legal counsel and other professional advisors.