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## Introduction

Take a simple bribery scenario. A foreign Government Minister is the key decision-maker for the award of a contract to build and operate infrastructure, say a toll road. A UK contractor wins the contract in a purportedly competitive bidding process, with the help of a local agent. It did so by paying bribes. One bribe was paid through the local agent to a Delaware company controlled by the Government Minister, which used it to acquire a London property. A second bribe was paid by the contractor to bank accounts in London held by a Seychelles company owned by the Minister's son. A UK trust and company service provider established the Delaware and Seychelles companies, and opened the bank accounts which they used to receive the bribes. The contractor is paid substantial amounts by the state under the contract.

In this briefing, we will consider the position from the perspective of English law. In international bribery schemes, the laws of two or more countries could arguably apply. Where those are common law countries, the principles may be very similar, albeit nuances might be important in some circumstances. The position may be more complex where the competing jurisdictions follow common and civil law traditions.

Bribes, and revenue or profits from a corruptly acquired contract, are criminal property obtained through criminal conduct, and knowingly possessing or dealing with them will be money laundering. On conviction, the benefits obtained from bribery by a bribe-payer or bribe-recipient can be confiscated in the UK, as in many other countries. Law enforcement agencies can also bring civil recovery proceedings to recover the bribes or profits as the proceeds of crime (proceedings known elsewhere as civil forfeiture or non-conviction based confiscation). These criminal mechanisms are all available to address bribery of public officials and, when deployed successfully, may be a comprehensive response against both the bribe-payer and the bribe-recipient.

But civil claims are also available, and may be appropriate when criminal solutions are unworkable or unsuccessful, or in circumstances where a civil mechanism offers a better financial outcome. Indeed, in some cases both criminal and civil processes may be appropriate, for example prosecution of the bribe-paying company by UK law enforcement, and also a civil claim against the company by the foreign state.

English law offers a number of different civil claims for bribery. They, or variants of them, will also be available in many common law countries. This briefing summarises those claims. There are several types of civil claim that might be relevant, and a range of possible defendants. In the example above, those defendants could include the bribe-paying company; the bribed public official and his son; the local agent; the trust and company service provider and the Delaware and Seychelles companies. The right claim will depend on the circumstances. The available claims include:

- The tort of bribery
- Contractual claims and termination
- Breach of fiduciary duty
- Dishonest assistance
- Knowing receipt
- Conspiracy

## 1. Tort of bribery

The meaning of a bribe in the civil law is very different from the criminal law equivalent. It has been described by one Judge, succinctly, as "*A commission or other inducement which is given by a third party to an agent as such, and which is secret from his principal*". In our scenario, a claim for the tort of bribery would be available against both the bribe-paying company and the bribed public official and, against the company that received the bribe, if controlled sufficiently by the bribed public official. The state would have to prove:

- First, the giving of a "*benefit*" to the public official, or a promise of future benefit. That may be cash, a payment to a bank

account, shares in the company winning the contract, "loans" (typically never repayable or repaid), children's school fees, an expensive watch, or anything else of some meaningful value. The type of benefit is irrelevant, provided it is material. The benefit could be given directly to the public official, or to a company or trust or other legal entity he or she controls. Or it could be paid indirectly to a third party, family or trusted associates.

- Secondly, the state must show that the public official had a role in the decision benefiting the payer. It is not necessary to show a decisive role, although that is often the case.
- Thirdly, the benefit must create a real possibility of a conflict of interest for the public official.
- Fourthly, the state must show that the payer knew that the recipient of the payment was a public official dealing with the payer on behalf of the state, or was wilfully blind to his or her position.
- Fifthly, the "*benefit*" must be secret from the state. It is the "*vice*" of secrecy that engages the civil tort of bribery, because it is a breach of the duty of loyalty that the state is entitled to expect. Full disclosure of the "*benefit*" is, however, a defence. The person relying on the defence must prove that full and appropriate disclosure has been given to an appropriate superior official or decision-making committee.

Note that it is not necessary for the state to prove dishonesty, although it is often present. Nor must the state prove that the bribe procured the contract or favourable decision. Once a bribe is proved there is an irrebuttable presumption that the public official was influenced by the "*bribe*", for example that its payment procured the contract to build and operate the toll road. And there is no need to link the payment to a particular transaction. Once a bribe is proved, any subsequent contract or favourable decision will be tainted. So, the bribes used in our example would taint subsequent contracts.

On providing bribery, a state has a number of remedies:

- It is entitled, without needing to show it has suffered any financial loss, to recover the amount of the bribe from the public official or the bribe-payer (but not both). This is because the courts will irrebuttably presume that the contract price was inflated by the amount of the bribe.
- Alternatively, a state can choose to recover the financial losses it has suffered. Losses might arise, for example, because a contract was awarded to an unqualified bidder that has performed the work badly. In those circumstances, the state could recover the cost of putting the work right. Or the state may be able to demonstrate that the contract price was inflated over and above the amount of the bribe. A state can elect between recovering the bribe or losses at any time before final judgment is given.
- A state has a "*proprietary*" (ownership) claim to the bribe, or to anything that is purchased using the bribe. That can have a number of significant consequences. For example, if the bribe is used to buy a property, the state is entitled to any increase in the market value of the property. Proprietary claims and their consequences are explored more fully in our briefing: [Who owns a bribe: the bribed official or the defrauded state?](#)

So, in the above example, the state would be entitled to recover and sell the London property, and keep any profit that was made as a result of the rise of the UK property market.

## 2. Contractual claims

A state is usually entitled, if it wishes to do so, to rescind or terminate a contract that has been obtained because of bribery. It may sometimes face a difficult decision over whether it should remain in a contractual relationship with a bribe-paying company, and, if so, on what re-negotiated terms.

The difference between rescission and termination is important. Rescission will mean the contract is void and is set aside as if it never existed. Both parties have to account to the other for any benefits received under the contract, for example the value of partially or fully completed works on the toll road (although the state does not have to account for the amount of the bribe, if recovered). Returning benefits that have been received may be unwelcome in some circumstances, for example where the bribe was paid to procure a sale of a state-owned asset that subsequently declined in value. One size does not fit all, and states should analyse each contractual situation on a case-by-case basis.

If the contract grants termination rights, there is usually no requirement to account for benefits that have been received following its termination, although sometimes termination procedures and their specified consequences

are equally unwelcome. A contractual claim for losses that have been suffered by a state will be available on termination, but not for rescission.

Termination rights typically have to be exercised reasonably quickly after a state becomes aware of the bribery. If they are not, the rights can be lost by inaction, requiring the state to continue to perform the contract. However, the state's right to seek compensation for financial loss would remain. The risk of a waiver can be problematic in circumstances where there is credible information about bribery available to the Government department responsible for the project, the contract is ongoing, and a criminal investigation is underway which will take some time to complete. In these circumstances, the natural instinct to await the outcome of the criminal process means there is a serious risk that termination rights will be lost.

### 3. Breach of fiduciary duty

In English law, the duties owed by senior public officials to their states are deeply rooted in the law of agency, and the "*fiduciary duties*" that an agent owes. Those duties include a duty of loyalty and fidelity; a duty to act in good faith and in the best interests of the state; a duty not to create a situation where personal interest conflicts with duties and responsibilities; a duty not to prefer personal interests or the interests of others to the interests of the state, or to make any undisclosed profit from a public position; as well as a duty not to solicit or accept bribes. Similar duties are owed, for example, by company directors, as well as others in a position of trust.

Bribery is usually a clear breach of all of these fiduciary duties. That would allow the state to seek:

- "*Equitable compensation*" for its financial loss. For technical reasons, an award of equitable compensation may be higher than the financial losses than can ordinarily be recovered in law. This is because legal principles that normally limit the amount that can be recovered do not apply.
- *Account of profits*. A claimant may be entitled to receive the profits its public official has achieved by virtue of the breach of duties, for example the increase in the value of shares or property given as a bribe, or acquired from bribes.
- Proprietary (ownership) claims are also available where there has been a breach of fiduciary duty.

### 4. Dishonest assistance

A state may also have a claim known as "*dishonest assistance*" against the bribe payer, or against anyone else materially involved in the bribery scheme or in the laundering of its proceeds. Here, depending on the extent of their knowledge and participation, those defendants could include the bribe-paying company; the public official's son; the local agent; the trust and company service provider and the Delaware and Seychelles companies. To succeed, a state must show:

- a breach of fiduciary duty by the official;
- that the bribe payer or other third party induced or assisted in the official's breach of fiduciary duty;
- dishonesty on the part of the defendant.

The breach of duty could be the receipt of the bribe, or indeed a failure to account for that bribe to the victim state. A dishonest assistance claim might be available against a wider range of defendants, unlike the tort of bribery which may be confined to the bribe payer or recipient. However, it is necessary to establish dishonesty. That means showing that the defendant did not act as an honest person (with his or her skills and experience) would have done in the circumstances. That is often not straight-forward to establish against third parties other than the principal wrong-doers, particularly when those third parties have incomplete knowledge of the circumstances.

A successful state would again be entitled to claim equitable compensation or an account of profits. However, the amounts that can be recovered against third parties may be lower than those available against the principal wrong-doers:

- In relation to equitable compensation, the Court will assess the loss arising from the breach of duty with which the defendant assisted. Depending on the extent of the defendant's participating, that may not include all breaches of duty and all losses that have arisen. The claimant state will be entitled to recover the losses that would not have been suffered "but for" the breaches

of duty which it induced, or with which it assisted.

- An account of profits is discretionary, and will not be ordered if the outcome would be "*disproportionate*" to the actions of the defendant. Assessing what is and what is not proportionate may often be difficult in practice, particularly when the extent of the defendant's involvement may not be well known

## 5. Knowing receipt

Knowing receipt is a type of claim often deployed in corruption cases, particularly in claims for stolen funds or assets. However, it is also available against companies, trusts or associates that hold bribery proceeds for the dishonest public official, for example the Delaware and Seychelles companies in the example given in the introduction. The essential elements of a claim are as follows:

- an asset was held under a trust or fiduciary relationship by the public official (this extends to a bribe received by a public official);
- the asset was transferred in breach of fiduciary duty owed by the official (e.g. the duty to account for the bribe to the state);
- the defendant is the beneficial recipient of the asset;
- it would be unconscionable for the defendant to retain the asset, a test which does not require dishonesty.

If these elements are present, the defendant is required to account to the state for the asset it has received, or for its value. It is a defence to show that the defendant was a "*bona fide purchaser for value without notice*". So, in our example, if the public official transferred the London property to his son at no cost, or even at full value when the son knew it had been corruptly acquired, the court could order the property to be transferred to the victim state. However, if the public official sold the property for a fair value to an innocent purchaser, the state would not be entitled to recover the land and would only have a claim against the proceeds of sale.

## 6. Conspiracy (unlawful means)

"*Unlawful means conspiracy*" requires loss to the state as a result of an unlawful act where two or more people have combined to cause the injury. A successful claim requires:

- an agreement between two or more individuals or entities to act unlawfully (which could include a company and the corrupt public official controlling it);
- the performance of that agreement;
- an intention to injure the claimant in doing so; and
- loss to the claimant.

The agreement could be formal or informal, and can be inferred from conduct. A claim by a state for unlawful means conspiracy could be available against all those that have participated in a bribery scheme (potentially all of those involved in the bribery scheme described in the introduction, depending on their knowledge).

Each defendant is responsible for all of the recoverable losses suffered if a conspiracy is established. Intention is the only ingredient worth pausing on. It might be said that the objective of the wrong-doers is to enrich themselves, not to damage the state. However, a claim can lie when it is foreseeable that the unlawful acts would cause loss to the claimant, and it is no answer for a defendant to demonstrate that its primary purpose was to further or protect its own interests.

Here, the Government Minister, the UK contractor, the agent, the trust and company service provider and the Delaware company would all potentially be liable for unlawful means conspiracy. Of these, the supporting cast could be liable if they had sufficiently material knowledge of the overall bribery scheme.

The state would be entitled to recover all of its pecuniary losses from the conspirators. This could include the bribe itself, any overcharging, the cost of the tender, and any costs associated with appointing a new contractor. However, it would be necessary to demonstrate to the court that these were genuine losses.

## Conclusion

There are a range of civil claims available to states that have been the victim of bribery, and the wide variety of potential defendants. Claims are not limited to the bribe-payer or the bribe-recipient; instead, they may extend to all knowing participants in the bribery scheme or the laundering of its proceeds. It is critical to choose the right claim for the circumstances. This involves a careful analysis of the circumstances and potential defendants to ensure that the best type of claim is used. Finally, it should not be assumed that these civil claims are an alternative to criminal action. Civil claims for corruption are often brought at the same time as a criminal investigation or prosecution. For example, the individuals involved in the bribery scheme might be prosecuted whilst civil claims are brought against the companies or other legal entities that enter into contracts, receive bribes or own assets acquired using the bribe.

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