Cooley

Who Owns a Bribe: the Bribed Public Official or the Defrauded State?

By James Maton and Jamie Humphreys

A public official receives a bribe to award a contract. Does the bribe "belong" to the official or to the state that he or she represents? The answer to the question can matter a great deal to the success of a claim. But the issue has been controversial and the answer unclear in English law, particularly in recent years, because of conflicting decisions going back to 1890.

The English position was conclusively resolved last year by the judgment of the United Kingdom's Supreme Court in the case of *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45. Although it does not concern a bribe paid to a public official, the reasoning of the case is directly applicable to such bribes. A Court comprising seven members of the Supreme Court decided that, in English law, the bribe will belong to the state. The decision ensures that English law is identical to other major common law jurisdictions. A summary appears here.

The legal concepts in issue are complex and involve (often unnecessarily) complicated language. This note will attempt, as far as possible, to avoid the use of technical terms. It is also concerned only with claims against the bribed officials. Other claims are, of course, available against bribe-payers, including claims for the amount of the bribes or losses suffered, and for the setting aside of contracts obtained by bribery.

"Fiduciary duties"

In legal systems founded on the English common law, senior public officials will typically owe wide-ranging duties to the state that they represent. These are known as "fiduciary duties" and may 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 put themselves in a position where their personal interest conflicts with their duties and responsibilities; a duty not to prefer their own interests or the interests of others to the interests of the state, or to make any undisclosed profit from their 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.

Breach of fiduciary duties can give rise to claims by the wronged principal (the state, in cases involving public officials). Theft of public assets and the taking of bribes would, of course, constitute breaches of fiduciary duty.

"Proprietary claims" and their importance

Where an official steals assets, for example by arranging for the transfer of public funds to his or her own accounts, the English position is clear. The official will be the legal owner of the funds, but those funds will be held by the official "on trust" for the state. The state has what is known as a "proprietary claim" to the funds.

The existence of a proprietary claim can be important for a number of reasons:

- Firstly, if the official becomes insolvent, all of the funds can be claimed by the state in preference to the claims of other (innocent) creditors.
- Secondly, if the funds are invested in assets that increase in value, such as property in a rising market, the state will be entitled to recover the entirety of those assets, therefore taking the benefit of the increase in value. In the absence of a proprietary claim, this would be more difficult, if available at all, because the increase in value is not itself usually a result of any wrongdoing.
- Thirdly, proprietary claims may bring more effective mechanisms to trace and recover funds that have been paid away.
- Fourthly, a claim by the state may be subject to less onerous rules requiring claims to be made within a certain period. And finally, the state may be able to obtain better rates of interest on sums awarded to it.

That can make a difference when bribes are substantial and uncovered only after a significant period of time.

What about bribes?

But what is the position in relation to a bribe? There is no doubt that the bribed official must pay the amount of the bribe to the state. But is that a purely “personal claim” for damages, or is it proprietary?

In *FHR European Ventures*, hotel owners engaged an agent to sell their hotel. That agent was also engaged by potential buyers. The owners agreed to pay the agent a fee of €10 million upon sale. The agent, acting for the buyers, then negotiated the sale of the hotel for €211.5 million. The agent did not adequately disclose to the buyers the fee that would be received from the hotel owners. That fee therefore amounted to a bribe in English law.

The issue was whether the buyers had a proprietary claim to the fee of €10 million that the agent had received from the owners. The Supreme Court decided unanimously that they did. The judgment was given by Lord Neuberger. The Court decided that:

- It is not in doubt that:
  - an agent owes a fiduciary duty to his principal;
  - this is because the agent has undertaken to act for or on behalf of his principal in a particular matter in circumstances which give rise to a relationship of trust and confidence;
  - as a result, the agent must not make a profit out of his trust, and must not place himself in a position in which his duty and his interest may conflict;
  - an agent who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty by putting himself in a position where his duty to one principal may conflict with his duty to the other.
- Where an agent acquires a benefit which came to his notice as a result of his fiduciary position, or pursuant to an opportunity which results from his fiduciary position, the general rule is that he is to be treated as having acquired the benefit on behalf of his principal.
- This means that “benefit” is “beneficially owned” by the principal, meaning it has a proprietary claim to it, or it can claim damages equal to the value of the benefit.
- There is no doubt that a principal can recover compensation for the receipt of a bribe, which will at least equal the amount of the briber.
- The dispute in the present case was whether a principal has a proprietary claim to a bribe obtained by an agent in breach of his fiduciary duty to his principal.
- It is not possible, as a matter of pure legal authority, to identify any plainly right or plainly wrong answer to this question.
- However, bribes undermine trust, and considerations of practicality and public policy support the case that a bribe or secret commission accepted by an agent is held on trust for his principal.
- This position was supported, taken as a whole, by the cases that had previously considered the question. Those cases reaching a different conclusion should be overruled.

The decision is consistent with the famous Privy Council decision of *Attorney General of Hong Kong v Reid* [1994] 1 AC 324 (PC) (New Zealand). Reid was a corrupt prosecutor. He took bribes from criminals to obstruct their prosecutions. However, he invested those bribes wisely, buying land that increased almost four-fold in value.

The Hong Kong Government successfully claimed that Reid held all of the land on trust for it, the Court famously stating that: “Bribery is an evil practice which threatens the foundation of civilised society”, and equating bribes with stolen assets. This meant that the Government recovered the bribes and the profits made from investing those bribes. The reasoning developed as follows:

- The bribe belongs to the official;
- But it is unconscionable for the official to receive, and keep, a benefit in breach of the duties owed to a state;
- As a result, the official must pay the bribe to the state;
- The bribe should have been paid on receipt;
- Equity considers “as done that which ought to be done”;
- On receipt, the bribe was therefore held by Reid on trust for the state.

Conclusion

The historical conflict was between a strict policy of ensuring that a bribe-taking official should be stripped of all the benefits that flow from the receipt of a bribe, and a strict but narrow application of the relevant conceptual principles. This issue has now been authoritatively and clearly settled by the Supreme Court. The decision that a bribe paid to a public official belongs to a state will strengthen the civil claims available to that state when it pursues the proceeds of corruption.