

## Bribery as Fraud

1. In criminal law bribery, although traditionally classified under generic conduct such as misconduct in a public office, has been regarded as a different species of offence from other offences of dishonesty such as conspiracy to defraud, theft and other obtaining offences.
2. The size of the sums of money which have been discovered to have been paid to corrupt rulers in the recent major international corruption investigations has caused criminal lawyers to think differently about this conduct.
3. A contract backed by a large bribe (sometimes as much as 100 % of the true contract price) is often as a matter of every day language a mechanism for 'theft' of public monies; for the obvious reason that the contract price is always increased to give sufficient money for the bribe to be paid. Criminal lawyers are now beginning to see the matter in a similar way and using the broad range of dishonesty offences in prosecutions involving bribery.
4. English civil law has analysed bribery in this way for over 100 years. There is not sufficient space here to analyse all the relevant cases, the following are examples.
5. There are a number of remedies available to a principal whose agent has been bribed and who wants to recover money. He or she may bring an action in restitution for money had and received (see generally **Arab Monetary Fund v Hashim** [1993] 1 Lloyd's Rep 543), in tort for fraud, deceit or conspiracy to injure by unlawful means (see generally **Daraydan Holdings Ltd v. Solland International Ltd** [2005] Ch 119 at paragraph 54) or in equity for breach of fiduciary duty (**Attorney General for Hong Kong v Reid** [1994] 1 AC 324 - this remedy will extend to any benefit obtained in the course of the fiduciary relationship: **Boardman v Phipps** [1967] 2 AC 46).
6. In **Hovenden v Milhoff** (1900) 83 LT 41 the Court of Appeal analysed a bribery case both from the point of view of the gain to the briber (restitutionary reasoning) and from the point of view of loss to the principal of the bribed agent (loss or damages reason). Lord Justice Smith said (p.42):

*"If a vendor bribes a purchaser's agent, of course the purchase money is backed by the amount of the bribe. It cannot be claimed. In this case the purchase money was £28,000 in which was included the £700 given to the purchaser's agent. Of course the vendor would have sold the goods for £ 28,000 less £700. Therefore he has in his pocket £700 money of the purchaser. That £700 he must disgorge"*

Lord Justice Romer said (p.43)

*"If the agent be a confidential buyer of goods for his principal from the briber, the court will assume as against the briber that the true price of the goods as between him and the purchaser"*

*must be taken to be less than the price paid to, or charged by, the vendor by, at any rate, the amount or value of the bribe. If the purchaser alleges loss or damage beyond this, he must prove it. As to the above assumption, we need not determine now whether it could in any case be rebutted. As at present advised, I think in the interests of morality, the assumption should be held an irrebutable one"*

7. In ***Mahesan v Malaysia Housing Society*** [1979] AC 374 Lord Diplock (in the Privy Council) quoted the above passage from Lord Justice Romer's judgment. However he did not appear to accept that the loss to the principal for the purposes of a damages claim could be assumed to be the amount of the bribe (p.382E and 383D). Instead he said that the amount of the bribe could be recovered as money had and received. The amount of loss or damage in tort having to be proved in the ordinary way.
8. In ***Arab Monetary Fund v Hashim*** (supra) Toulson J was a little ambiguous on the precise legal principles but still reasoned in the way I set out above, he said:

*"I respectfully agree with Mr. Justice Legatt's view in Anangel Atlas Campania Naviera SA v Ishikawhaina - Harima Heavy Industries Co. Ltd [1990] 1 Lloyd's Rep 167 that what Lord Diplock said does not detract from Lord Justice Romer's judgment. I hold therefore that in a case such as the present, where the employer has paid the contractor the full amount due under a contract which was induced by a bribe paid to the employers agent, the employer is entitled to recover the amount of the bribe from the contractor (on a restitutionary basis as distinct from a damages claim) and that the reason for the contractors liability is that he has received a greater sum than what was the true price between them and must restore the balance"*

(Although cf: Staughton J's comments in ***Armagas Ltd v Mundogas Ltd*** [1985] 1 Lloyd's Rep 1 at p.19 (on which Legatt J based his comments))

9. In ***Daraydan*** (supra) Lawrence Collins J appeared to take the same view as Romer LJ in ***Hovenden***, at paragraph 53 he said:

*"In proceedings against the payer of the bribe there is no need for the principal to prove: ... (d) that the principal suffered any loss or that the transaction was in some way unfair: the law is intended to operate as a deterrent against the giving of bribes, and it will be assumed that the true price of any goods bought by the principal was increased by at least the amount of the bribe, but any loss beyond the amount of the bribe itself must be proved".*

It is right to say, however, that in that case the evidence that the contract price had been inflated by the amount of the bribe was "overwhelming" (paragraph 89).

10. Finally, in ***Fyffes Group Ltd & Ors v Templeman*** [2000] 2 Lloyd's Rep 643 at 660 Evans J said:-

*"The issue which I have to decide at this stage is whether Fyffes have shown that they suffered any loss as a result of the payment of the secret commissions beyond the amount of the commissions themselves. There can be no dispute that Fyffes' loss amounts at least to the amount of the bribes, because they were taken into account by Seatrade in agreeing the amount of the freight for each year, which would have been correspondingly less for Fyffes if they had only had to pay the net sum which Seatrade were prepared to accept. The contentious question is whether Fyffes have established that they have suffered greater loss"*

11. Clark & Lindsell on Tort (19<sup>th</sup> Edition at para.18-52) conclude on the damages point, that:

*"There is a strong, though not conclusive, presumption that the amount of the bribe represents a loss to the principal, on the pragmatic basis that he would otherwise have benefited from it by way of discount or otherwise; in addition the principal can claim any further loss he may have suffered"*

## **Conclusion**

12. Analysing bribery in this way accords more closely with what happens as a matter of fact, particularly in cases of government corruption. It also provides an answer to some of the legal arguments which are raised in historic overseas bribery cases.

David O'Mahony (c) 2009  
Barrister, 7 Bedford Row