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Who Owns a Bribe? And Why Should You Care?


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Published annually, the Corruption Perception Index tells a sorry tale of corruption, kleptocracy, fraud, graft and cronyism. It shows, year-in year-out, African, Eastern European and Latin American countries struggling with endemic problems. Not even Nordic countries, with their strong public sector records of keeping corruption at bay, are free from corruption in the private sector. Transparency International's 2019 Report flagged the Fishrot Files (Iceland), Danske Bank (Denmark), and Ericsson (Sweden). Strikingly, these Nordic examples each involve trails of contracts and money stretching far beyond their Nordic origin into countries such as Djibouti, Namibia, Vietnam, Cyprus and the Marshall Islands.

Any significant international commercial venture is pregnant with the risk that the foreign business will get sucked into the mire of fraud and corruption. When bribes have been paid and received, the two main villains cast themselves – the briber and the bribee (is there such a word?) need no audition. But who to cast as the deserving victim? The company, the assets of which have been misapplied to pay the bribe? Or the state, whose politician or official has abused and exploited his position of influence by accepting the bribe?

This chapter focuses on one specific type of corruption – bribery – and analyses recovery issues through the lens of ownership. It does so principally by reference to English law, and offshore law to which it is so closely related. These sources of jurisprudence are also highly relevant when considering the law in Anglophone African states.

No Remedial Trusts Under English Law

Under these systems of law, analysing ownership of a bribe is more important than it usually is, for example, under US, Australian and Canadian law. Unlike those systems, English law does not recognise the concept of the remedial constructive trust – a trust imposed by way of discretionary judicial remedy. In remedial trust jurisdictions, the judicial imposition of a constructive trust confers ownership on a claimant who, pre-judgment, was no owner at all. This remedy therefore operates retrospectively.

Remedial Trust – a US-based Example

A good example of the remedial constructive trust from our experience arose in the Chevron-Ecuador-Donziger litigation. Following the discovery of corrupt practices in litigation brought against it in Ecuador, Chevron brought a Racketeer Influenced and Corrupt Organizations Act (RICO) claim – a civil claim, not criminal proceedings – against the instigator in the US courts. The judge held that Mr. Donziger had set up a dishonest scheme to secure a massive award of damages against Chevron. His plan was to syphon the damages into a Gibraltar company, and then distribute the proceeds to various interested parties. The remedies granted at the conclusion of the RICO trial included the imposition of a remedial constructive trust over Donziger's shares in favour of Chevron. The trust arose not by prior operation of law, but solely by virtue of judicial order. As a consequence of this order, Donziger was obliged to sign over title to the shares to Chevron.

This could not happen under English law. English law only recognises institutional trusts, which arise by operation of law from the date of the circumstances giving rise to it. In some respects, under English law, the search is for a root of title much as would be the case in a property transaction in which the vendor demonstrates his ownership of the property he is selling. In asset recovery or defence under English and associated legal systems, ownership via an institutional constructive trust is a more pressing and relevant issue than elsewhere in the common law world.

So, a provisional answer to the question *"who cares about ownership of a bribe?"* is: anyone operating in the realm of institutional rather than remedial trusts. Although of vital importance in English law, it is still relevant in the US and other remedial trusts jurisdictions because the institutional trust sits alongside the remedial trust and criminal forfeiture powers in the jurisprudential gun-rack.

With that in mind, let's look at a relatively common scenario from the shadowy world of corruption.

A Typical Scenario

Suppose a company executive bribes a senior politician or official. The politician or official invests the money in property and shares in a "rule of law" (i.e. reputable) jurisdiction. The politician's investments prosper. A new government chases down the exiled politician's assets, and asserts ownership rights through a proprietary claim over those assets, including the investments that had been seeded by the bribes. Under English law, there is a well-established basis for this assertion of ownership rights.

The Victim-State's Claim to Ownership

On one view, of course, the victim-state has not *directly* lost anything as a result of a bribe being paid to a corrupt senior politician or official. *Indirectly*, however, it can clearly be said that the victim-state did not receive full value for (say) the contractual concession that was granted as a result of the bribe which was paid.

This requires a little further analysis, but it lies at the heart of English (and offshore) law relating to bribes. If I pay $1 million dollars as a bribe to secure the right to buy oil for $100 million, in reality I was actually prepared to pay $101 million for that oil. The seller has been short-changed by $1 million as a

consequence of the corrupt way in which the transaction was executed. The recipient of the bribe should have handed those monies over to his principal. The recipient of the bribe has profited from his position, and should not be allowed to retain the money. As Lord Millet said, commenting on the old case of *Morison v. Thompson*,[1] *"where…a fiduciary…takes advantage of his position to make a profit for himself, the profit is the property of the principal"*.[2] Subject to any issues regarding the precise scope of fiduciary duties arising under the laws of the victim-state, it might be thought obvious that a senior politician, holding the power to grant a valuable contract to a third party, owed fiduciary duties to that victim-state.

And this ownership argument has subsequently been endorsed by the English Supreme Court in *FHR European Ventures LLP v. Cedar Capital Partners LLC*,[3] which authoritatively decided that unauthorised profits made by a fiduciary are held on trust for his principal.

"Show Me *All* the Money"

Usually, there is a time-lag between the receipt of the bribe by the corrupt politician or official and the discovery of the corrupt transaction. In that time, the bribe may have been invested. The benefits of an ownership claim which accrue to the victim-state can extend beyond the amount of the bribe. In the example given earlier in this chapter, our corrupt senior politician invested his ill-gotten gains shrewdly, and those investments prospered. Is the victim-state limited in its ownership claims to the amount of company used to bribe the politician, or can its claims go further?

In modern times, it was the courts of Hong Kong that first answered this question, delivering an unequivocal "yes" to a question which arose from facts worryingly close to their home. Mr. Reid, the head of the commercial crime unit responsible for enforcing Hong Kong's bribery laws, was convicted… of taking bribes. He had invested those bribes in certain assets, and the Attorney-General claimed on behalf of the Crown that those assets (real estate) were held on constructive trust in favour of the Crown. In a divergence from old English case law, this argument prevailed in Hong Kong. It took a number of years of judicial agonising in the courts of England before the old case law was given a decent burial by the Supreme Court in England.[4] If bribes have been invested successfully, the recipient must not only pay over the bribes themselves but assets derived from those bribes.

Crowbarring the Cronies – Not Necessarily Double-Recovery

Moreover, if bribes have been funnelled by the corrupt recipient into the hands of his cronies, ownership rights against the corrupt recipient can be coupled with compensatory rights against the cronies – without the need to give credit to the original recipient of the bribe for sums recovered from the cronies. By electing compensatory rather than restitutionary remedies against the cronies, the victim-state can broaden the recovery landscape. The remedy for dishonest assistance in a breach of fiduciary duty is compensatory, not restitutionary. If the crony is held liable as a dishonest assistant, and pays compensation, then the sums recovered on this compensatory basis do not diminish the size of the restitutionary claim that can be pursued against the corrupt recipient of the bribes.

This was very recently illustrated by the decision of the Court of Appeal in *Marino v. FM Capital Partners*.[5] Along with another director, the corrupt director of a company had, amongst other things, received and paid bribes. The company's claims against the other director were settled, and the company received the settlement sum from the other director. The company nevertheless refused to deduct those recoveries from its claim against the corrupt director. The Court of Appeal upheld the company's position, with Sir Jack Beatson concluding that:

> *"…because claims against a particular defendant for restitution of bribe moneys are not concerned with loss to the claimant, the claimant's recoveries from third parties do not affect the particular defendant's liability to make restitution of the bribes received by that defendant or to account for any profits made."*

Disclaiming Ownership Rights – a Victim-State's Option

All of these considerations can make it attractive to a victim-state to assert ownership rights where a senior official or politician has received bribes. But it may be more attractive for the victim-state *not* to pursue its ownership rights. Successfully asserting ownership of assets currently held by third parties could expose the victim-state to the risk of garnishee or receivership attacks from all manner of creditors of the victim-state.

This might weigh heavily with the victim-state, not only in civil claims against the corrupt official or politician, but also when deciding whether to invite and how to respond to forfeiture proceedings brought by the host state. If the assets are identified as being located in a state with which the victim-state has a mutual legal assistance treaty (MLAT), the victim-state could invoke the MLAT and ask the host state to secure forfeiture of the assets and their repatriation. The victim-state may also enter into an *ad hoc* agreement with the host state for the repatriation of forfeited assets, as occurred in the recoveries made by Malaysia from the US government in the 1 MDB case. Moreover, under US criminal forfeiture law, if a forfeiture order is made, the government's ownership will relate back to the moment of the first overt criminal act. In addition, intermediate transactions may be voided under this relation back doctrine if forfeitable property has been transferred to third parties. A forfeiture order entered by a US criminal court will wipe the prior ownership slate clean, and declare that the property belongs to the US Government.

Oftentimes, an MLAT process which involves forfeiture proceedings will ultimately include an agreement between the host and victim-states under which the assets are divided between the two of them, and a share of the assets is repatriated to the victim-state. A characteristic term of a "purse-sharing" agreement is one which excludes any third-party rights. So, from the perspective of the victim-state, splitting the spoils with the host state will wipe out its ownership and produce a recovery of only part of what it previously owned.

On the other hand, a victim-state glancing anxiously at a queue of creditors might decide that disavowing ownership rights and recovering only a proportion of the assets be a better outcome than making a 100% recovery from the corrupt politician, only to see the benefit of that victory snatched away by third-party creditors.

Accordingly, in some circumstances, from the perspective of the victim-state, the capacity to exclude any third-party rights by means of a purse-sharing agreement with the host-state can be a very attractive feature. And there have been examples of a victim-state initially opposing the host nation's forfeiture proceedings, arguing that it is the true owner of 100% of the assets in question, and then flip-flopping – conceding the forfeiture, allowing the host state to secure title to the assets under the forfeiture proceedings, and negotiating a repatriation agreement with the host state. Half a sixpence is better than no sixpence.

The Victim-Company's Claim to Ownership

So far, this chapter has looked at ownership issues from the perspective of the victim-state. However, there can be a very different narrative and a competing legal analysis when viewed through the lens of the company whose money was used to bribe the politician or official.

If the company can properly be said to have known and approved of the corrupt transaction, then obviously the company can make no claims against the assets, whether in pursuit of ownership rights or otherwise. In that instance it is a perpetrator-company. But quite often, the executive who agreed to pay the bribe, and who caused the bribe to be paid, was acting covertly and without the knowledge or approval of the company. The company can credibly say that it knew nothing about the corrupt scheme or its execution. In this alternative scenario, the company can fairly describe itself as a victim-company. The victim-company can argue that its assets have been pillaged and misapplied. Can a victim-company argue that the bribe amounts to the misappropriation and misapplication of its assets? If so, might there be a seat at the ownership table for the victim-company?

If ownership rights can be asserted by a victim-company, they can be very valuable, not only in English and associated systems of law, but also in the context of US criminal forfeiture proceedings. This is because, despite the powerful tools of criminal forfeiture, the US courts have increasingly recognised the constructive trust as a pre-existing beneficial interest in property that can trump forfeiture claims brought by the government. In a recent decision, the interest of a beneficiary of a constructive trust and the government's in bribe payments arose at the same time. The 2nd Circuit decided that the beneficiary's interest defeated the government's claim under the relation back doctrine.[6] There are limits to Uncle Sam's long and strong forfeiture arm.

US federal law has an embedded choice of law relevant to the victim-company's position. In order to determine whether the victim-company has a valid ownership right, the court must first look to the law of the jurisdiction which is said to provide the origin of that ownership.[7] So, whether the ownership card played by the victim is indeed a trump card in US forfeiture proceedings may depend on whether those ownership rights validly exist under the law of England or any other foreign jurisdiction where the ownership interest or constructive trust has arisen.

One procedural route which the victim-company may choose to assert any ownership rights is to intervene in the forfeiture proceedings. Alternatively, the victim-company could take its own proceedings against the corrupt politician or official in the host state, and set up a competing claim to ownership of the assets. This is a difficult course for the victim-company to navigate, if only because it requires the company to keep on top of the way in which the host state and the victim-state are proceeding towards forfeiture. Timing will likely be critical. If the victim-company moves too slowly, it may find that the forfeiture door has already been slammed shut, conferring title to the assets on the host state. But if it can act nimbly, there is a legal analysis which could command a seat at the ownership table. It is possible to see this by building the argument in steps.

The Building Blocks of the Victim-Company's Claim

When the individual briber uses victim-company money to pay the bribe, he commits a breach of fiduciary duty. He is liable to the victim-company, even though the briber may truthfully say that the contract he was winning benefitted the victim-company. Under English law, a victim-company can indeed assert rights where its assets have been used for the purposes of bribery. In *E. Hannibal & Co Ltd v. Frost*,[8] the bribe-paying managing director was successfully sued by the paying company, and his defence that he was paying bribes to secure orders for the benefit of that company was rejected. Although there are complicated issues regarding compensatory remedies in this situation, the case itself serves to demonstrate clearly that the victim-company can indeed be regarded by the courts as a victim.

Once the bribe is in the hands of the corrupt recipient, the victim-company has a claim against him. Company money corruptly passed by a dishonest executive into the hands of a politician can be subject to proprietary remedies. It can be said to represent *"…the fruits of fraud, theft or breach of fiduciary duty"*, which are the characteristics which *"…must be shown to establish a constructive trust…"*.[9] The recipient of the bribe would be liable to the victim-company for *"knowing receipt"* of the bribe. This type of equitable liability – quite different from dishonest assistance in a breach of fiduciary duty – requires proof of the following ingredients: (a) disposal of assets in breach of fiduciary duty; (b) the beneficial receipt of those assets; and (c) knowledge on the part of the recipient that the assets are traceable to a breach of fiduciary duty.[10] Once the recipient is shown to be liable for knowing receipt, he will be treated as holding the monies on trust for the victim-company.[11]

Who Owes Fiduciary Duties? Not Just Office-Holders

It is not usually problematic to classify the briber as someone owing fiduciary duties to the victim. It is now well-established in English and offshore law that those owing fiduciary duties to a company are not just the directors or office-holders, but will include almost any individual who by virtue of his employment contract (including his job specification) is placed in a position of trust with regard to a specific matter. As Lord Justice Fletcher-Moulton quaintly observed in an Edwardian case, even an errand boy is obliged to bring back my change, and *"…is in fiduciary relations with me"*.[12] Fiduciary duties arise out of and are circumscribed by the contract under which an individual is engaged, and not solely by his status.[13] Once it is established that the briber owed fiduciary duties, and that the payment was in the nature of a bribe, the recipient is bang to rights for knowing receipt, with the consequence that the victim-company has established a constructive trust over the assets.

Now the victim-company can attempt to harness the jurisprudence that allows ownership rights to extend to the fruits of the recipient's investments. *"I want my money back and I claim ownership of all the investments bought with my money."*

Evaluating the Competing Ownership Claims of Victim-State and Victim-Company

An arm-wrestling match between a victim-state and a victim-company is subject to numerous legal cross-currents. It can fairly be said that the victim-company was the first owner, and the first victim of misconduct – effectively, the fiduciary paying the bribe has stolen company assets, so why should a victim-state take ownership over the prior claims of the victim-company? On the other hand, it can also be argued that the victim-company should be held vicariously liable for the misconduct of its fiduciary, so why should the victim-company be allowed to disavow the acts of its fiduciary so as to assert a claim to ownership?

The common law doctrine of vicarious liability is not an easy fit with ownership arising under the equitable concept of constructive trusts. And in some circumstances, the law does allow a company to disavow the acts of its dishonest fiduciaries. In the context of litigation between a company and its fraudulent directors, the English Supreme Court held that the illegal conduct of the senior executives need not be treated as that of the company of which they were directors. As Lord Neuberger stated:

> *"Where a company has been the victim of wrong-doing by its directors, or of which its directors had notice, then the wrong-doing, or knowledge, of the directors cannot be attributed to the company as a defence to a claim brought against the directors by the company's liquidator, in the name of the company and/or on behalf of its creditors, for the loss suffered by the company as a result of the wrong-doing, even where the directors were the only directors and shareholders of the company, and even though the wrong-doing or knowledge of the directors may be attributed to the company in many other types of proceedings."*[14]

The other side of the coin is the decision of the Court of Appeal in *Hamlyn v. John Houston*,[15] in which it was held that the employer of an individual who paid a bribe was vicariously liable to the employer of the recipient for any damage caused by the corrupt course of conduct. However, the issue before the court was not one of ownership, but of liability to pay compensatory damages, so it is hard to conclude that it would represent the decisive argument in favour of a victim-state in an ownership tussle with a victim-company.

Moreover, the narrow focus of this chapter, concentrating on the proprietary issue, excludes the position of other third-party victims. The most obvious example is the company that unsuccessfully bids for a contract that was corruptly awarded to the victim-company on the back of a bribe. These third parties can have the capacity to put a spoke in the wheel of both victim-state and victim-company, for example by bringing civil RICO claims.

Not the Final Word

The final section in most chapters is usually headed "Conclusion". Not in this chapter. The preceding discussion makes plain why it would be over-ambitious to describe the last section of this chapter as a conclusion. Instead, it is safer to circle back to the title of the chapter and simply say – *"So, who **does** own a bribe?"*

Endnotes

1. (1874) LR 9 QB 480.
2. "Bribes and Secret Commissions Again" (2012) CLJ 583.
3. [2014] 3 WLR 535.
4. *FHR European Ventures v. Cedar Capital Partners LP*; see endnote 3 above.
5. [2020] EWCA Civ 245.
6. *Federal Insurance Company v. United States*, 882 F.3d 348 (2nd Cir. 2018).
7. *United States v. Ramunno*, 599 F.3d 1269, 1273-74 (11th Cir. 2010).
8. [1988] 4 BCC 3.
9. *Bailey v. Angove's Pty Ltd* [2016] UKSC Civ 47, per Lord Sumption at paragraph 30.
10. *El Ajou v. Dollar Holdings* [1994] 2 All ER 685 at page 700, endorsed by the Privy Council in *Arthur v. Attorney General of the Turks & Caicos Islands* [2012] UKPC 30 at paragraph 32.
11. *Arthur v. Attorney-Genral of the Turks & Caicos Islands* [2012] UKPC 30 at paragraph 37.
12. *In re Coomber* [1911] 1 Ch 723.
13. *Customer Systems v. Ranson* [2012] IRLR 769; *Helmet Integrated Systems v. Tunnard* [2007] FSR 16; *University of Nottingham v. Fishel* [2000] ICR 462.
14. *Jetivia SA and another v. Bilta (UK) Ltd (in liquidation) and others* [2015] UKSC 23.
15. [1903] 1 KB 81.

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