Bribes: Legal Ramifications and Remedies

Introduction

Bribery is an insidious practice that continues to pervade our system of trade and commerce. The term itself is deceptively simple, and provokes images of clandestine meetings and the exchange of briefcases of cash. The law surrounding bribes however has not always been clear. What can amount to a bribe? What are its legal ramifications on the parties involved, businesses and third parties? What are the remedies available to affected victims?

In this Client Update, we look at bribes from both the civil and criminal perspective, as well as the options available for affected parties seeking to enforce their rights. We also take a look at recent developments in the law of bribery in Singapore and the UK.

What is a Bribe?

A bribe exists in many forms, and need not be monetary in nature.

From a criminal perspective, any gratification made or given with corrupt or dishonest intent may be considered a bribe under the Prevention of Corruption Act (“PCA”). Gratification may include money, a gift, security, or other property. It may also include any office, employment, or contract, as well as any other service or advantage. Generally, there must also be a causal link between the gratification and the act it was intended to procure or reward.

A recent spate of high-profile prosecutions in Singapore have highlighted that the authorities are prepared to investigate into and pursue cases beyond the traditional domain of monetary bribes. For instance, in the cases of Public Prosecutor v Peter Benedict Lim Sin Pang [2013] SGDC 192 and Public Prosecutor v Tey Tsun Hang [2013] SGDC 165, corruption charges were brought against the accused for obtaining bribes in the form sexual gratification.

The key element in any criminal prosecution for corruption however remains that of a corrupt or dishonest intent. In Public Prosecutor v Tey Tsun Hang [2013] SGDC 165, the conviction by the trial judge was overturned on appeal by the High Court in Tey Tsun Hang v Public Prosecutor [2014] 2 SLR 1189 as the High Court held that there was no objective corrupt intent.

From a civil perspective, bribes are commonly referred to as secret commissions, and may attract civil liabilities independent of any criminal prosecution. The main difference is that a party may be liable for receiving secret commissions even without any corrupt or dishonest intent, so long as these secret commissions were received in breach of fiduciary duties, such as those owed by a director, employee or an agent.

It is a strict rule of equity that a fiduciary may not earn or receive any benefit (including monies, profits or opportunities) in the course of his duty without the informed consent of his principal. As such, if you are an agent or employ or deal with agents in the course of your business, it is important to evaluate all remuneration and commission arrangements and to ensure adequate disclosure of the same to the relevant principal. Otherwise, you may be liable to the principal for such remuneration and commission received.
Criminal Penalties

Under the PCA, the giving of a bribe may result in a fine of up to S$100,000 and imprisonment for up to 5 years. Similarly, receiving a bribe is also an offence, carrying an equal penalty to the giving of a bribe. The recipient of a bribe is also liable to pay as penalty, a sum which is equal to the amount or value of gratification received.

Bribery which relates to a contract with the Government or any of its departments, or any public body, is considered especially serious, and carries an enhanced maximum imprisonment of 7 years. The same applies to bribes offered to or received by a Member of Parliament or a member of a public body for the corrupt exercise of their powers.

Civil Remedies

A principal may recover secret commissions received by its agent. In certain circumstances, the principal may also seek equitable compensation from the briber directly.

The options available to the principal to recover secret commissions received by the agent would depend significantly on the nature of the claim. In Singapore, it has been firmly established in the Court of Appeal decision in Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina) [1994] 3 SLR(Rev) 312 (“Pertamina”) that such a claim would be proprietary in nature. This has two important advantages. First, it effectively allows the principal priority over the agent’s unsecured creditors in the event of the agent’s insolvency. Second, it allows the principal to trace and follow the secret commissions in equity (to third parties and to profits made).

Controversy in this area however arose from a 2012 decision of the UK Court of Appeal in Sinclair Investments v Versailles Trade Finance Ltd [2011] EWCA Civ 347 (CA) (“Sinclair”), where the English Court of Appeal held that the nature of a claim by a principal to recover secret commissions received by an agent was personal in nature, and not proprietary. The impact and controversy arising from Sinclair had been covered in our earlier Clients updates, which you may access here and here.

A recent decision of the UK Supreme Court in FHR Europe Venture LLP v Cedar Capital Partners LLC [2014] UKSC 45 (“FHR Europe”) has brought welcome clarification and certainty in this controversial area of law. In FHR Europe, the agent for the purchaser of a hotel accepted a secret commission from the seller in the transaction. The issue before the UK Supreme Court was whether such a claim was proprietary or personal in nature.

The UK Supreme Court acknowledged that there has been inconsistent judicial decisions on this issue over the past 200 years, and the decision in Sinclair had generated a great deal of recent academic controversy. At the same time, the determination of such a technical sounding question had significant impact on the remedies available to the principal.

Upon a thorough consideration of decided cases, legal principles, policies and practicalities, the UK Supreme Court held in favour of a more robust approach against the bribes and secret commissions, and held that such claims would be proprietary in nature. The UK Supreme Court in FHR Europe therefore overruled the decision in Sinclair, and aligned the UK position with that of the Singapore Court in Pertamina as well as other Commonwealth jurisdictions in Australia, New Zealand and Canada.

Concluding Words

Bribery is an ever increasing problem that plagues and undermines trust in the commercial world.

There are many weaponries available to an affected principal legally to combat bribery and commercial malpractice, and has grown increasingly so with the affirmation of the UK Supreme Court in FHR Europe of its proprietary nature. It is important that you are fully aware of the full legal arsenal at your disposal.
At the same time, it is equally important that one is aware of the full legal ramifications of various arrangements made in the course of one’s business and their impact. Companies should familiarise themselves with what constitutes a bribe, and how to maneuver their business practices away from such practice.

Parties wishing to consult on issues of bribery, corruption, and other corporate malpractice may contact Rajah & Tann’s Commercial Litigation and White Collar Crime Practices below.

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