

Clarification in Jersey on the law relating to bribery and constructive trusteeship

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A recent decision of the Royal Court, Lloyds Trust Co (CI) Limited v. Fragoso [2013] JRC 211, has clarified the basis upon which professional trustees hold trust assets that ultimately derive from the proceeds of bribes received by the Settlor. It provides welcome guidance in an area which, by its nature, is important and sensitive.

Background

The Trust in question was established in 1999. The Settlor, Mr Carlos Fragoso, told the Trustee, Lloyds, that the monies settled into the Trust were the proceeds of engineering consultancy contracts. They were not. They were the proceeds of bribes paid by the English construction company, Mabey & Johnson, to Mr Fragoso in his capacity as an important civil servant in Mozambique. Lloyds did not know that Mr Fragoso held this position.

The true origin of the monies emerged in 2010 following Mabey & Johnson's conviction in England for paying bribes in Ghana and Jamaica. Following an investigation, it was revealed that Mabey & Johnson had also paid over a quarter of a million pounds into a Swiss bank account relating to Mr Fragoso. In addition, it transpired that Mr Fragoso had been the national director of the National Directorate of Roads and Bridges in Mozambique, and had been responsible for concluding a multitude of construction contracts. Mabey & Johnson accepted that corrupt payments had been made in Mozambique, despite no formal criminal charges being brought in relation to that jurisdiction.

Having subsequently been approached by Lloyds, Mr Fragoso failed to explain the situation adequately apart from denying that the monies were derived from bribes. Lloyds applied to the

Royal Court for directions pursuant to Article 51 of the Trusts (Jersey) Law 1984 (as amended).

Mr Fragoso's stance was held by the Royal Court to be demonstrably untrue. The factors important to the Royal Court in reaching this conclusion were as follows:

- that Mr Fragoso lied to Lloyds about his occupation and source of wealth;
- that there was documentary evidence of bribes;
- that Mr Fragoso attempted to stop his family being made aware of the Trust;
- that Mr Fragoso failed to provide any subsequent legitimate explanation.

The Royal Court accepted that it was impossible to trace the exact origin of all of the monies settled into the Trust. However, it applied earlier case law (Federal Republic of Brazil v. Durant [2012] JRC 211) which said that in matters of fraud, where direct evidence is often hard to come by, it was permissible to accept "*inferences of fact drawn from positive evidence of other facts*". In light of this principle, and the factors mentioned above, the Court inferred, on a balance of probabilities, that all of the monies settled into the Trust represented the proceeds of bribes.

Constructive Trusts

Having reached this conclusion, the Royal Court then considered the capacity in which Lloyds held the Trust fund. The Royal Court had to consider two inconsistent lines of previous authority:

- a decision of the Privy Council, on appeal from the New Zealand court (Attorney General for Hong Kong v. Reid [1993] UKPC 2) ("**Reid**"), which held, in particular, held that the recipient of a bribe received the money in breach of duty (for example, duties owed to a third party such as an employer if the bribe was designed to influence the exercise of powers arising pursuant to a contract of employment). Therefore, the recipient held the money as constructive trustee for the third party to whom he/she owed the duty. The constructive trust operated from the moment the bribe was received. This meant that the recipient was under a duty to account to the third party not only for the nominal value of the bribe but also for any profit or increase in value (for example because it had been invested). If the property representing the bribe decreased in value then the recipient was obliged to make up the difference because he/she should not have incurred the risk of loss;
- a decision of the English Court of Appeal (Sinclair Investments Ltd v. Versailles Trade Finance Ltd [2011] EWCA 347) ("**Sinclair**") which declined to follow Reid, applying an earlier line of English Court of Appeal decisions that it felt bound to follow. In essence, Sinclair held that there was no constructive trust relationship between the recipient and the third party, only that of debtor/creditor.

The Royal Court chose to apply the principles derived from Reid (i.e. that a constructive trust should arise) over and above the competing principles derived from Sinclair. It held that there were strong policy reasons for doing so, *"namely the need to deter fraud and corruption"* and to strip recipients who had channelled their ill-gotten gains through Jersey of all benefits.

Unlike the English Court of Appeal in Sinclair, the Jersey Royal Court was unconstrained by the operation of binding judicial precedent. Whereas the English law position would require the intervention of the Supreme Court or legislature for a recalibration to take place (despite a positive acceptance in a recent English decision that Sinclair was *"unusual"* and *"controversial"* and that this area of law required *"an overhaul...to provide a coherent and logical framework"*), the Jersey position was more flexible. Absent a ruling of the Privy Council on appeal directly from Jersey, other decisions (including English decisions and rulings of the Privy Council on appeal from other jurisdictions) were at best persuasive. The degree of persuasiveness could include social and policy considerations particular to Jersey.

Therefore, on a natural extrapolation of the Reid principle, the Royal Court held that Lloyds was holding the trust fund, net of any legitimate costs, upon constructive trust for the Government of Mozambique who was the party to whom Mr Fergoso owed duties which he had breached by taking bribes in his official capacity. That declaration having been made, the monies no longer represented the proceeds of crime and could be paid to the Government of Mozambique without further delay.

Summary and conclusions

For professional trustees, the relevance of the decision is as follows:

- if a professional trustee becomes aware that a trust fund is likely to represent the proceeds of bribery, then it should consider applying to the Royal Court for directions. The Royal Court has shown itself as willing to help professional trustees who find themselves in such difficult circumstances. The decision about how to proceed does not have to be taken alone;
- the professional trustee should also consider its obligations under proceeds of crime legislation, including the filing of Suspicious Activity Reports;
- conclusive evidence, beyond all reasonable doubt, that the trust fund is tainted is not required. The relevant test is whether it is likely to be tainted on the balance of probabilities. The Court recognises the difficulties often inherent in tracing the proceeds of crime and is prepared to infer fraud if necessary. This should inform the stance of the professional trustee at the outset when it is considering the evidence;
- once fraud has been established, the recipient of the bribe will be treated as a constructive trustee from the moment the bribe was received. The important point is that the recipient of the bribe should be precluded from any gain associated with, or arising out of, the bribe;

- it follows that the professional trustee is also a constructive trustee. Common sense dictates, therefore, that a professional trustee should take steps to address the issue immediately upon becoming aware of it to negate the potential for any criticism;
- the Royal Court is unconstrained by judicial precedent in the same way as the English Courts. This means that the Royal Court can act commercially and sensibly, taking into account important matters of policy in the decisions that it reaches. Decisions of the English Courts are often persuasive, as it has demonstrated on a number of previous occasions, but the Royal Court is willing to forge its own path if necessary. This should act not only as comfort to those already operating within Jersey, but also as encouragement to others in choosing Jersey as a place to do business.

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