Consent of the principal: effect under the Bribery Act 2010

The Court of Appeal has lately ruled on whether the prosecution, in bringing a case under section 1 of the Prevention of Corruption Act 1906, must prove that a principal consented to their agent giving or receiving a bribe. ***Katherine Buckle*** *of QEB Hollis Whiteman and* ***Vedrana Pehar*** *of 2 Bedford Row study the decisions and how they bear on proceedings brought under the Bribery Act 2010.*

A number of recent high profile cases have considered the issue of whether, in a prosecution under *section 1* of the *Prevention of Corruption Act 1906*, the prosecution is obliged to prove that the 'principal' did not consent to the giving to, or the acceptance by, his agent of a bribe. The debate was resolved in December last year, when the Court of Appeal, in *R v J, B, V and S* [2013] EWCA Crim 2287, concluded that the prosecution need not prove the absence of the principal's consent. That is not to say that 'consent' has no role at all to play – it may, in the case of a commercial agent and in circumstances envisaged by the Court of Appeal as being out of the ordinary, be relevant to the jury's determination of whether the payment was or was not made or received corruptly. The 1906 Act was repealed on 1 July 2011 and replaced by the *Bribery Act 2010*. With the introduction of the *Bribery Act 2010*, does consent of the principal still have a role to play in defending a charge of bribery?

While having been debated in the political sphere and considered in cases abroad, the concept of consent of the principal was first raised in this jurisdiction prior to *R v J, B, V and S* in the case of *R v D* [unreported], which came to an end in December 2013. The Serious Fraud Office (SFO) alleged that D had paid approximately US$67 million in bribes between 1998 and 2006 to former managers of Aluminium Bahrain (Alba), the world's fourth-largest aluminium smelter, in return for a cut of contracts worth over US$3 billion. The case involved allegations of corruption at senior levels of government and business in Bahrain, a sensitive issue at a time of political unrest in the secretive Gulf kingdom. The defendant's answer to the allegation was that he had the principal's consent; on his case, government officials and the CEO of Alba were aware of and authorised the payments. Legal argument followed about whether the principal's consent was a defence in law in England and Wales.

The defence contended that, on a proper construction of *section 1* of the *Prevention of Corruption Act 1906*, the consent of the agent's principal was a complete answer to the charge and had to be disproved before the prosecution could succeed.

An issue for the judge at first instance was whether the word "secrecy" could be read into *section 1* as a necessary ingredient of the offence. The element of secrecy is not found in the wording of the 1906 Act, nor was there prior authority in English criminal law which supported its inclusion. The judge concluded that, on an analysis of the history of the 1906 Act, the secrecy of these payments was the wrong at which the offence was to be aimed. To his mind, there could be little dispute that it was the betrayal of trust in a principal/agent relationship which was at the heart of the offence and, therefore, the element of secrecy was an essential ingredient to the offence of corruption under the 1906 Act and inherent in the word "corruptly". It was thus for the prosecution to prove that the defendant's principal did not know of or consent to the relevant payments. The identity of the principal, the judge held, was a matter for the jury. He ruled that it was clear that international obligations were not in the mind of the legislators in 1906 nor were the sort of complications that can arise when trading in some foreign jurisdictions in the present day; those were addressed in the *Bribery Act 2010*. He held that the SFO were seeking to read those obligations into the pre-existing statute.

The judge gave great weight to the Commonwealth authorities that were drawn to his attention, in particular *R v Kelly* [1992] 2 SCR 170 and *C v Johnson* [1997] SASR 279. It was clear that in Commonwealth jurisdictions the secrecy element was essential. Further, it was noted that the Attorney General Lord Goldsmith in 2007 appeared to have accepted advice, which was not from the SFO, that "our corruption law does not allow us ultimately to pursue a corruption case if the principal has approved".

It was hardly surprising, therefore, that the Organisation for Economic Cooperation and Development (OECD) reported in 2008: "Whether principal consent is a valid defence in UK law may not be entirely clear. What is clear is that the defence may become a basis for terminating foreign bribery investigations and prosecutions. The UK should therefore promptly amend the law to expressly clarify that the defence does not exist with regard to foreign bribery."

The SFO was unable to challenge the ruling in *R v D*; however, it was afforded the opportunity to do vicariously in the case of *R v J, B, V and S* (an ongoing prosecution). In that case, the defendants are charged with making corrupt payments to agents of the tax

authorities of a state in the Commonwealth as an inducement to show favours to a company in relation to the calculation of tax owed by that company. The matter fell to be determined by the judge who had ruled on this very issue in *R v D*. He again ruled that it was necessary for the prosecution to prove that the agents of the tax authorities did not have the consent of the tax authorities, as their employer or principal, to receive the sum of money or other consideration.

In its judgment, the Court of Appeal made clear it was not concerned with the correctness of the judge's ruling in *R v D*, as there was no appeal in relation to that case. Instead, counsel for D were permitted to intervene in the appeal to assist the court in relation to any issues that might affect that case.

At appeal, the prosecution contended that it had to prove the defendant was an agent, that he accepted the consideration, that this was for the prohibited purpose and that it was done corruptly. It was for the jury, looking at all the facts, to determine whether the payment or other advantage made or accepted was made "corruptly". It was not necessary to show that it was contrary to the interests of his principal or that the payment had been made without the knowledge and consent of the principal.

The defendants argued that the word "corruptly" connotes secrecy. As the 1906 Act had been formulated in terms of "principal" and "agent", it must follow that a payment could not be secret if it was made with the knowledge and consent of the principal. Thus it must be for the prosecution to prove, as part of its case, the specific ingredient of lack of knowledge or informed consent by the principal.

The court examined the judge's conclusion at first instance in the matter of *R v D* that secrecy was an essential element in this offence and must be inherent in the word "corruptly". In short, was it necessary for the prosecution to prove that the defendant's principal did not know or consent to the relevant purpose? In doing so, the court examined first the language of the 1906 Act, second whether there was anything that could be derived from the Act that showed this ingredient was inherent in the word "corruptly" and lastly other material and the Commonwealth authorities.

The court determined that there was no requirement that the prosecution specifically prove the lack of knowledge and informed consent of the principal separately. The court held that the reason why Parliament did not make that a separate ingredient and why such an ingredient cannot be implied was because the 1906 Act expressly included in the definition of an agent a person serving under the Crown or a local authority. Although the informed consent of the principal after full disclosure would in the case of a commercial agent usually mean that the payment was not made corruptly, it would not be a defence that someone in the government department or local authority had knowledge of a payment to its employee or agent by another party for the prohibited purpose and purported to consent to it. The court held that such a payment cannot be authorised if it is made for the prohibited purpose.

The Court clarified that, rather than being a defence to a charge of corruption, the principal's consent is a limitation on the application of the offence. The court's decision moved consent of the principal away from the agency context. While the informed consent of the actual principal (after full disclosure) might be relevant in cases relating to commercial agents, it is not relevant to those in public service in the UK or any other constitutional democracy. It therefore cannot be implied or inherent in the 1906 Act that the prosecution has to prove that the principal did not know of and did not consent to the payment.

The court held that, in determining whether the payment was made corruptly in the case of transactions between commercial agents and principals, any evidence relating to what was disclosed to the principal and what the principal knew and any informed consent may be highly material to the issue of whether they acted corruptly. This issue, along with the identity of the principal, is a matter for the jury.

As consent of the principal may be applicable to the issue of whether a payment was "corrupt" under the 1906 Act, it is now possible to see how it would also be applicable to whether a payment was made "improperly" under the *Bribery Act 2010*.

Section 4 of the 2010 Act states that a "relevant function or activity" (on which the offence is based) is performed "improperly" if it is in breach of a "relevant expectation", ie, in breach of good faith, of impartiality or because the person in a position of trust failed to act in the manner expected. The legislation is in its infancy and this remains uncharted territory. It will be interesting to see how the definition of "improperly" develops through case law. A question to be posed is, in the context of a private commercial transaction, where a payment between agent and customer was known and consented to by the principal, could it be considered "improper" to such an extent as to attach criminal liability?

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