



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 70

IN THE MATTER OF ORDER 15 (RULE 16) OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

X LIMITED

Plaintiff

-v-

Y

Defendant

REASONS FOR DECISION

(in Court)

Originating Summons-application for declaration as to meaning and effect of Bribery Act 2016, sections 3 and 4 -whether declaratory relief appropriate-construction of Bribery Act

Date of hearing: 3 July, 2019

Date of decision: 3 July, 2019

Date of Reasons: 11 September, 2019

Mr Keith Robinson and Mr Kyle Masters, Carey Olsen Bermuda Limited, for the Plaintiff

Mr Mark Diel and Mr Jonathan White, Marshall Diel & Myers Limited, for the Defendant

Introductory

1. The Plaintiff applied for a declaration that the payment of certain benefits to the Defendant pursuant to a Separation Agreement was prohibited by sections 3 and/or 4 of the Bribery Act 2016 (the “Act”). In broad outline, the basis for the application was that although the Separation Agreement was lawful when made, the fact that certain payments were due after the Defendant, its former employee, engaged the provisions of the Act because of a conflict between the interests of his new employer and the interests of his former employer, the Plaintiff.
2. The application was disposed of on the basis that the provisions of the Act were potentially engaged, but that any such contravention would be adequately circumvented if the Defendant undertook not to be personally involved in any transactions involving the Plaintiff. It being agreed that a judgment should only be given in anonymised form, counsel requested the Court to provide reasons for its decision on the construction of important statutory provisions which have not previously been considered by the local courts. The Summons was adjourned with liberty to apply.
3. The issues initially in controversy were the scope of the jurisdiction to grant declaratory relief and the scope of the Act’s prohibition on bribery as defined. The jurisdiction issue was not seriously pursued in oral argument, perhaps in part because of the provisional views I expressed at the outset about how the application might fairly be disposed. What constituted a “bribe” was the principal dispute at the hearing. I concluded that the ambit of the Act, as the Plaintiff centrally argued, was surprisingly broad. Payments which do not resemble popular traditional notions of a bribe are caught by the Act, which applies to private sector and public sector recipients alike.

Jurisdiction to grant declaratory relief

4. The Plaintiff’s submissions assumed that it was obvious that the present case was an appropriate one for granting declaratory relief under Order 15 rule 16 which provides permissively as follows:

“No action or other proceedings shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may

make binding declarations of right whether or not any consequential relief is or could be claimed.”

5. The Skeleton Argument of the Defendant, in contending that the present case was an inappropriate one for exercising the broadly framed jurisdiction to grant declaratory relief, relied on two authorities. Neither authority appeared to me to be directly on point. Firstly, reliance was placed a *dictum* of Lord Steyn in *R (on the application of Rushbridger and another)-v-Attorney General* [2003] 3 All ER 784 at 792:

“The general principle has often been stated that, save in exceptional circumstances, it is not appropriate for a member of the public to bring proceedings against the Crown for a declaration that certain proposed conduct is lawful and name the Attorney General as the formal defendant to the claim. This principle was discussed in Imperial Tobacco Ltd. v [1980] 1 All ER 866, [1981] 1 AC 718. That case, however, involved an attempt to obtain a declaration in the face of pending criminal proceedings which were properly launched and were not vexatious. Here there are no criminal proceedings pending or threatened. All that need be said about the actual decision of the House in the Imperial Tobacco case is that it was based on the paradigm for the application of the restrictive principle. Viscount Dilhorne did, however, express himself more generally. He observed ([1980] 1 All ER 866 at 876, [1981] AC 718 at 742):

‘My Lords, it is not necessary in this case to decide whether a declaration as to the criminality or otherwise of future conduct can ever properly be made by a civil court. In my opinion it would be a very exceptional case in which it would be right to do so...’

6. Although the present case was not a “*paradigm*” instance for the application of this restrictive principle, the broader principle that civil courts should not ordinarily make determinations about the criminal law position was (if right) clearly engaged by the Plaintiff’s application. The second authority was a constitutional case where the Privy Council apparently held that a constitutional motion was an inappropriate procedure for seeking a determination that the proposed operation of a fast-food franchise in Bermuda would contravene the Prohibited Restaurants Act 1997. Reliance was placed on Lord Hoffman’s following *dictum* in *Grape Bay Ltd.-v- Attorney-General of Bermuda* [2000] 1 WLR 574 at 586:

“...this is hardly a point to be raised on a constitutional motion. If Mr Diel is right, Grape Bay is free to open a McDonald’s Restaurant and its constitutional rights are untouched. The right time at which to argue the point is if and when Grape Bay is prosecuted for infringing the Act.”

7. Whatever restrictions may exist as regards seeking declarations in relation to potential criminal liability against the Crown from the civil courts, in my judgment a different

position clearly appertains to resolving questions of illegality in the course of litigation between the parties to a private contract. Not only is the Court entitled to consider whether a contract cannot be enforced by reason of illegality where the issue is raised by the parties to the contractual dispute, the Court is under a duty to take the illegality point itself if the illegality is clear and the parties have not raised it: *Re PQR* [2015] SC (Bda) 65 Civ (6 August 2015) (at paragraphs 18-19); *Lillian Martin-v-Minister of National Security* [2019] SC (Bda) 46 Civ (31 July 2019) (at paragraph 5).

8. Those cases were not referred to in the course of argument. However, the Plaintiff's Skeleton Argument summarised the law on illegality by reference to the judgment of Lord Toulson in the UK Supreme Court decision of *Patel-v- Mirza* [2017] AC 467. For present purposes, it suffices to reproduce the following statement of principles upon which both the Plaintiff and the Defendant relied:

“120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.”

9. In the present case, this was a straightforward case of one contracting party inviting the Court to determine that the contractual obligations the other contracting party was seeking to enforce were not enforceable by reason of illegality. In these circumstances there was no tenable basis for finding that it is inappropriate to consider the merits of the application for declaratory relief.

The respective submissions

The Plaintiff's submissions

10. The Plaintiff submitted that the Act was based on the UK Bribery Act 2010 and created two types of offences:

“31.1 Section 3 creates the offence of bribing another person by reference to six ‘Cases’. The payer of the bribe is referred to as ‘P’;

31.2 Section 4 creates the offence of being bribed also by reference to six ‘Cases’. The recipient of the bribe is referred to as ‘R’.”

11. As regards section 3 and the offence of payment of a bribe, Mr Robinson submitted that Case 2 defined in section 3(3) applied to the present case. In brief, making the contractual payment to the Defendant would amount to giving a benefit in circumstances where the Plaintiff knew or believed that the receipt of the payment would, in and of itself, be improper.
12. As regards section 4 and the position of the Defendant, Mr Robinson submitted that case 4 as set out in section 4(4) applied. In summary, the Defendant would be accepting a financial advantage in circumstances where the relevant acceptance was improper. In this context, he argued that the *mens rea* of the recipient was immaterial on the face of the statute.
13. The critical factor of impropriety was said to be defined by reference to two main sections of the Act. Firstly, section 6 provides that a function or activity is performed improperly if it is performed in breach of a relevant expectation. Secondly, section 7 defined the expectation test as *“what a reasonable person in Bermuda would expect in relation to the performance of the type of function or activity concerned”*.
14. The Plaintiff’s Skeleton made the following balanced submission:

“73. The facts of this case are a long way from any ordinary conception of a bribe case. In this case it is clear that neither party intended to commit an offence under the Bribery Act but the effect of what has been agreed...means that the performance of the obligation under...the Separation Agreement would nevertheless amount to a bribe and give rise to offences under section 3(3) and 4(3) of the Bribery Act.”

15. However, in my judgment the ultimate submission that the only cure for the illegality was for the Defendant to wait until he left his new post to receive his entitlements under the Separation Agreement represented an absolutist position. To my mind it was obvious that the illegality problems validly complained of were not grounded in the mere abstract fact of the Defendant holding a position which might require him receive a financial benefit while being required to deal impartially with matters involving the Plaintiff. The pivotal concerns centred on the practical possibility that the Defendant would be carrying out functions which required impartiality in circumstances where the receipt of a financial advantage compromised that impartiality.

The Defendant's submissions

16. The Defendant responded to these submissions with his own absolutist position. This was that the circumstances of the present case could not be viewed as giving rise to any contravention of the Act.
17. The first limb of this primary submission relied upon uncontroversial rules of statutory construction. The Act was a penal statute which should be construed strictly against the Crown and in a manner which avoided appropriating fundamental property rights. These principles were deployed in support of the argument that, in effect, any doubts about whether a contravention of the Act had occurred would in the criminal context have to be resolved in favour of legality.
18. The next limb of this submission was that as long as disclosure of the impugned financial advantage was given by a recipient to his employer, no reasonable person in Bermuda would believe that accepting the relevant benefit would entail impropriety. The third limb was that the construction the Plaintiff contended for would lead to absurd results. Two helpful hypothetical scenarios were advanced to support this submission:

“Scenario 1

Mr [Z], a director of a law firm, retires from private practice to take up a position on the bench. On 1 June 2019, Mr Z disposes of his shares and soon after begins sitting as a puisne judge. Now this particular law firm pays out dividends (if any) annually based on some complex algorithm. The dividend calculation and any resulting payments occur on 31 December each year. So our director's pro-rated dividend payment entitlement cannot be calculated or paid until 31 December 2019.

On [X]'s interpretation of the Bribery Act, any dividend payment to Mr [Z] after his appointment as a puisne judge would constitute a bribe. Furthermore, the payment would still be unlawful despite, for example, Mr Z fully informing the Governor and the Chief Justice and recusing himself from all matters involving his former firm.

Scenario 2

Mr A and Mr B enter into a sale and purchase agreement in relation to Mr B's house. Unfortunately, multiple issues arise, and the sale drags on for months. In the interim and unbeknownst to the other, Mr B is appointed as chairperson of the Commercial Fisheries Council, and Mr A applies for a commercial fishing license.

On [X]’s interpretation of the Bribery Act, the sale and purchase agreement cannot be completed because payment of the purchase price by Mr A to Mr B would constitute a bribe. According to [X], the sale cannot occur unless Mr B ceases to be the chairperson of the Commercial Fisheries Council or Mr A withdraws his application.”

19. The Defendant’s counsel submitted:

“28. Results of this kind (many more of which could be conceived) cannot have been intended and provide another reason why the court should not accept the interpretation proffered by the Plaintiff.”

20. These submissions appeared to me to be fundamentally sound in terms of the broad principles articulated. On the other hand, the undertakings initially offered by the Defendant and relied upon as purportedly eliminating any concerns about a contravention of the Act fell far short of alleviating the lack of impartiality concerns which underpinned the statutory scheme, properly construed.

The key statutory provisions

Overview

21. The key provisions can only be understood in their wider statutory context. The Act deals with the following broad topics:

- (a) *“General bribery offences”* (sections 3-7);
- (b) *“Bribery of foreign public officials”* (section 8);
- (c) *“Failure of commercial organisations to prevent bribery”* (sections 9-11);
- (d) *“Reporting bribery”* (sections 12-14);
- (e) *“Prosecutions and penalties”* (sections 15-17);
- (f) *“Offences-general provisions”* (sections 18-21);
- (g) *“National Anti-Corruption and Bribery Committee”* (section 22).

22. The penalties for individuals convicted of offences are severe: 10 years imprisonment and/or a fine of \$500,000 on summary conviction and 15 years imprisonment and/or an unlimited fine if convicted on indictment (section 16(1)). Artificial persons face the same maximum fines. In addition to creating general bribery offences, the Act makes it an offence for a commercial organisation, if a person associated with it, pays a bribe in order to obtain or to gain a commercial advantage (section 9(1)). This

section applies to all Bermuda companies and partnerships as well to any companies and partnerships established elsewhere which are doing business in Bermuda. A public official who fails to report being offered a bribe commits an offence (section 13).

23. The establishment of a National Anti-Corruption and Bribery Committee to advise the Ministers on policies to prevent corruption and bribery (section 22) signifies the strong public policy imperative manifested by the Act, reflective in a very general sense of the anti-money laundering legislative scheme. The application of the Act to the private commercial sphere as well to the public sphere is indicative of the breadth of the Act. The provisions of the Act must clearly be construed in a purposive way designed to give effect to these public policy imperatives, notwithstanding the fact that the fair trial rights of persons accused of contravening the Act will of course apply in undiluted form in the criminal law context.

Bribery defined

24. Section 3 (“*Offences of bribing another person*”) of the Act provides as follows:

“(1) A person (‘P’) is guilty of an offence if either of the cases applies.

(2) Case 1 is where:

(a) P offers, promises or gives a financial or other advantage to another person; and

(b) P intends the advantage—

(i) to induce a person to perform improperly a relevant function or activity; or

(ii) to reward a person for the improper performance of such a function or activity.

(3) Case 2 is where—

(a) P offers, promises or gives a financial or other advantage to another person; and

(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.

(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.

(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.”

25. Because the facts of the present case involved the impugned receipt of a benefit under a pre-existing contract, Mr Robinson submitted that the term “gives” in section 3(3) was broad enough to encompass a payment under a contractual obligation. Mr Diel submitted that “gives” should be limited to a gift and invited the Court to find that (a) a contractual payment conferred no advantage, and (b) the Court should favour a non-penal construction. It could not be disputed however, that the critical question was (assuming that an advantage was offered, promised or given) whether the person paying the putative bribe “*knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity*”.
26. In my judgment, the word “gives” must be construed as potentially including contractual benefits. Whether the Act is actually infringed will of course depend on the facts of the relevant case. In many cases, the receipt of a contractual benefit negotiated between the payer and recipient before it was known that the recipient would assume an office under which he was to perform duties involving the payer, for instance, would not excite suspicion. However the facts of the Defendant’s hypothetical scenario involving a judge receiving contractual benefits from his former firm suggest that this will not always be the position. In that hypothetical scenario, the Defendant’s counsel contended that it ought to be possible for such a judge to neutralize any potential engagement of the Act by declining to deal with cases involving the paying firm.
27. Viewing this point of construction more broadly, it is ultimately obvious Parliament cannot have intended to permit the bribery scheme to be legitimately avoided by simply conferring an advantage on contractual terms rather than by way of a gift. The Plaintiff’s construction which I adopt is in my judgment more consistent with the natural and ordinary meaning of the word “gives” in its statutory context having regard to the manifest object and purpose of the statute as a whole. There is no ambiguity to be resolved against the Crown or, in the recent case, in favour of the putative accused.
28. Section 4 deals with the liability of the recipient of the putative bribe as follows:
- “(1) A person (“R”) is guilty of an offence if any of the following cases applies.*
- (2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).*
- (3) Case 4 is where—*

(a) *R requests, agrees to receive or accepts a financial or other advantage; and*

(b) *the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.*

(4) *Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.*

(5) *Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly—*

(a) *by R; or*

(b) *by another person at R's request or with R's assent or acquiescence.*

(6) *In cases 3 to 6 it does not matter—*

(a) *whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party;*

(b) *whether the advantage is (or is to be) for the benefit of R or another person.*

(7) *In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.*

(8) *In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.”*

29. Mr Robinson rightly pointed out that as regards the recipient of the bribe, it matters not whether he or some other relevant actor knows or believes that the performance of the relevant function or other activity is improper. An objective test applies. Moreover, Case 4 (upon which the Plaintiff in part relied) envisages that merely agreeing to accept a benefit may itself be improper even if no other improper conduct occurs. More generally however, it is important to have regard to what a “relevant function” is and what constitutes improper performance for the purposes of both sections 3 and 4. These important concepts are defined in the sections which follow.

30. Firstly, section 5 (“*Function or activity to which bribe relates*”) provides:

“(1) For the purposes of this Act, a function or activity is a relevant function or activity if—

(a) it falls within subsection (2); and

(b) it meets one or more of conditions A to C.

(2)The following functions and activities fall within this subsection—

(a) any function of a public nature;

(b) any activity connected with a business;

(c) any activity performed in the course of a person’s employment;

(d) any activity performed by or on behalf of a body of persons (whether corporate or unincorporate).

(3)Condition A is that a person performing the function or activity is expected to perform it in good faith.

(4)Condition B is that a person performing the function or activity is expected to perform it impartially.

(5)Condition C is that a person performing the function or activity is in a position of trust by virtue of performing it.

(6)A function or activity is a relevant function or activity even if it—

(a) has no connection with Bermuda; and

(b) is performed in a country or territory outside Bermuda.

(7)In this section “business” includes trade or profession.”

31. The Act applies to functions of a public nature, connected with a business, or activities performed in the course of employment or on behalf of any body of persons, in or out of Bermuda. But in any of those instances, the function is only a “relevant” one where either:

(a) the function or activity is expected to be carried out in good faith; and/or

(b) the function is expected to be carried out impartially; and/or

(c) The person performing the function is in a position of trust.

32. Section 6 (“*Improper performance to which bribe relates*”) provides as follows:

“(1) *For the purposes of this Act, a relevant function or activity—*

(a) is performed improperly if it is performed in breach of a relevant expectation; and

(b) is to be treated as being performed improperly if there is a failure to perform the function or activity and that failure is itself a breach of a relevant expectation.

(2) In subsection (1), “relevant expectation”—

(a) in relation to a function or activity which meets condition A or B means the expectation mentioned in the condition concerned; and

(b) in relation to a function or activity which meets condition C, means any expectation as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust mentioned in that condition.

(3) Anything that a person does (or omits to do) arising from or in connection with that person’s past performance of a relevant function or activity is to be treated for the purposes of this Act as being done (or omitted) by that person in the performance of that function or activity.”

33. In short, section 5 explains what (broad) categories of functions are covered by the Act, but narrows the scope of the qualifying functions by imposing a requirement that they meet one or more of Conditions A, B and C. Section 6 provides that a relevant function is performed improperly if there is breach of the expectation as to how the relevant functions would be performed by reference to one or more of the same Conditions A, B and C. The expectation test is then expressly defined as an objective one. Section 7 (“*Expectation test*”) provides:

“(1) *For the purposes of sections 5 and 6, the test of what is expected is a test of what a reasonable person in Bermuda would expect in relation to the performance of the type of function or activity concerned.*

(2) In deciding what such a person would expect in relation to the performance of a function or activity where the performance is not subject to the law of Bermuda, any local custom or practice is to be disregarded unless it is permitted or required by the written law applicable to the country or territory concerned.

(3) In subsection (2), “written law” means law contained in—

(a) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned; or

(b) any judicial decision which is so applicable and is evidenced in published written sources.”

34. The Act is accordingly potentially engaged where an advantage or benefit is conferred directly or indirectly on a person holding a public office or private commercial position in which they are reasonably expected to perform their functions either in good faith or impartially or where the recipient is in a position of trust. It will obviously be far easier to establish a breach of the relevant expectation where the recipient is the holder of a public office. Public officers will almost invariably be expected by reasonable people in Bermuda to perform all of their significant functions in good faith and/or impartially. More analysis may perhaps be required in relation to private commercial contexts until the parameters of bribery in the commercial context become more clearly established. However, there are undoubtedly many commercial contexts where private employees are expected to act in good faith, if not impartially, and where private actors subject to fiduciary duties might be said to be in a position of trust.

35. Three important aspects of the legislative scheme warrant attention in the context of the present case, which involved the prospective receipt of a contractual entitlement negotiated before the recipient took up his current position in circumstances where there could be no serious suggestion that the payer (X) intended the recipient (Y) to improperly perform any function of his new office:

(a) the payer may be liable of contravening the Act where “*P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity*” (section 3(3)(b), Case 2), as the Plaintiff’s counsel submitted;

(b) the recipient may be liable for contravening the Act where “*the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity* (section 4(3)(b), Case 4), as the Plaintiff’s counsel submitted; and

(c) in such circumstances it may be possible to avoid any inherent impropriety through the recipient undertaking not to exercise any functions in relation to the payer, as the Defendant’s counsel submitted.

Findings: disposition of Originating Summons

36. On the facts of the present case, it was clear that (applying the agreed legal test for illegality as formulated by Lord Toulson in *Patel-v- Mirza* [2017] AC 467 at

paragraph 120) that, *prima facie*, it would be contrary to public policy for the contractual payment to be received.

37. Mr Robinson for the Plaintiff rightly submitted that making the contractually agreed payment to the Defendant potentially involved a contravention of the Act under Case 2 of section 3 and Case 4 of section 4(3)(b). However, the Plaintiff's opening position was that the inevitable legal result was that the contractually agreed payment could not be made as long as Y remained in his 'conflicting' new employment position. The Defendant's opening response was that no potential contravention arose in all the circumstances of the present case, because he had disclosed receipt of the anticipated payment to his new employer. However, he initially (and until prompted by the Court) failed to offer undertakings as broad as those offered in Mr Diel's hypothetical judicial example.

38. I found that any potential contravention of the Act flowing from making the impugned payment could be cured by the Defendant giving appropriate undertakings not to carry out any duties which a reasonable person in Bermuda would expect he could not properly discharge in relation to transactions involving the Plaintiff. Having orally pronounced this decision, the Defendant offered to give satisfactory undertakings so that the need to consider granting the declaratory relief the Plaintiff sought and established that it was *prima facie* entitled to did not arise.

Summary

39. For the above reasons, on July 3, 2019 the Originating Summons was adjourned with liberty to apply and costs were reserved.

40. Should the parties be unable to agree costs, the Plaintiff is at liberty to file written submissions in relation to costs within 14 days of the date of delivery of this Judgment and the Defendant may file responsive submissions 14 days thereafter.

Dated 11 September, 2019

IAN RC KAWALEY
ASSISTANT JUSTICE