

Application of Bermuda's Bribery Act considered by Supreme Court

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Abstract

The scope and construction of Bermuda's Bribery Act 2016 (the Act), was considered for the first time this summer by the Supreme Court of Bermuda in the case of X Ltd v Y (No. 70 of 2019). Acting Justice Kawaley's decision in X Ltd concludes, generally, that the application of the Act is broader than one might expect and, when properly interpreted, even when parties to an otherwise legally binding contract have no intention to offer or accept a bribe, their otherwise legitimate actions may still constitute a breach of the Act. The facts of X Ltd should serve as a warning to advisors and business operators alike: Bermuda's anti-corruption legislation cuts a wider path than might be expected and ought to form part of the fundamental considerations of otherwise ordinary commercial arrangements.

The facts

The Court was asked to make a declaration that contractually agreed payments to Y, a former employee of X Ltd (the company) pursuant to a separation agreement made between the Company and Y (separation agreement) would constitute the payment and receipt of a bribe under the Act so that the Separation Agreement was unenforceable in accordance with the doctrine of illegality as understood in the light of *Patel v Mirza*.¹ Under the terms of the Separation Agreement, certain payments became due to Y on a delayed basis. Between the date of the Separation Agreement and the date the payments became due to Y, Y took up employment with a new employer whose interests and activities were potentially in conflict with the company. The Court put it this way:

“The pivotal concerns centered on the practical possibility that [Y] would be carrying out functions which required impartiality in circumstances where the receipt of a financial advantage compromised that impartiality.”

Before making the payments under the Separation Agreement to Y, the company sought the assistance of the Court on the question of whether or not the Act affected a legitimately formed contractual arrangement in circumstances where neither party to that arrangement contemplated the bribery issue at the time of the agreement, and where the circumstances of the parties changed after the agreement had been made. Essentially, could a perfectly proper agreement be rendered unlawful under the Act by material change in the parties' circumstances. In other words, could there be such a thing as “bribery after the fact”?

In the end the Court was not required to determine the question of illegality and enforceability of the Separation Agreement between the parties as a result of certain undertakings provided by Y at the hearing; however, Kawaley AJ, recognising the importance of the issues, provided a reasoned decision on the material aspects of the case and, in particular, how the Act would apply to such circumstances. This article provides an overview of that decision and considers some of the broader implications of the decision that would be parties to agreements may wish to consider.

The Bribery Act

The Act is closely modelled on the UK Bribery Act 2010. For the purposes of the issues that arose in this case, it is important to note that it creates two categories of bribery offence: (1) an offence of *giving* a bribe (Case 2); and (2) an offence of *receiving* a bribe (Case 4). In the Act, the person paying the bribe is referred to as “P” and the recipient is “R”. In the case of each type of bribery offence, the Act creates (i) the basic element; and (ii) the wrongfulness element, and then proceeds to outline a number of “cases” which identify the various forms the offence of bribery can take in the context of both giving and accepting a bribe.

Relevantly, for the purpose of the case, s.3 of the Bribery Act provides that a person (P) is guilty of an offence if ...:

- “(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.”

Section 4 of the Act deals with R and Case 4, which provides:

- “(3) Case 4 is where –

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¹ *Patel v Mirza* [2017] A.C. 467 SC.

- (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.”

In broad terms in respect of a Case 2 and a Case 4 bribery offence, a “function or activity” will be a “relevant activity” if it is a function of a public nature or any activity connected with a business² or performed in the course of a person’s employment,³ and that a person performing that function or activity is expected to perform it in good faith⁴ or impartially⁵ or is in a position of trust.

The question of whether there is improper performance is an issue which falls to be assessed objectively on the basis of the expectation of the reasonable Bermudian. Section 4(7) provides that for the purposes of Case 4 it does not matter whether R knows or believes that the performance of the function or activity is improper. In this context that is a fundamental difference between P and R (i.e. between the payer and the receiver of a bribe).

The case for the company

The Company argued that, notwithstanding the fact that its obligation to make the payment arose within the context of a legitimate contractual arrangement, the performance of that legal obligation to make the payment to Y in circumstances where there was a relevant conflict of interest between Y’s employer and the Company could amount to the commission of a Section 3 Case 2 bribery offence on its part and the commission of a s.4 Case 4 bribery offence on the part of Y. The company was at pains to point out in its argument that the circumstances were unusual:

“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.”

The company’s concerns regarding a Case 2 offence were put this way by the Court:

“In brief, making the contractual payment to [Y] would amount to giving a benefit in circumstances where [the Company] knew or believed the receipt would in and of itself be improper.”

The company’s concerns regarding a Case 4 offence were characterised as follows by the Court:

“In summary, [Y] would be accepting a financial advantage in circumstances where the relevant acceptance was improper.”

Crucially, it was argued that, in respect of a Case 4 bribery offence as provided for in the Act, Y’s state of mind (i.e. whether or not Y knew or believed the performance of the function was improper) was irrelevant. All that had to be demonstrated was that the request itself would constitute improper performance by Y of a relevant function or activity. As noted below, what constitutes improper performance rests on the outcome of the application of the objective test set out in s.6 of the Act, namely, what a reasonable Bermudian would expect Y to do.

The case for Y

Attorneys for Y, unsurprisingly, resisted the company’s interpretation of the Act and argued that the payment sought to be impugned was legitimate and in no way in contravention of the Act. Y’s case was developed on two fronts:

First, it was argued that the Act, being a penal statute, was subject to the ordinary rules of interpretation which required it to be interpreted strictly against the Crown and in a manner which would avoid the deprivation of Y’s property (Y’s interest in the payment under the Separation Agreement).

It was specifically argued, in the context of a Case 2 offence, that the term “gives” in s.3 of the Act should be interpreted to exclude circumstances where the passing of the advantage occurs pursuant to a contractual arrangement and be limited to a “gift”. Y’s attorneys argued that a non-penal construction ought to be favoured by the Court, otherwise it would result in Y being deprived of his contractual entitlement.

Second, it was argued on behalf of Y that, even if the Act were engaged, the reasonable expectation test under s.6 of the Act concerning what a reasonable person in Bermuda would expect of Y in relation to the performance of their duties under the Act, was not met so long as Y had properly disclosed the payment under the Separation Agreement to the new employer.

In support of this second limb of their argument, Y’s attorneys deployed hypothetical scenarios involving a decision-maker, R, who becomes entitled to receive a benefit from another party, P, under wholly innocent contractual agreements but, as a result of a change in circumstances (such as a change in the employment position of R after the conclusion of the agreement), R finds himself in a position of potential conflict between his duty to act impartially and his entitlement to receive a benefit from P.

² Bribery Act 2016 s.5(2)(b).

³ Bribery Act 2016 s.5(2)(c).

⁴ Bribery Act 2016 s.5(3).

⁵ Bribery Act 2016 s.5(4).

Y's attorneys argued that these hypothetical scenarios were not dissimilar to those arising between the company and Y and that these kinds of issues are common, especially on an island as small as Bermuda where people employed in specialist fields often finds themselves employed in roles where conflicts of interest arise. Y's attorneys suggested that it would be absurd if situations of this kind resulted in breach of the criminal law but, rather, could be addressed by (in this case) Y simply arranging to declare his conflict of interest to his new employer, which Y had done. It was argued that no sensible Bermudian knowing the facts would consider Y's continued employment in such circumstances improper.

Court's analysis

The Court disagreed with the interpretation of the Act advanced on behalf of Y. The judge concluded that the ambit of the Act was (as had been argued on behalf of X) "surprisingly broad". He held that the word "give" in the Act included the passing of a benefit under the terms of a contractual arrangement. When considering the facts in the case within the wider legislative scheme, the Court found that the provisions of the Act must be construed in a purposive way designed to give effect to the wider policy imperatives articulated by Bermuda's Parliament concerned with avoiding and deterring corruption and bribery in Bermudian business dealings. This included ensuring that a scheme could not legitimately avoid being caught by the Act simply as a result of it being employed within the context of a contractual agreement.

The Court concluded that the best course of action, in the case of Y and the company would be for Y to give appropriate undertakings not to carry out any duties which a reasonable person in Bermuda would consider that Y

could not properly discharge in relation to transactions involving the company. This addressed, in large part, Y's attorneys' hypothetical examples on the issue. While the court agreed that such scenarios were common, it was not prepared to allow the Act to become the subject of an interpretation which would allow such actions to operate unabated.

Conclusion

The case is important because it shows that in certain circumstances the performance of a perfectly proper contractual obligation can result in the crime of bribery being committed by the payer or the receiver or both. In the commercial context this could have very serious reputational consequences. The Bermuda Courts have found that the Bribery Act can apply to otherwise legitimate contractual agreements arising in the ordinary course of business when the payment or giving of an advantage results in the recipient's acceptance being improper.

Parties to agreements which involve the passing of a financial or other advantage must be alive to the fact that the context within which the payment is made could overshadow the basis upon which the payment is made when it is considered within the framework of Bermuda's anti-bribery and anti-corruption legislation.

The case of *X Ltd* is authority for the proposition that there is no requirement for an intention to commit the crime of receiving a bribe in order for transactions to be considered as such. Further, and perhaps more surprisingly, the ruling appears to confirm that there can be such a thing as bribery after the fact; an issue that modern practitioners should be aware of when entering into otherwise ordinary business arrangements.