Briefing

BURGES SALMON

Fraud and White Collar Crime

November 2014

Bribes, Secret Commissions and Monaco Hotels: *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45

Synopsis

The Supreme Court has ruled, in *FHR European Ventures LLP and others v. Cedar Capital Partners LLC* [2014] UKSC 45, that a bribe or a secret commission received by an agent is held by the agent on trust for his principal. The effect of this ruling is that a principal has a proprietary remedy against the agent in respect of the bribe or secret commission itself, as opposed to a mere claim for equitable compensation against an agent for a sum equal to the value of the bribe or secret commission.

Introduction

In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, FHR European Ventures LLP, the Claimant, FHR, a venture capitalist, purchased the issued share capital of Monte Carlo Grand Hotel SAM from Monte Carlo Grand Hotel Ltd (the Vendor) for EUR 211,500,000. The Defendant, Cedar, acted as an agent for the Claimant in negotiating the purchase.

The Vendor paid Cedar a EUR 10,000,000 fee following completion, as part of an 'Exclusive Brokerage Agreement' of which FHR was not aware. On 23 November 2009, the Claimant brought proceedings to recover this fee from Cedar. The main dispute was over whether, as it contended, Cedar had made proper disclosure to the Claimant of the Exclusive Brokerage Agreement.

The Question

The question for the Supreme Court was whether a bribe or secret commission received by an agent is held by that agent on trust for his principal, or whether the principal merely has a claim for equitable compensation in a sum equal to the value of the bribe or commission. Previous answers to this question have proved both inconsistent and controversial. The distinctions between the two are nevertheless significant, with wide-ranging practical implications. For example, if an agent was to become insolvent, a proprietary claim would give a principal priority over the agent's unsecured creditors and the ability to trace the proprietary claim into the agent's assets.

The Decision

In reaching its judgment, the Supreme Court held that a bribe or secret commission received by an agent is indeed held by that agent on trust for his principal. The Court followed three key rules:

- An agent has a fiduciary duty (position of trust and responsibility) to his principal;
- An agent must not profit out of his fiduciary duty; and
- Where an agent receives a benefit in breach of his fiduciary duty, or in conflict with his fiduciary duty, that agent is obliged to account to the principal for that benefit.

The Supreme Court held that these rules apply equally to an agent who obtains a bribe or secret commission in breach of his fiduciary duty to his principal. One of those considerations was, as the Court described 'elementary economics': that it was possible that the Claimant would be disadvantaged in some way. In the present case, it was held that removing the commission could have helped FHR to obtain a lower price. Cedar was therefore holding the benefit of the 'Exclusive Brokerage Agreement' on trust for FHR as principal.

The amount owed to a principal in such circumstances is to be calculated as the amount of the bribe or secret commission less any deductions in favour of the agent – such as any expenses it may have incurred. This is because the relief afforded by equity is said to be on a 'restorative' basis, rather than a compensatory basis.

Practical Implications

- The rule is not confined to agents and principals: it includes many fiduciary relationships, including employers/employees, company directors, some categories of public official and also trustees-beneficiaries.
- The proprietary remedy will allow the principal to trace into the assets of the agent and any relevant third parties (excluding the defence for recipients of bona fide purchases). However, the claimant could opt for making

either a personal or a proprietary claim, depending on the specific facts of the case.

- The proprietary nature of the remedy makes available to the principal certain ancillary measures, such as freezing injunctions.
- Due to the confirmation that there is a proprietary base in bribes and commissions, agents will need to enquire thoroughly into conflicts of interest that could arise from payments. It will be necessary for agents to disclose secret payments more extensively and, where possible, agents should obtain formal consent from principals to the receipt of any commissions.
- As principals are now able to claim ownership of bribes and secret commissions which their agent is holding, unsecured creditors may lose out in any connected insolvency proceedings.
- Any client in the position of principal should take steps to ensure that its agent is obligated to display complete transparency in respect of commissions and that it seeks the principal's consent in every instance that it is offered a commission.
- Any client in the position of an agent should ensure that it is transparent with its principal in respect of its commission arrangements in order to avoid potential allegations of bribery and, following this case, proprietary claims against its assets.

Contacts

For further information please contact:

David Hall
Partner
+44 (0) 117 902 2798
david.hall@burges-salmon.com

Thomas Webb
Senior Associate
+44 (0) 117 307 6976
thomas.webb@burges-salmon.com

David Hall heads Burges Salmon's Fraud and White Collar Crime team. Thomas Webb is a member of that team which advises clients on legal issues connected to allegations of fraud, money laundering, bribery and white collar crime.

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

BRM0838 11 14