

Insight

Insight provides practical information on topical issues affecting the building, engineering and energy sectors.

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The Bribery Act 2010: A Refresher¹



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The Ministry of Justice's guidance on the Bribery Act 2010 (the "**Bribery Act**") from March 2011 stated the obvious when it wrote "everyone agrees that bribery is wrong...". With concerns about economic recovery being dented by the Bribery Act, Kenneth Clarke (the Secretary of State for Justice at the time) was at pains to emphasise:

"We don't have to decide between tackling corruption and supporting growth. Addressing bribery is good because it creates the conditions for free markets to flourish."

Globally it is estimated that between 10% and 30% of the value of construction output is lost due to corruption. Closer to home there is evidence that corruption is also a significant issue within the construction sector² and that, internationally, corruption levels are rising generally.³

With the eighth anniversary of the Bribery Act receiving its Royal Assent (granted on 8 April 2010)⁴ this Insight provides a refresher of the key provisions of the Bribery Act, how it impacts on the construction industry and also reviews some of the most high profile prosecutions arising in the last few years.

Key offences for individuals

The Bribery Act consolidated a number of previous common law and statutory offences to create the following key offences:

1. Bribing another person (active offence) pursuant to Section 1;
2. Accepting a bribe (passive offence) pursuant to Section 2;
3. Bribing foreign public official pursuant to Section 6.

In relation to Section 1 of the Bribery Act, a bribe can be an offer, promise or a financial or other advantage to another person⁵ the aim of which is either:

1. Intended to bring about the improper performance by another person of a relevant function or activity or to reward such improper performance;⁶ or
2. Where the person offering the advantage knows or believes that the acceptance of the advantage offered, promised or given in itself constitutes the improper performance⁷ of a relevant function or activity.⁸

In relation to Section 2, four broad categories of requesting or receiving bribes were created. These again incorporate the notion of improper performance of an activity or function

caused by the bribe. The definition of financial or other advantage is also along the same lines as for the Section 1 (active) offences.

What is a "bribe"?

What is clear from the wording of all of these sections is that bribery is not restricted to offering a simple monetary reward. The wording covers a broad range of ways in which bribery can be committed.⁹ So what form could a bribe take if it doesn't constitute the classic "brown envelope"?

Potential "bribes" (depending on their context) include corporate hospitality, Christmas gifts (a crate of Champagne for example), employing someone related to an organisation or awarding a contract to someone in expectation of a favour being repaid.

Perhaps one of the most difficult examples is in respect of corporate hospitality. Is what is being offered just a day at Wimbledon or is it an inducement or reward for improper performance? The Ministry of Justice acknowledges in their guidance that "no one wants to stop firms getting to know their clients by taking them to events like Wimbledon or the Grand Prix"¹⁰ but draws upon principles, such as timing, to consider whether the reality of a corporate event is different from the perception.

Taking a client to Wimbledon will not fall foul of the guidelines in and of itself. However, if the event exceeds the industry norm¹¹ (e.g. paying for a whole team to go on an expensive skiing weekend) or, for example, occurs during a tender process rather than upon completion of the Contract, then it could be viewed differently.

Likewise, those who take or receive referral fees (e.g. letting agents who are paid referral fees in return for introducing fit out contractors to their clients) need to be careful that the nature and extent of the arrangement does not fall within the scope of the Bribery Act. Indeed, some trade organisations provide further guidance and advice in respect of these types of issues including the RICS. Transparency is key.

The key test that has to be applied pursuant to Sections 3 and 4 of the Act is that of expectation. In particular the test is:

"what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned." [Emphasis added]

The fact the expectation is of a reasonable person in the United Kingdom is significant because it means standards in this country are expected to be imposed abroad. The

only caveat to this is where a local custom or practice in another country “is permitted or required by the written law applicable to the country or territory concerned.”

In other words, the fact that a country’s public officials are used to being bribed (or even actively expect such bribes) does not mean meeting their expectations isn’t an offence under the Bribery Act. The test is what a reasonable person would expect in the United Kingdom.

Section 7 - Failure of commercial organisations to prevent bribery

The key part of Section 7 of the Bribery Act provides that:

“(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place **adequate procedures designed to prevent persons associated with C from undertaking such conduct.** [Emphasis added]

As a result of this section a commercial organisation can be prosecuted if an “associated person”¹² bribes another person intending to obtain or retain business or an advantage for the relevant commercial organisation.¹³

What is an “associated person”?

It should be noted that an “associated person” includes anyone who performs services for the company (whether as an employee, agent, subsidiary or even a Joint Venture Partner).¹⁴ This means that subsidiary companies in different jurisdictions can end up costing the parent company in the UK a fortune in fines. Indeed, Subcontractors and Suppliers

could also land Main Contractors on the hook unless appropriate precautions and procedures are taken and put in place to prevent bribery from or by them.

What are “adequate procedures”?

Companies can therefore be held liable for the conduct of their associated persons unless they can show, on the balance of probabilities, that they had “adequate procedures” in place to prevent such conduct. Six principles were laid down by the Ministry of Justice Guidance intended to assist in determining what adequate procedures are. These include:

1. Proportionate procedures;
2. Top-level commitment;
3. Risk assessment;
4. Due diligence;
5. Communication (including training);
6. Monitoring and review

The specific procedures that any company needs to have in place to prevent bribery depend on the size and risk profile of an organisation. However, key measures include: explicitly prohibiting bribery of any kind; implementing systems to stop it happening; detailed procedures on gifts, hospitality etc.; training and whistle blowing procedures to name but a few. Contractors and Consultants will normally be expected to produce their anti-bribery policy as part of the tendering process. Likewise, anti-bribery provisions are now standard in construction standard forms.

The JCT forms provide that an Employer may terminate the Contractor’s employment if the Contractor has committed an offence under the Bribery Act.¹⁵ The NEC4 suite of Contracts provides that the Contractor will not perform a “Corrupt Act”¹⁶ and will prevent a Subcontractor/Supplier from undertaking a corrupt act as well as ensuring they have similar provisions

within their Subcontracts.¹⁷ A right to terminate exists in certain circumstances where there has been a corrupt act.¹⁸

FIDIC note that “corruption’s taint includes the procurement of design and construction”¹⁹ and urges both Member Associations and Member Firms to develop and maintain high ethical systems in order to prevent corruption and bribery from occurring. The FIDIC Pink Book provides that the Employer is able to terminate the Contract with 14 days’ notice if the Employer has determined that the Contractor has “engaged in corrupt, fraudulent, collusive or coercive practices.”²⁰

Depending on the size of a project, its location and general risk profile more comprehensive wording may be required. For example, some contracts impose indemnity provisions should the agreement’s obligations in respect of bribes (including a duty to notify) be breached with the indemnification carved out from any liability cap.

Recent case law and penalties

So what type of cases have been brought to date by the Serious Fraud Office (“SFO”) (which is the main prosecuting body for bribery and corruption offences)? Well there are surprisingly few but the two key ones are *R v Sweett Group Plc* and the more recent *Rolls Royce* case.

R v Sweett Group Plc (“Sweett”)

The first company to achieve the dubious pleasure of being successfully convicted under the Bribery Act was a construction company.

Sweett²¹ were convicted under Section 7 of the Bribery Act on 19 February 2016, for failing to prevent an employee in Dubai (working for Cyril Sweett International Limited, a UAE subsidiary of Sweett) from bribing a senior executive of a development company (known as AAI) to secure the award of a contract for the building of the Rotana Hotel in Abu Dhabi.

The offence was described by the judge as a “system failure” of Sweett as it had taken place over a long period of time. A fine totalling £2.25 million was ordered and Sweett’s share price sank by more than 20%.

Sweett were unable to rely on the statutory defence of having adequate procedures in place to prevent the bribery occurring because an accounting firm had produced a number of reports calling for better internal governance but little had been done in light of them.

Indeed, the SFO did not offer Sweett what is known as a Deferred Prosecution Agreement (“DPA”) due to their perceived lack of cooperation and self-reporting.²² This also increased the level of the fine applied. In particular, Sweett asked the AAI to say the amounts were legitimate rather than act transparently.

In other words, Sweett’s conduct after the bribery came to light made their position far worse.

Rolls Royce

Perhaps the highest profile bribery case so far under the Bribery Act has been against Rolls Royce.

Rolls Royce²³ were made to pay approximately £600 million due to two subsidiaries committing fraud, bribery and corruption offences over a number of years. The investigation took four years to bring about a successful conviction and included a review of over 30 million documents,²⁴ the discovery of agreements to make corrupt payments to agents in connection with the sale of Trent aero engines spanning over 17 years,²⁵ corrupt payments in connection with the supply of gas compression equipment in Russia²⁶ and failure to prevent employees of Rolls Royce providing inducements in China and Malaysia between 2010 and 2013.²⁷

Importantly Rolls Royce were offered a DPA by the SFO which meant they were able to avoid being debarred from public works contracts (a very significant part of Rolls Royce’s business). This was subject to some debate in the press.

Conclusion

There is no doubt that the Bribery Act can have real teeth, both in the UK and abroad, although the number of prosecutions has been relatively small to date. The consequences in terms of fines as well as in respect of reputation are extremely serious. As such it is essential to keep the provisions of the Bribery Act in mind and ensure that procedures are in place to, ideally, ensure that bribery will not take place in the first place but also, if the worst comes to the worst, provide a defence to a prosecution.

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Footnotes

1. By Claire King and with thanks to Laura Bowler for her research and assistance.
2. See for example PWC’s 2014 survey entitled “Fighting corruption and bribery in the construction industry” part of their “Engineering and construction sector analysis of PWC’s 2014 Global Economic Crime Survey” which noted that 49% of the respondents reporting economic crime say it includes bribery and corruption – the highest in any industry. They further noted that 70% of the most serious economic crimes were perpetrated by insiders.
3. See PWC’s “2018 Global Corruption Survey” which noted that 49% of organisations globally (not construction specific) said they’ve been a victim of fraud and economic crime – up from 36% in 2017.
4. The Bribery Act came into force on 1 July 2011.
5. See Sections 1(2) and (3) of the Bribery Act. The relevant sections state: “1(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.”
6. See Section 1(2) of the Bribery Act.
7. Improper performance is defined at Sections 3, 4 and 5 of the Bribery Act. By way of summary only, it means performance which amounts to a breach of expectation that a person will act in good faith, impartially, or in accordance with a position of trust.
8. See Section 1(3) of the Bribery Act.
9. “The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing”, Ministry of Justice, March 2011, Paragraph 1

- <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
10. “The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing”, Ministry of Justice, March 2011, Foreword <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
 11. “The Bribery Act 2010 – Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing”, Ministry of Justice, March 2011, Paragraph 28 <https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.
 12. See Section 8 of the Bribery Act. A person who “performs services” for or on behalf of a commercial organisation will be an associated person. Their capacity does not matter. They could be an employee, agent or subsidiary.
 13. See Section 7 of the Bribery Act.
 14. See Section 8 of the Bribery Act.
 15. Clause 8.6 JCT Design and Build Contract 2016, Clause 6.6 JCT Minor Works Building Contract, Clause 8.6 Intermediate Building Contract 2016.
 16. Core Clause 18.1 NEC4 Engineering and Construction Contract, Core Clause 17.1 NEC4 Professional Services Contract, Core Clause 18.1 NEC4 Design, Build and Operate Contract.
 17. Core Clause 18.2 NEC4 Engineering and Construction Contract, Core Clause 17.2 NEC4 Professional Services Contract, Core Clause 18.2 NEC4 Design, Build and Operate Contract.
 18. See Clause 91.8 of NEC4 Engineering and Construction Contract, June 2017.
 19. FIDIC Policy Statement < http://fidic.org/sites/default/files/fidic_policy_corruption.pdf>
 20. Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (FIDIC Pink Book), Clause 15.6.
 21. R v Sweett Group Plc (unreported). See the SFO’s Press Release dated 19 February 2016.
 22. As set out on the SFO’s website: “A UK Deferred Prosecution Agreement (DPA) is an agreement reached between a prosecutor and an organisation which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organisation meets certain specified conditions. DPAs can be used for fraud, bribery and other economic crime. They apply to organisations, never individuals.

The key features of DPAs are:
 - They enable a corporate body to make full reparation for criminal behaviour without the collateral damage of a conviction (for example sanctions or reputational damage that could put the company out of business and destroy the jobs and investments of innocent people).

- They are concluded under the supervision of a judge, who must be convinced that the DPA is 'in the interests of justice' and that the terms are 'fair, reasonable and proportionate'
 - They avoid lengthy and costly trials
 - They are transparent, public events"
23. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036.
 24. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 20.
 25. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 4(i).
 26. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 4(iv).
 27. Serious Fraud Office v Rolls Royce Plc, Rolls Royce Energy Systems Inc [2017] Case no. U20170036, para 4(vi).

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