Proprietary Claims For Bribes

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Introduction

It is axiomatic in common law countries that a fiduciary who receives a bribe is accountable to his principal for the bribe. There is greater controversy whether the fiduciary also holds the bribe on constructive trust for the principal. There are clearly advantages for the principal to pursue a proprietary claim, including priority in the event of the fiduciary’s insolvency, tracing to the gains made from the bribe, and tracing to third party recipients.

Exposition of the law in this area often begins with the English Court of Appeal decision in *Lister & Co v Stubbs* (1890) 45 Ch D 1 (“*Lister*”), where it was clearly decided that the principal could not assert any beneficial title to bribes received by its fiduciary agent.

The Position in Singapore

Lai Kew Chai J in *Sumitomo Bank Ltd v Thahir Kartika Ratna* [1992] 3 SLR(R) 638 had decided not to follow *Lister*, holding that the principal had a proprietary claim to the bribe. The same position was taken by the Privy Council on appeal from New Zealand shortly thereafter in *AG for Hong Kong v Reid* [1994] 1 AC 324 (“*Reid*”). Lai J’s decision was then affirmed by the Singapore Court of Appeal in *Kartiaka Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 (CA) (“*Pertamina*”), relying heavily on *Reid*.

The issue appears to be concluded in Singapore law, but it may well be re-examined by the Singapore Court of Appeal in view of recent conflicting decisions from the Commonwealth: While *Reid* received powerful endorsement by the Full Court of the Federal Court of Australia in *Grimaldi v Chameleon Mining NL (No 2)* [2012] FCAFC 6 (“*Grimaldi*”), it was criticised scathingly and not followed in the English Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] 3 WLR 1153 (CA) (“*Sinclair*”).

In *Sinclair*, Lord Neuberger MR refused to follow *Reid* for 7 reasons: (1) the Court was bound by its own decision in *Lister* and a number of other authorities; (2) Lord
Templeman’s reasoning in *Reid* was criticized as being circular in assuming the very thing that was in issue, i.e., that the fiduciary held the bribes in trust for the principal; (3) the concern of Lord Templeman that the fiduciary should not be able to take advantage of further gains made on the bribes could be met by appropriate equitable accounting orders; (4) a bribe situation could not be described as one where the fiduciary took for himself an asset which, if he were to take it at all, he should have taken it for the principal; (5) the balance of academic authorities supported *Lister*; (6) a constructive trust was potentially unfair to the creditors of a bankrupt fiduciary; and (7) there were recent English decisions which had followed *Lister*.

Thus, under English law presently, the principal cannot claim a proprietary interest in any asset acquired by the fiduciary in breach of duty, but is entitled only to an equitable account, unless the asset is or has been the property of the principal or the fiduciary acquired the asset by taking advantage of an opportunity or right properly belonging to the principal.

On the other hand, the court in *Grimaldi* distinguished *Sinclair* on the basis that unlike English law, Australian law recognised the constructive trust as a discretionary remedy. The Court emphasized the deterrent effect of the constructive trust, stating that the situation of a bribed fiduciary is where such deterrence is most needed.

### Possible Futures for the Law on Bribery

In the light of this controversy, should *Pertamina* be challenged in the Singapore Court of Appeal today, several possible (but non-exhaustive) consequences could follow.

First, the Court may follow *Sinclair* and confine *Pertamina* to its own facts – that the plaintiff in that case could trace the money it had paid out into the hands of the fiduciary. This, however, was not the basis of the decision in *Pertamina* itself, and further, it can cause difficult distinctions between a principal who paid out before the fiduciary’s receipt of the bribe and one who paid out after, and between a principal who is the purchaser and the principal who is the vendor. On this view, third parties recipients of the bribe would only be liable for dishonest assistance or unconscientious receipt. Innocent recipients (which might well be rare in such contexts generally) would be untouchable except where the principal could point to property traceable from its own payout. A further difficulty is that tracing may be impossible if rescission of the impeached contract is barred for any reason.

Secondly, the Court may follow *Sinclair* but take a wider view that a bribe-taking fiduciary has taken advantage of an opportunity or right which properly belonged to the principal. The English High Court has closed this route for itself as it would
undermine the main thread of reasoning in *Sinclair* itself.

Thirdly, the Court may affirm *Pertamina*. The Singapore Court of Appeal faces the converse problem of binding precedents from its English counterpart. Good reasons need to be shown for it to depart from *Pertamina*. The emphasis in *Grimaldi* on the need for deterrence echoes the sentiments expressed by Lord Templeman in *Reid* that “Bribery is an evil practice which threatens the foundations of any civilised society.” Lai J in the High Court in *Pertamina* had also alluded to public policy.

This approach would locate the constructive trust squarely within restitution for wrongs; the principal does not need to establish either a proprietary base from money paid out of its accounts or the abuse of an opportunity that can be said to “belong” to the principal. Admittedly it begs the question why a proprietary remedy is called for. One common criticism against *Reid* – and this is repeated in *Sinclair* – is that it assumes that because the fiduciary ought to transfer the bribe to the principal, the principal thereby owns the bribe beneficially. However, this criticism cannot be pushed too far because whether a constructive trust arises out of an obligation to transfer or not is ultimately a matter of judicial decision.

A variation of this approach is to affirm *Pertamina*, but on the basis of the discretionary remedial constructive trust alluded to in *Ching Mun Fong v Liu Cho Chit* [2001] 1 SLR(R) 856. This would allow the court to shape the content and scope of the proprietary effect of the trust. However, the status of this type of constructive trust is still not clear in Singapore law.

In any event, a third party who is a bona fide purchaser of legal interest for value without notice would be protected. Short of that, it is less clear whether an innocent third party recipient (who is not a purchaser) should be able to invoke a bona fide change of position defence.