

Commercial Organisations Face Tough New Bribery Law

The Bribery Bill had its third reading in the House of Lords on 08 February and is with the Commons for consideration. The purpose of the Bill is to provide a modern and comprehensive scheme of bribery offences to equip prosecutors in the Courts to deal effectively with bribery in the UK and abroad.

The new law could leave construction firms, together with other commercial organisations, open to bribery charges.

The key areas of the Bill are as follows:

- Replace old and fragmented legislation with a modern and consolidated Bribery law.
- Create offences of offering, promising or giving of a bribe, requesting, agreeing to receive or accepting of a bribe either in the UK or abroad, in the public or private sectors.
- Create a discreet offence of bribery of a foreign public official in order to obtain or retain business.
- Create a new offence in relation to commercial organisations which fail to prevent a bribe being paid by those who perform services for or on behalf of the organisation.

Commercial organisations will have a defence if they can show "adequate procedures" were in place to prevent bribery. Unfortunately there is no definition of "adequate procedures". However, in February the Government agreed to amend the Bill to impose a duty on the Secretary of State to provide guidance. The amendment will help ensure that the guidance is issued properly and commercial organisations will welcome this duty on what will constitute adequate procedures under the Bill.

The penalties range from fines to terms of imprisonment, and the offence of failure of a commercial organisation to prevent bribery carries an unlimited fine.

The practical consequences for all commercial organisations are that they must prohibit bribery in any form either direct or indirect and by or for the organisation and commit to implementing systems to counter bribery. They should put in place staff training and ensure written procedures are available to staff and contracted consultants and consider amending contracts of employment to provide for termination in breach of compliance with the internal anti-corruption and bribery procedures. In addition, consideration should be made for

including standard clauses in the organisation's commercial contracts that replicate the clauses prohibiting bribery commonly used in public sector contracts.

Further, it is suggested that due diligence should be carried out before entering into arrangements with other parties, appropriate checks carried out during the processing of payments and a plan prepared to deal with the allegation of bribery.

The OECD has published a good practice guide on internal controls, ethics and compliance for companies to establish and ensure the effectiveness of their measures of preventing and detecting the bribery of foreign public officials.

There is some limited guidance from the Serious Fraud Office (SFO), and Transparency International publish business principles and practical guidance – www.transparency.org. The Secretary of State's guidance is awaited.

Local Democracy, Economic Development & Construction Bill (LEDC Act 2009)

In our Autumn 2009 edition we reported on the Construction Bill. The Act, aimed at improving the operation of construction contracts, particularly with regard to cash flow and adjudication, has received Royal Assent.

The Local Democracy, Economic Development and Construction Bill (LEDC Act 2009) will amend the adjudication provisions and will include the introduction of a statutory slip rule for adjudicators' decisions.

Other amendments include the restriction of the parties' right to agree who will pay the costs of the adjudication until after the notice of the adjudication has been given, and, although construction contracts will no longer need to be in writing, adjudication clauses will need to be documented.

When it comes to payment provisions, the Act will continue to require that all construction contracts include an "adequate mechanism" for payment but will prevent payment from being linked to obligations included in other contracts.

In effect, this is likely to mean that contractors extend the time in which they pay sub-contractors to ensure that they are in receipt of payment owed to them under the main contract.

This prohibition will not extend to contracts where the works are carried out by a third party, for example, if a management contractor is employed.

The amended Act will reverse the current focus, which is on withholding notices, and will make payment notices a key element of the contractual relationship. The construction contract must require either the payer or the payee to issue a payment notice for every payment provided for in the contract not later than five days after the due date, even where the amount of the payment is zero. This should set out the sum due and the basis upon which it was calculated.

If the contract provides that the payer should provide the notice, and he fails to do this, the payee must instead issue a notice and the payee's rights are restricted until he does this. He cannot suspend the contract, nor is the payer obliged to pay until the payee has issued a default notice.

Once the default notice has been issued by the payee the payer must pay the amount outstanding. Alternatively, the payer may issue a counter notice indicating that he intends to pay less than the amount in the default notice.

The Act will strengthen the payees' right to suspend the contract. A party will be permitted to suspend part, or all, of its obligations where a payment notice has been issued but the payer has failed to pay by the final date for payment. This right is subject to the giving of seven days' notice to the party in default of the intention to suspend, and stating the grounds upon which the suspension will take place. This right ceases when payment is made in full.

When the right is exercised the party in default will be liable to pay a reasonable amount of costs and expenses incurred as a result of exercising the right.

Contractual time limits to complete works affected by valid suspension will be extended to allow for the period of suspension and any delay suffered as a consequence of the suspension.

It remains to be seen when these amendments will come into force. The Scheme for Construction Contracts Regulations 1998 must be amended before this takes place and the Government has indicated that it may begin the consultation process early in 2010.

Expert Witness Immunity from Suit

The Court of Appeal case of *Stanton v. Callaghan* [1998] EWCA Civ 1176 involved a structural engineer Mr. Callaghan who provided expert evidence to the Stantons. At a meeting between experts Mr. Callaghan revised his views in such a way which undermined the Stantons' claim and they subsequently sued him for breach of retainer and negligence. The Court of Appeal upheld Mr. Callaghan's immunity from suit in respect of both the contents of his report and the joint statement of the experts. The case is still good law and the expert witness immunity from professional sanction is long-standing.

However some legal experts have been expecting it to be removed, on the basis that an expert is instructed as a professional and is paid for his work. If he or she carries out instructions negligently, causing loss, then why should the instructing client not have redress?

In the recent case of *Jones v. Kaney* [2010] EWHC 61 (QB) the defence of immunity was raised. Dr. Kaney was instructed as a medical expert on behalf of Mr. Jones's solicitors to advise on the psychological aspects of his psychiatric injury claim following a road traffic accident. Dr. Kaney initially suggested that Mr. Jones did have post-traumatic stress disorder, but subsequently changed her opinion with the result that Mr. Jones compromised his claim for lower damages after having been refused permission to obtain a new expert.

The Judge found that *Stanton* was still good law, notwithstanding arguments on behalf of Mr. Jones that it preceded the coming into force of the Human Rights Act 1998 which imported an obligation on the Court to act compatibly with Article 6 of the European Convention of Human Rights, namely the right to a fair trial.

However the Judge in *Jones v. Kaney* noted that the policy basis of expert witness immunity had been narrowed or undermined since *Stanton* and he granted Mr. Jones a "leapfrog certificate" enabling him to apply for permission to appeal the question directly to the Supreme Court.

Adjudication – Stay of Execution

The leading case on stay of execution of Adjudicators' decisions is *Wimbledon Construction Company 2000 Limited v. Derek Vago* [2005] EWHC 1086 (TCC). In the recent unreported case of *Anrik Limited v. AS Leisure Properties Limited*, an application was made to the Court by AS (who had accepted that Anrik was entitled to Summary Judgment of the Adjudicator's decision) for a declaration that there was no enforceable contract and an application for a stay. To avoid jurisdiction arguments the parties had agreed to an "ad hoc" adjudication. AS argued that there was a real risk that Anrik would be unable to pay the Judgment sum if it was ordered to do so after the declaration proceedings because of the worsening of its financial position between the date of the alleged construction contract and the Adjudicator's decision. The Wimbledon case was authority for the Courts not to enforce a stay even if it was probable that the Judgment sum could not be repaid if the winning side's financial position was the same or similar to that at the date of the relevant contract. Anrik successfully argued that the relevant contract was the "ad hoc" adjudication agreement and not the alleged underlying contract. In addition, the Judge said obiter that if he had thought that the Adjudicator's decision had been unarguably correct he would not have granted a stay regardless of any significant change in financial position. However, never before has a party applying for a stay had to show an arguable case that the Adjudicator's decision was wrong. If this test is applied in future, complicated applications will result.

This Update is for guidance only. Legal advice should be obtained for specific issues.

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