

International fraud and asset tracing litigation news - summer: bribery and privilege against self-incrimination

03 SEPTEMBER 2008

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Facts of the Case

Lord Justices Moore-Bick, Carnwath and May had to grapple with three separate appeals in the latest round of litigation between Kensington International Limited and The Congo.

The most interesting of these appeals was that against the Order of Gross J dated 13 July 2007 giving Norwich Pharmacal relief against Vitol Services Limited and Vitol Broking Limited ("the UK Vitol Companies"), a Mr Chautard and a Mr Lambroza requiring them to disclose certain information relating to payments said to have been made in Hong Kong by or on behalf of Vitol S.A. ("Vitol") to employees or representatives of the Congo by way of bribes.

The main ground of appeal was that the Judge was wrong to hold that Section 13 of the Fraud Act 2006, which came into force on 15 January 2007, deprived the UK Vitol Companies of the right to claim privilege against self-incrimination in relation to the disclosure of information required by the Order of Gross J.

There were four arguments of principle made against the interpretation of Section 13 by Gross J of the Fraud Act.

The Decision

The first argument of principle was that privilege against self-incrimination is a fundamental right and any provision said to deprive a person of that right is to be strictly construed. That was rejected. The Court of Appeal regarded the loss of privilege as largely if not entirely balanced by rendering information disclosed pursuant to Section 13 inadmissible in proceedings for an offence under the Fraud Act itself or a related offence.

The second argument of principle was that the present proceedings were not "proceedings relating to property" within the meaning of Section 13(1)(a) and 13(3). Section 13(1) provides that:

"A person is not to be excused from:

(a) answering any question put to him in proceedings relating to property, or

(b) complying with any Order made in proceedings relating to property,

on the ground that doing so may incriminate him... of an offence under this Act or a related offence."

Section 13(3) provides that "proceedings relating to property" means any proceedings for:

(a) the recovery or administration of any property,

(b) the execution of a trust, or

© an account of any property or dealings with property,

and "property" means money or other property whether real or personal (including things in action and other intangible property)".

Not surprisingly, the Judgment of Moore-Bick (with which Lord Justices May and Carnwath agreed) held that the proceedings for pre-action disclosure under CPR 31.16 or a Norwich Pharmacal application made before substantial proceedings had been commenced would not fall within Section 13(3). But "proceedings relating to property" did not limit the range of proceedings to which it applied and was quite capable of referring to proceedings in the wider sense – in this case the many substantive proceedings issued by Kensington to recover amounts owed to it by the Congo.

The Court also dealt a blow to the argument that Section 13(1) extended only to proceedings by which the Claimant seeks to recover property of which he has been wrongfully deprived and does not include a payment of a debt. "Property" included "money" and thus "must be understood as including proceedings to recover a debt by suing on the chose in action".

The third argument of principle was that disclosure might incriminate the Appellants of offences other than offences under the Fraud Act or related offences, since it would tend to expose them to proceedings for offences which do not involve any form of fraudulent conduct or purpose. Gross J was wrong to hold that the risk of self-incrimination under (a) Section 1 of the Public Bodies Corrupt Practices Act 1889, (b) Section (2) of the Prevention of Corruption Act 1906 relating to bribes obtained or given to agents and © the common law offence of bribery were “related offences” because none of them involved any form of fraudulent conduct or purpose – as none of them required proof of dishonesty as required by Section 13(4) which states that “related offence” means -

(a) conspiracy to defraud;

(b) any other offence involving any form of fraudulent conduct or purpose.”

The argument failed. Lord Justice Moore-Bick held that the essence of fraud is deception of one kind or another, coupled with injury or an intention to expose another to a risk of injury by means of that deception.

Lord Justice Carnwath had some interesting observations on the apparently attractive syllogism “dishonesty is an inherent feature of offences of fraud under the 2006 Act; it is not a necessary element of the offence of bribery; accordingly bribery is not an offence involving fraud”. But his conclusion was that he would hold that “any offence involving deception or surreptitious dealing is a “related” offence” within Section 13, and that bribery is such an offence.

The fourth argument of principle was that the provisions of Section 13 of the Fraud Act do not apply to information relating to events occurring prior to 15 January 2007.

This was rejected on the basis that it was predicated on the assumption that the information which could be withheld immediately prior to the date on which the Fraud Act came into force was incriminating at that date. But this assumption was not necessarily so “given the nature of the offence covered by Section 2 (Fraud by Misrepresentation) it is quite possible for a person to make a deliberately false statement after the Act came into force about an entirely innocent matter (such as his date of birth) that occurred before the act came into force ... in such a case Section 13 does not criminalise the earlier conduct; it merely requires disclosure of a matter that establishes the later offence.”

Points of Interest

This case demonstrates that Section 13 of the Fraud Act 2006, which removes privilege against self-incrimination is not limited to criminal proceedings. Thus, Kensington International Limited was able to rely on this section in its application for Norwich Pharmacal relief to enable it to commence civil proceedings against third parties who it claimed had received monies from the Congo as bribes. The loose interpretation given to “proceedings relating to property” and to “a related offence” have wide-ranging implications for the conduct of both civil and criminal proceedings.