

Proceeds of corruption

Criminal Asset Stripping Conference

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- foreign PEP steals funds and receive bribes for award of contract, including bribes paid by an English company through a foreign intermediary
- those funds are laundered through a network of companies and trusts controlled by an English solicitor, an old school-friend
- funds also used to buy London properties through offshore companies
- companies established by a trust and company services provider, which also introduces the PEP to a major UK bank
- accounts at the banks receive funds directly from owners of companies awarded contracts
- bank also provide loans against security of properties acquired using stolen funds, and subsequently enforce that security and sell the properties

- UK criminal conviction, followed by confiscation order
 - (typically) for money laundering offences in foreign corruption cases
- UK civil recovery (forfeiture)
 - orders obtained by law enforcement in civil claim without a criminal conviction on basis assets are proceeds of crime (or derive from them)
- UK enforcement of foreign confiscation or civil recovery/forfeiture order
 - for underlying corruption offences or for money laundering
- repatriation of confiscated or forfeited assets
- private civil proceedings, UK or foreign (including insolvency mechanisms)
 - state instruct lawyers to bring proceedings in the civil courts
 - enforcement of foreign civil order

e.g., civil claims available to a state when a contract is procured by bribery?

- claim for the amount of the bribe against the briber (eg a contractor) and the bribe recipient (eg a public official)
- claims for various torts against briber, the bribe recipient and others that knowingly participated in bribery or the laundering of its proceeds
- claims are likely to be available against companies, trusts, family members or associates used as a mechanism of bribery or a conduit for bribe monies
- claims not limited to those that received funds
- claims may be available for compensation for losses that have been suffered (for example arising from poor performance of a corruptly acquired contract), or for an “account” of the profits obtained by wrong-doers
- a claim against the briber for compensation for breach of contract
- a right to rescind (treat as void from the beginning) or terminate a contract procured by bribes (or secret commissions or other inducements)

Choosing the recovery route: issues to consider (1)

- public interest in criminal convictions and sentence
 - what is the objective? convictions or recoveries? both?
 - serious wrongdoing demands criminal sanctions
- are criminal and confiscation proceedings available & realistic?
 - location and legal owner of corrupt assets can be very important
 - will foreign confiscation orders or civil judgments be enforced promptly in the UK?
 - usually best to make claim where assets are located, otherwise fight twice
- does criminal or civil route offer higher financial recovery?
- claims against third parties
 - civil claims may be available against third parties that have assisted in wrongdoing
 - criminal proceedings against those parties may be unavailable or difficult

Choosing the recovery route: issues to consider (2)

- need and ability to obtain further evidence
 - law enforcement typically best placed to obtain further evidence through use of investigatory powers (e.g. production orders and search warrants)
 - and internationally through mutual legal assistance
 - often less opportunity for (meaningful) coercive powers in civil cases, and certainly less opportunity at investigation phase before proceedings are brought
 - but will timely MLA be available?
 - to what extent can the Defendants be forced to provide disclosure?
- ease of freezing assets
 - usually desirable or critical to secure assets at outset
 - law enforcement typically have lower threshold to meet e.g. existence of an investigation and a reasonable suspicion

Choosing the recovery route: issues to consider (3)

- do contractual relationships need to be terminated or recast?
 - civil courts may be better at dealing with termination and claims that arise
 - risk of civil waiver of contractual rights through inaction
- standard of proof
 - civil “balance of probabilities” more straight-forward than criminal “beyond reasonable doubt”
 - particularly relevant where evidence is incomplete and inference important
 - or where there may be admissibility issues in criminal proceedings
- criminal v civil definitions of “bribe”
 - civil bribe is a secret commission, unnecessary to prove dishonesty
- availability of settlement mechanisms

Political will is by far the biggest obstacle to asset recovery

- solutions?
 - extend jurisdiction of International Criminal Court?
 - specialist International Corruption Court?
 - give universal jurisdiction to domestic Courts, or wider jurisdiction?
 - permit (legitimate) civil society groups to bring claims (False Claims Act)?
 - use some of freezing mechanisms deployed in terrorism cases?
- publicly available filings on beneficial ownership of companies?
- asset declarations (public)
 - presumption of forfeiture, if asset is economically controlled by public official but undeclared?
- automatic reporting of PEP transactions?
 - which PEPs?