Commercial Litigation Client Service Group

To: Our Clients and Friends

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Bribes and Secret Commission – held on trust for the principal?

In July 2014 the Supreme Court handed down judgment in *FHR European Ventures LLP and others v Cedar Capital Partners LLC* [2014] UKSC 45.

This case concerned the purchase of a Monte Carlo hotel whereby a consultancy service company acting for a purchaser entered into a brokerage agreement with the owner of the hotel. The brokerage agreement was intended to facilitate the sale of the hotel by identifying and introducing potential purchasers, for which the consultant would be paid a commission when the hotel was sold. The consultant never mentioned this brokerage agreement to the purchaser of the hotel and therefore the commission was paid to the consultancy company in secret. The buyer of the hotel subsequently discovered the secret payment and claimed for recovery of the secret profit.

The question before the Supreme Court was whether a bribe or secret commission received by an agent is held by that agent on trust for the principal, or whether the principal merely has a claim for equitable compensation in a sum equal to the value of the bribe or commission. This is a question to which the English courts have historically given inconsistent answers to.

This is not simply an academic discussion but has real practical implications. If the principal has a proprietary claim to a bribe or commission, the principal has priority over unsecured creditors should the agent become insolvent. Perhaps more importantly the principal would also be able to trace and follow the claim in equity. What this means in practice is that the principal could recover assets bought with the proceeds of the bribe or commission, taking advantage of any increase in value, rather than simply having a judgment for a defined sum of money against the principal. The Supreme Court held that where an agent acquires a benefit which is in breach of his fiduciary duty to his principal (such as a bribe or secret commission), the general equitable rule is that the agent is to be treated as having acquired the benefit on behalf of their principal, so it is therefore to be treated as being held on trust for the principal.

London’s large financial centre and thriving property market have combined with the unintended consequences of recent changes to company law to make England a location in which to potentially hide the proceeds of corruption. This has led to a large number of high profile claims in the High Court brought by states and persons seeking to recover assets bought with bribes and secret commissions. This Supreme Court decision confirms England’s status as a commercially aware and attractive location in which to bring proceedings in order to recover the proceeds of underhand dealing.
If you have any questions or would like additional information on this topic, please do not hesitate to contact either Robert Dougans at +44 (0)20 3207 1214 or robert.dougans@bryancave.com or Nabeel Osman at +44 (0)20 3207 1236 or nabeel.osman@bryancave.com. You can also contact any member of our Commercial Litigation Client Service Group to discuss further.

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