Suing Bribing Competitors for Lost Profits

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Companies are competing to win a contract. One pays a bribe to exclude its competitor from the bidding process, or to win the contract. If caught, it faces prosecution under the UK's Bribery Act 2010, as do its bribing directors or employees. The bribing company also risks termination of its contract and claims from its customer.

But could it also be sued by its aggrieved competitor for compensation?

In England, and other common law countries, the answer is yes. And the available claims are not limited to wasted bidding expenditure. Lost profits can also be recovered.

The issue was tested in England in the recent case of *Jalal Bezee Mejel Al-Gaood v Innospec Ltd* [2014] EWHC 3147. The defendant, Innospec, had previously admitted paying bribes in criminal proceedings in both the UK and the US. It had also settled a civil claim made against it by a manufacturer of competing chemicals in New York.

The circumstances seemed promising for a claim, but Innospec successfully defended the case. The Court decided that a claim by a bribing competitor was legally possible. However, it rejected the case because the claimant could not show that its product would have been purchased by the customer in the absence of bribery. This was because the product did not meet the required technical specification. That finding meant the claimant had suffered no loss and its claim failed.

The legal basis of a claim against a bribing competitor

The claim against the bribing competitor was articulated as "unlawful means conspiracy". This requires a claimant:

- To have suffered loss (e.g. profits that would have been earned had the claimant won the contract);
- As a result of an unlawful act or acts (bribery);
- Carried out by two or more people, acting together (the bribing company and the bribe receiver);
- With an intention to injure the claimant.

It is the final limb that could have been legally problematic. In a leading conspiracy case, *Lonrho plc v Fayed* [1993] 1 WLR 1489, the English Court of Appeal decided that a conspiracy case will fail when there is no intention to cause loss to the claimant, even if it is foreseeable that the defendant's actions could do so. Based on this, it could be argued that a bribe payer intends to enrich itself, not injure its competitor.

However, critically, the Court of Appeal also stated that a claim could succeed if the defendant's primary purpose was to advance or protect its own interests. In addition, the stronger argument always seemed that a briber necessarily intends to damage competitors that it corruptly excludes from a fair bidding process. Support for this is found in a case called *Kuwait Oil Tanker Co. SAK v Al Bader* [2000] 2 All ER (Comm) 271. That case concerned a conspiracy to steal the claimants' assets. The English Court of Appeal decided that intention to injure the claimant did not have to be the defendants' predominant purpose. In many cases, the Court decided that it will be clear from the acts of the conspirators that they must have intended to injure the claimant, adding that "*in the case of a conspiracy to defraud by wholesale misappropriation it would be absurd to argue that the conspirators did not intend just that*". The defendants' principal purpose was personal gain, but the Court decided that they could not then say that they did not intend to cause losses to their victim.

In England, bribing competitors might have alternative claims. For example, in a formal bidding process there might be an implied agreement that tenders will be considered honestly, impartially and on their merits. Receipt of a bribe might breach that contract, founding a claim by other tenderers for wrongfully procuring a breach of the implied agreement. Or there may be a breach of an implied contract directly between bidders that each would tender honestly. Competition (anti-trust) claims might also be available against bribing competitors.

Summary of the Innospec case

The claimants supplied lubricant additives and fuel additives to the oil refining industry. The defendants were subsidiaries of Innospec and manufactured and sold chemicals including a lead based fuel additive called tetraethyl lead ("TEL"). TEL was widely used throughout the world until 1990. However, it was banned in many countries because of the adverse environmental and health impact of lead. Nonetheless, Iraq continued to use TEL. At that time, the claimants sold a less toxic alternative toTEL, known as MMT.

The claimants' asserted that between 2003 to 2008 Innospec bribed officials within the Iraqi Ministry of Oil ("MOO") to buy TEL rather than MMT. The claimants claimed this was a conspiracy, and argued that, but for the bribery and corruption, the MOO would have started to purchase MMT and phased out the use of TEL.

After the invasion of Kuwait by Iraq in 1990, the United Nations Security Council imposed stringent economic sanctions against Iraq. The sanctions prevented UN members from undertaking business with Iraq, save for the sale of humanitarian supplies. The UN subsequently permitted Iraq to sell oil and to use the proceeds to purchase humanitarian supplies and equipment to maintain and service Iraq's oil sector. This limited exception to the sanctions regime was known as the Oil for Food Program ("OFFP"). The rules of the OFFP required the proceeds from all sales to be deposited into a UN-controlled escrow account from which the purchase of humanitarian goods would be made. The first Iraqi oil exports under the OFFP began in December 1996.

However, Saddam Hussein's regime (the "Hussein Regime") circumvented the restrictions through numerous secret arrangements. For example, the Hussein Regime required suppliers of humanitarian goods to pay it an illegal "kickback" in order to receive government contracts. Typically the contract price was inflated by the amount of the kickback. The effect was to cause the UN itself, unwittingly, to pay the kickbacks to the Hussein Regime from the proceeds of sales of oil held by the UN.

Innospec, and its Iraqi agent, admitted paying kickbacks to the Hussein Regime in criminal and civil proceedings in the US and UK; as well as offering or paying bribes to officials of the MOO and the Trade Bank of Iraq. In addition, Ethyl, the claimants' supplier, had brought civil proceedings in the US against Innospec claiming damages for loss suffered as a consequence of corrupt payments by Innospec in Iraq and Indonesia. The claim was for US$123 million, of which US$102 million related to Iraq and the balance to Indonesia. The allegations made in those proceedings in relation to Innospec's behaviour in Iraq were broadly similar to the allegations made by the claimants in the current proceedings. Those proceedings were settled in September 2011 by Innospec agreeing to pay Ethyl US$45 million.

The claimant therefore asserted:

- Iraqi officials were bribed to continue using TEL rather than switching to MMT.
- Innospec was liable in tort for unlawful means conspiracy, as 'but for' the bribery and corruption, a decision to switch from TEL to MMT would have been implemented in late 2003. MMT would then have been purchased as the primary additive.
- A field test carried out by the MOO during 2006 on MMT was unnecessary and a charade. Bribed officials ensured that MMT failed the test after a deliberately protracted problem.

Significant reliance was placed on judgments and documents arising out of these various cases. Innospec's case was that the bribes paid or promised did not lead to decisions different from those which would have been made in any event, and that no admission to the contrary had been made in the criminal proceedings.

The judgment

The Judge concluded that the claimants had failed to prove that:

- There was a decision to switch from TEL to MMT in October or November 2003;
- Innospec's agreement with Iraq to supply TEL was procured by bribery; and
- But for the bribes or the promise of bribes, the decision would have been implemented and the MOO would have replaced TEL with MMT from early 2004 onwards.

This was for the following reasons:

Firstly, the Judge decided that MMT alone did not meet the technical specification required by Iraq's refineries. This contradicted the argument that, 'but for' the bribes, a switch to MMT from TEL would have been made. TEL would instead have been required for the foreseeable future. This called into question whether a switch would ever have

taken place, irrespective of any bribery, particularly as TEL was cheaper than MMT.

Secondly, the Judge rejected the claimants' argument that corrupt officials had reversed a decision to switch to MMT. The minutes of the relevant committee demonstrated that no decision had been made to switch.

Thirdly, the Judge rejected the suggestion that payment of kickbacks to the Hussein Regime evidenced a corrupt relationship between Innospec and officials in the MOO which persisted into the post-invasion period.

Fourthly, the Judge dismissed the claims regarding the field test as an 'opportunistic construct'. He pointed to the admission by Innospec's agent that he had kept for himself money provided to him to bribe officials to ensure that MMT failed the field test.

Fifthly, the Judge decided that there was no evidence that the Minister for Oil, the decision-maker, had been bribed.

Concluding comments

In conclusion, the Judge decided that although there clearly was criminal wrongdoing by Innospec, that wrongdoing did not prevent sales of MMT and had not caused any loss to the claimants.

This case demonstrates that claims against bribing competitors are available in England, but emphasises that an innocent claimant must be able to demonstrate that it would have successfully sold its products or services "but for" its competitor's bribery. In the right case, a Court may well be convinced that this can be inferred from the circumstances. But the claimant must identify and address any perceived obstacles to its own success in fair competition.