

# Dispute Resolution Bulletin

Summer 2010

## Bribery Act 2010

The Bribery Act 2010 is due to come into force by the end of 2010. It contains some important changes to our current laws on bribery and of particular importance to commercial organisations is the new offence of the failure to prevent bribery by a person associated with that organisation.

### What is bribery under the new legislation?

In summary, bribery is an offer, promise or gift of a financial advantage or other advantage to another person to bring about improper performance of a relevant function or an activity, or to reward a person for the improper performance of a relevant function or an activity.

The Act introduces 4 offences: 1) bribing another person, 2) being bribed, 3) bribing a foreign public official and 4) the failure of a commercial organisation to prevent bribery. This summary concentrates on the 4th offence.

### Failure of commercial organisations to prevent bribery

A relevant commercial organisation (which is defined widely in the Act) is guilty of an offence if a person associated with it commits the offence of bribery in order to obtain or retain business or a business advantage for the organisation.

“Associated with” means a person who performs services for or on behalf of the organisation and it does not matter in what capacity the services are performed.

### Available Defence

There is a defence to this offence if the organisation can show that it had in place adequate procedures designed to prevent bribery. However, there is currently no guidance on what is meant by “adequate procedures”. The government has indicated that it will issue guidance three months before the new law comes into force.

### Penalties

The first 3 offences carry a penalty (on indictment) of imprisonment for a maximum of 10 years and/or an unlimited fine. Both the company and its directors can face these criminal penalties. The 4th offence carries the penalty (on indictment) of an unlimited fine. Guidance on how the Courts should approach the levels of fines is awaited.



### What should your organisation do now?

Whilst the government's guidance on what will constitute adequate bribery preventative procedures is awaited, every commercial and public-sector organisation should ensure that it has in place provisions that prohibit bribery and should commit to implementing systems to prevent bribery.

Whilst the level of detailed bribery prevention measures to be put in place will much depend on the size and resources of the relevant organisation, all organisations should undertake the following:

1. Ensure that all directors and senior managers are aware of the provisions of the new Act and, in particular, that they could be held personally liable for an offence if the necessary prevention measures are not implemented.
2. Carry out a risk assessment for your organisation. Consider where the risks may lie with your particular organisation. Consider your policies covering, for example, gifts, hospitality, facilitation payments, vetting outside agents and advisers, lobbying and political contributions.
3. Review and amend where appropriate any existing policies on preventing bribery.
4. Consider what further staff training is required.

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## Speaking Plainly

Plain and intelligible language is a phrase which has arisen in both of the foregoing pieces, but what actually does it mean?

The Office of Fair Trading (OFT) has issued some guidance on the matter and what follows is a synopsis on the approach which should be taken when using consumer facing contractual terms, as well as some examples of proposed changes to current terms made by the OFT.

It is of course desirable that contractual language should be clearly written in the first instance, but what is required is that the terms in question are intelligible to ordinary members of the public, not just lawyers.

For example, wide exclusion clauses qualified by references to statute are liable to be deemed unfair due to a lack of clarity. The point is that whilst such a term may not be unclear in law, if consumers do not understand the references, they may be put off from pursuing otherwise legitimate claims.

Ordinary words should be used as far as possible, but avoidance of technical jargon will not of itself guarantee clarity. Consideration must also be given to the way the terms are organised. Sentences should be short, and the text of the agreement should be broken up with easily understood headings. Further, the contract should be presented clearly, using legible print, of a suitable size, and on paper of good quality and plain colour.

The point is not to insist that all consumers will understand every word of every contract, but to give them a real chance to be clear about the terms by the time they become binding.

Examples which have recently come under scrutiny from the OFT are:

### Lien

The Carrier shall have a general lien on any Consignment for its charges for the carriage or storage of that or any other Consignment for the Customer or for any other monies due from the Customer to the Carrier.

becomes...

We may keep or hold all or some of your goods until you have paid all the charges you owe us, even if the unpaid charges do not relate to those goods.

### Minimum Term

This agreement... shall subject to Clauses 7 and 8, continue for a minimum term of 15 months inclusive of the 90 day notice period referred to in Clause 8(c).

becomes...

The minimum term of this agreement is 12 months.

## Disclosure and Electronic Documents

Documentary evidence is critically important in most cases and "disclosure" is the term used by the Court to describe the process of producing documents relevant to a case to the opposing party. The usual requirement is to produce documents which support or harm a party's case, or support or harm that of their opponent.

For paper documents, this is relatively straightforward and is a case of digging out, reviewing and then listing the hard copy. In the case of electronic documents, life is not so simple because of the disparate nature of electronic media. Electronic files can be in many places: central servers; PC's; webmail; mobile devices, to name the most obvious. All of these sources need to be considered, steps taken to retrieve the data and then to search and review it. This can be a mammoth task, involving literally millions of documents.

This process is considered very important by the Court and the parties are usually required to file a "Disclosure Statement" confirming that the appropriate search has been undertaken of all media. Furthermore, in the recent case of *Gavin Goodale & Others v. The Ministry of Justice & Others* [2010] EWHC B40 (QB), the Court required the Defendant to complete a questionnaire setting out how they intended to deal with the disclosure process.

If you are involved in Court action, then you should:-

- Take immediate steps to preserve documents, including electronic media on all devices and seek specialist advice where necessary to avoid corrupting documents and to arrange retrieval if required;
- Review with your solicitor at an early stage the methodology to be adopted in the disclosure of electronic documents and the extent to which this needs to be coordinated with the other party;
- For the long term, review your document retention policy.

*Remember, documents are often critical to the success of your case and one email or text message may make all the difference between success and failure.*

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