



**International
Lawyers
Project**

ENGLAND AND WALES

VICTIMS OF CORRUPTION: NATIONAL LEGAL FRAMEWORKS

**DATABASE
2022**

**SOURCE: INTERNATIONAL LAWYERS
PROJECT**

VICTIMS OF CORRUPTION WORKING GROUP



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1. Legal Standing

1.1 Legal standing for civil society organisations and/or citizens in corruption-related cases

Civil society organisations and individuals maybe have legal standing in corruption-related cases.

1.2 Type of Cases

- Civil (for citizens)
- Administrative (for both citizens and CSOs)

1.3 Legal basis under which citizens have legal standing

The primary statute within England dealing with the prosecution of corrupt practices is the Bribery Act 2010 (the “**Act**”).

In England, a private citizen can typically initiate and conduct a private prosecution.¹ However, under s.10 of the Act, no prosecution can be brought under the provisions of the Act without the personal consent of either: (1) the director of Public Prosecutions at the Crown Prosecution Service (“**CPS**”); (2) the director of the Serious Fraud Office (the “**SFO**”); or (3) the director of Revenue and Customs Prosecutions at the Revenue and Customs Prosecution Office (the “**RCPO**”).² The consent will be given on the basis of a two part test: (1) is there sufficient evidence to provide a realistic prospect of success; and (2) is a prosecution in the public interest.³ The CPS may also discontinue actions commenced by private citizens where it does not believe they will be successful.⁴

¹ Prosecution of offences Act 1985 s.6

² In addition to the roles of the CPS, SFO and RCPO in prosecuting corruption-related offences (as outlined above), it should be noted that the National Crime Agency (the “**NCA**”) has standing to prosecute corporate entities for failure to prevent certain corruption-related crimes, such as money laundering.

³ Please refer to: the “Bribery Act 2010: Joint Prosecution Guidance of The Director of the Serious Fraud Office and The Director of Public Prosecutions” (accessible via <https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and>); and the “Code for Crown Prosecutors”, s.4 (accessible via <https://www.cps.gov.uk/publication/code-crown-prosecutors>)

⁴ Prosecution of Offences Act, 1985, ss.6(2); R (Gujra) v CPS [2011] EWHC 472.

Whilst the Act does not explicitly prohibit such consent being granted to CSOs or private citizens, government guidance indicates that, in the case of private prosecutions, “if the proposed prosecution passes the Full Code Test, the CPS will then take over the prosecution. If the proposed prosecution fails the Test, consent to prosecute will not be given.”⁵ Therefore, the ability to request the personal consents referred to above should be viewed as a means by which the CPS can be prompted by a CSO or private individual to open a prosecution for an offence under the Act rather than as a means by which a perpetrator can be privately prosecuted for a criminal offence.

English common law does provide some potential remedies for corruption-related offences. Of particular relevance are: (1) the civil tort of bribery;⁶ (2) the tort of misfeasance in public office;⁷ and (3) the ability for these torts to be brought against an employing entity, such as a public body, via the principles of vicarious liability.⁸ However, the usefulness of torts as a means by which private citizens and, in particular, CSOs can bring claims for corruption is limited by fundamental common law standing requirements. A claimant in tort must have suffered material damage, requiring a nexus between the action of the defendant and its impact upon the claimant.⁹ For example, the tort of bribery requires a loss to be suffered and a principal-agent relationship to persist. The requirement for a direct relationship and/or loss in order to bring a civil claim under tort limits their utility to the private citizens or CSO acting out of civic duty rather than a direct loss or breach of duty.

Other civil actions that may empower private citizens to take action against the perpetrators of corruption include actions for dishonest assistance and an action for a breach of fiduciary relationship. However, it should be noted that, due to the privity of the fiduciary relationships that these actions are based on, these actions are of a similarly limited utility to CSOs and unconnected private citizens.

⁵ Please refer to the following CPS Guidance: (1) “Private Prosecutions” (accessible via <https://www.cps.gov.uk/legal-guidance/private-prosecutions>); and (2) “Consents to Prosecute” (accessible via <https://www.cps.gov.uk/legal-guidance/consents-prosecute>)

⁶ *Industries and General Mortgage Co Ltd v Lewis* [1949]

⁷ *Three Rivers District Council v. Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1 p.191-196

⁸ *Society of Lloyd’s v Henderson* [2008] 1 WLR 2255 para.25

⁹ *Watkins v SoS for Home Department* [2006] 2 A.C. 398

Judicial review may offer a means by which private citizens and CSOs can take action against the perpetrators of corruption by challenging actions by governmental and quasi-governmental bodies where decisions have been impacted by corrupt practices. Judicial review is a process that enables the courts to review the decision-making process of governmental and quasi-governmental organisations. Judicial reviews may be brought on claims of illegality, procedural unfairness, irrationality and legitimate expectation. In order to be able to initiate a judicial review in England, the claimant has to have “sufficient interest” in the subject matter of the application.¹⁰ However, the courts have generally been unwilling to dismiss applications for lack of standing where an issue of merit, and often public importance, is addressed. Consequently, the courts have interpreted “sufficient interest” broadly, focusing more on whether a “substantial default or abuse” has occurred rather than whether the claimant’s personal rights of interests have been affected.¹¹ Therefore, private citizens and CSOs will have standing to initiate a judicial review of decisions that they believe to have been influenced by corruption.

In addition, decisions regarding whether or not to prosecute allegations of corruption/corruption-related offences may, being decisions by public authorities, also be the subject of a judicial review. A key example of this is *R (Corner House Research) v Director of the Serious Fraud Office*.¹² Here, a judicial review into the decision of the SFO to drop an investigation in BAE Systems for alleged bribery was initiated at the request of Corner House Research, a private CSO involved in the Campaign Against the Arms Trade. Though the case was unsuccessful, the right for the decision by the SFO to drop the case to be the subject of a judicial review was not challenged.

However, the efficacy of judicial review as a tool against corruption is limited by the reluctance of the courts to interfere in executive decision-making processes and the remedies available. The courts have adopted a common position that they will only interfere in the discretionary decision-making of executive officers in

¹⁰ Senior Courts Act 1981, s.31(3)

¹¹ *R v SoS for Foreign Affairs, ex p. the World Development Movement Limited* [1995] 1 W.L.R. 395

¹² [2008] UKHL 60

exceptional circumstances.¹³ Further, even should a judicial review be successful typically only orders amending, staying, or quashing the decision in question will be available. Restitution of money received as a bribe is not possible and damages can only be sought if they would be available in an associated civil suit, such as tort. Damages are not available by right as a result of losses due to unlawful administrative actions.¹⁴ Therefore, whilst *locus standi* for judicial review is interpreted liberally, the ability and willingness of the courts to intervene appears quite restricted.

1.4 Citizens and/or civil society's intervention in corruption cases in other capacities (e.g. third party contributors, expert input, etc)

There is no explicit provision for this under the Act or specific guidance for this from the SFO. The SFO and CPS may call upon private citizens as witnesses. CSOs could provide collect and provide information to public prosecutors. However, there does not seem to be much precedent for this. Where civil suits are brought, third parties can act as a litigation funder or provide advisory support.

1.5 State's entitlement to represent the citizens collectively in corruption cases and whether its intervention excludes direct intervention by citizens

No, except to the extent that the CPS and SFO are empowered to bring criminal prosecutions for corrupt acts such as bribery (please refer above). The CPS is also entitled to take over private prosecutions of criminal acts and discontinue proceedings where it is sceptical about the chances of successful prosecution.¹⁵

1.6 Legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country's citizens

¹³ *R (Corner House Research and another) v Director of the SFO* [2008] 3 W.L.R. 30

¹⁴ *R (Quark Fishing Ltd) v SoS for Foreign and Commonwealth Affairs* [2005] UKHL 57 at para 96

¹⁵ Prosecution of Offences Act, 1985, ss.6(2); *R (Gujra) v CPS* [2011] EWHC 472.

There is no legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country's citizens.

2. Cases

2.1 Existence of corruption-related cases brought to Court by civil society organisations, journalists, or citizens.

None located.

3. Collective Damage

3.1 Legal instruments that enable claiming reparation, compensation, or restoration of collective damages in any field (environmental damages, human rights, corruption, among others)

See below

3.2 Procedures for advancing class-actions

There are several mechanisms for bringing collective action (and, by extension, to seek damages on a class basis). However, with the exception of certain competition actions, these are only available on an “opt in” basis.

Representative Actions: An individual, either alone or supported by a CSO, may bring a claim on behalf of others whom they can demonstrate to have the “same interest” in the relevant claim, at the beginning of the claim, as themselves.¹⁶ Members of the represented group are not joined to the action, but any judgement or order is binding on all parties represented and enforceable with permission from the court. Unlike a Group Litigation Order (“GLO”) (see below), these representative actions operate on an opt-out basis, meaning that represented individuals would need to take active steps to elect not to be

¹⁶ CPR 19.6(1)

represented. With court consent, the individual bringing the claim will then act as the representative of those with the 'same interest'.

Typically, such claims are brought by one of the group of individuals with a direct claim with third parties, such as CSO's, providing support through funding and the provision of expertise. A good example of this can be found in *Lloyd v Google LLC*,¹⁷ in which an individual, Richard Lloyd, brought a claim against Google LLC (for a breach of data protection regulation on behalf of an estimated 4.4m iPhone users) with funding from Therium Litigation Funding IC and support from a CSO called "Google You Owe Us," which was specifically set up to seek restitution for the alleged breach.

However, the scope of such actions has been interpreted restrictively by the courts. Through case law, the following rules restricting the scope of representative actions, have developed:

1. the requirement that parties have the "same interest" will not be met when the relief sought would not be equally beneficial to all members;¹⁸
2. it must be possible to definitively say if a party is or is not represented at the time of the claim, even though all represented parties need not be identified;¹⁹
3. it is not possible to sue for the lowest common denominator of damages (i.e. the lowest amount of damages available to each represented individual) in order to bypass the issue that damages for each party might otherwise differ;²⁰ and
4. "damage" will not have been suffered by default if the claimant is the victim of a breach of law but, instead, the damage suffered must be specifically quantified.²¹

Representative actions have been attempted in an 'opt-out' fashion for environmental claims with mixed success. Examples include *Vedanta Resources*

¹⁷ [2021] UKSC 50

¹⁸ *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch) at para 35

¹⁹ *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch) at para 36

²⁰ *Lloyd v Google* [2021] UKSC 50, para 5

²¹ *Lloyd v Google* [2021] UKSC 50, para. 5 & 94

plc v Lungowe and ors, [2019] UKSC 20, and *Jalla & Anr v Shell International Trading & Anr*, [2021] EWCA Civ 1389.

Group Litigation Orders: Under the Civil Procedure Rules (“CPR”), claimants pursuing claims with “common or related issues of fact or law” may seek a group litigation order (a “GLO”).²² A GLO operates on an ‘opt-in’ basis since participants must register on the group register before a specified date in order to participate. The court has discretion to refuse a group litigation order where it considers it more appropriate for the claims to be consolidated into a single, representative action (as above) or brought separately. It should be noted that the need for each individual to actively sign up to participate means that the uptake of GLO opportunities when opened to the general public is likely to result in far fewer individuals being represented in the action than in a representative action.

Collective Actions and Damages under the Competition Act 1998 (as amended by schedule 8, paragraph 5 of the Consumer Rights Act 2015) (“CA 1998”): Consumers and businesses may bring a private action for damages for losses resulting from breach of competition law.²³ Such actions may be done on an “opt-out” basis at the discretion of the Competition Appeal Tribunal (“CAT”). It is also possible to settle opt-out claims provided settlement terms are presented to the CAT.

4. The Role of the victims of corruption

4.1 Definition of victims of corruption or common definition used by the courts in this country

There is no definition of victims of corruption.

4. 2 Cases that recognize the role of victims

There are no cases that recognize the role of victims

²² CPR 19.1

²³ s.47B CA 1998

4. 3 Corruption-related court cases (criminal, civil, administrative) that awarded compensation to individuals or to identifiable or non-identifiable groups of victims to repair the damage caused by the corruption offense

There are no corruption-related court cases that awarded compensation.

4.4 Innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases

Chapter 22 of the Crime and Courts Act 2013 provides for the CPS and SFO to enter into deferred prosecution agreements (“DPAs”) with corporate defendants, which allow defendants to avoid criminal prosecution in return for, usually, restitution of proceeds of corruption. For example, Amec Foster Wheeler Energy Limited recently avoided criminal prosecution by providing £200,000 of compensation to victims of corruption in Nigeria.²⁴ A DPA will be negotiated where the relevant prosecuting authority, (for example, the SFO), deems that it is in the public interest. Therefore, it seems likely that a CSO could actively lobby for a DPA to be entered into where it is aware that an investigation is ongoing.

5. Available Information

5.1 Information published by enforcement authorities (including control agencies) about corruption enforcement actions

Information is published by enforcement authorities. Type of information::

- The initiation of investigations
- The conclusion of investigations whether the investigated person has been acquitted or not
- The enactment of sanctions
- Initiation of settlement negotiations
- Settlements

²⁴Please refer to the SFO’s press release accessible via: <https://www.sfo.gov.uk/2022/02/21/sfo-investigation-delivers-over-200000-compensation-for-the-people-of-nigeria/>

- The grounds for sanctioning or acquitting (the case)

5.2 Feasible access to information on ongoing or concluded cases

As a general rule, within the UK, the public have feasible access to all ongoing and concluded cases by default. Exceptions to this may be made at the court's discretion.

5.3 Ways for citizens or civil society organisations to gather information on whether corruption cases are being investigated or trialed.

Citizens and Civil Society Organisations can gather information on corruption cases via law reports, press releases by Government bodies and, in particularly high-profile circumstances, from coverage in the general media. Of particular importance, is the case archive operated by the SFO recording all of their investigations (freely accessible via <https://www.sfo.gov.uk/our-cases/>) and an archive of law reports from the UK administered by the British and Irish Legal Information Institute (freely accessible via <https://www.bailii.org/databases.html#ew>).

6. Supplementary information

6.1 Main identified barriers that prevent CSOs, citizens, and journalists from standing as victims of corruption cases.

See above

6.2 Other aspects, issues, provisions, or practices linked to the role, recognition, and compensation of victims of corruption.

N/A