

Breach of Trust under the Kuwaiti Penal Law

September 2016

Article 240 of the Kuwaiti Penal Law provides:

“A punishment of no more than three years of imprisonment and or a fine not exceeding 3,000 Kuwaiti Dinar shall be applied to whoever appropriates assets for himself, or dissipates assets for his benefit, or intentionally damages assets while he possesses the assets owned by another, on trust, loan, lease, mortgage, proxy or any other contract obliging him to preserve the asset and return it or use it in a specific manner for the benefit of the owner or anyone else, and to account for the said usage, or based on a legal provision or court ruling requiring him to do so.

The asset mentioned in the preceding paragraph includes any instrument establishing a right or discharging its owner of said right.”

According to Article 240 of the Kuwait Penal Law, a person is guilty of breach of trust if he dishonestly appropriates assets belonging to another, which he holds on trust, with the intention of permanently depriving the other of ownership. In this regard, the trustee receives the asset with the owner's consent and for a specific purpose other than appropriating the asset. As such, the trustee would be in breach of his obligation if he involves himself in a conflict of interest situation by appropriating the asset of the owner held on trust or gaining any benefits from said asset as opposed to what was contemplated by the owner.

Based on Article 240, the crime of breach of trust can be established upon satisfying the following elements:

- Having assets that belong to another.
- Possessing the asset based on one of the contracts mentioned in the article.
- Appropriation of asset belonging to another.
- The intention to permanently deprive.

Asset belongs to another:

It is necessary to decide whether something falls within the definition of “asset”, which includes money, moveable properties and anything with a monetary value. Article 240 makes it clear that “asset” includes documents establishing rights for its owner or discharging him from obligation. Further, the proceeds of business can fall within the definition of “asset” as it is capable of being stolen.

Possessing the asset based on one of the contracts mentioned in Article 240:

Article 240 sets out the methods by which the assets must come into the possession of the trustee, as follows:-

- Trust contract, which requires the trustee to hold the assets owned by another, to act according to the instructions mentioned in the trust deed and to return the asset to the owner.
- Loan contract, which requires the trustee to use the assets for a specified timeframe and then return the assets to the owner.
- Lease, which requires the trustee/lessee to keep the leased assets intact and return them to the owner without any damage, deduction or severance of any fixtures attached to the assets.
- Proxy, which is an arrangement with the owner by which an individual acts on the owner's behalf within the scope of the powers and authorities conferred on him by the owner.

It should be noted that Article 240 provides that the trust relationship can be created by any other contracts or arrangements requiring one person to possess the asset owned by another and return the said asset to its owner, or use the said asset in a specified manner for the benefit of its owner or any other person and keep account for said usage.

Article 240 provides that the trust relationship can be created not only by contract but legal provision or court order requiring one person to possess the asset owned by another person. For example, a company's liquidator who is appointed for the purpose of collecting in all of the assets of the company and settling all claims against the company before putting the company into dissolution.

Further, Article 240 covers the situation where the trustee has been instructed by the owner to collect monies and to account to the owner for those monies less a commission or other reward. Accordingly, if the trustee sells the owner's goods on his behalf, the trustee may be in a fiduciary relationship with the owner in respect of the proceeds of sale.

Article 240 provides that where assets are held on trust, the persons to whom they belong would have a right to enforce the trust. Where a person receives assets from, or on account of, another, and is under an obligation to the other to retain and deal with those assets or their proceeds in a particular agreed way, the assets or proceeds shall be regarded as belonging to the other. The obligation of the trustee must be clear that he is bound to retain and deal with the asset in a particular way for the interest and benefit of the owner or any other specified person. As such, Article 240 will be satisfied where the trustee, having received money or other assets from the owner, or on account of the owner, has an obligation to the owner to preserve a fund representing the money or assets, which fund is to be maintained except so far as it may or must be dealt with "in a particular way" – that is, in the manner required by the agreement with the owner, or by transfer to the owner or at his direction.

The intention to permanently appropriate asset belonging to another:

Article 240 creates trust relationship that requires the trustee to be bound to act for the benefit of another – the owner or any other person specified by the owner. In such a case, the trustee cannot allow any personal interest to conflict with his/her duty to the owner. This is because the trustee is also a fiduciary who is under an obligation to place his/her duty to another ahead of his/her own personal interest as the essential feature of the trust relationship is the vulnerability of the owner in the hands of the trustee who can damage or harm the interests of the owner.

In order to establish criminal liability, the appropriation of assets by the trustee must be without the consent of the owner for this element of the crime to be satisfied. An intention to appropriate the asset as distinct from merely assuming its possession is insufficient. Therefore, if the intention of the trustee was to deprive the true owner of possession for a limited time, breach of trust within the wording of Article 240 is not made out. This view was adopted by the Kuwaiti Cassation Court in the Appeal number 19 of 1992 dated 8 June 1992.

Based on the above, the individual would be in breach of his obligation as trustee where he/she appropriates anything forming part of the asset or dealing with it in breach of the confidence reposed in him/her. For instance, a bank teller holds the funds of customers based on trust which requires him/her to preserve the said funds. Where said teller transfers the funds to his/her bank account in circumstances of dishonesty, he/she would be in breach of trust.

Conclusion

Article 240 requires the holder of assets to act for the benefit of the owner in any contract upon which a relationship of trust exists. The trustee should not allow any personal interest to conflict with the duty owed to the owner, or assume permanent entitlement to own the assets. Such an act, coupled with the requisite intention, would amount to breach of trust. In other words, the trustee is under an obligation to place the duty owed duty to the owner ahead of his own personal interest.