

# Court of Appeal clear on corruption

## Introduction

The Court of Appeal recently issued its decision in *Borlase v R*,<sup>1</sup> which concerned convictions for corruption and bribery offences arising out of the payment of more than \$1 million of bribes between 2006 and 2013 at Rodney District Council (RDC) and Auckland Transport (AT).

The issue under appeal in relation to the conviction<sup>2</sup> was a narrow one and concerned how the “intent to influence” element of corruption charges under the Crimes Act 1961 should be interpreted. However, the decisions in both the High Court and Court of Appeal have also provided some invaluable general guidance about how our legislative framework deals with corruption.

The facts in this case also highlight how corruption of this nature can infiltrate an organisation despite the presence of a number of ‘red flags’.

Set out below is a brief summary of some of the more significant aspects of the High Court and Court of Appeal judgements and what that might mean for future prosecutions in this area. We also provide an SFO view about some of the key warning signs for organisations to be aware of around possible corrupt behaviour.

## Background

In 1997, the appellant Mr Borlase established Projenz, which provided engineering consulting services to RDC and subsequently to AT.

The relevant offending began in or about 2006 when Mr Noone was employed as the Director of Transport at RDC. From that time, Mr Noone received monthly payments from Mr Borlase (through Projenz), as part of a sham consultancy arrangement. During this same period, Mr Borlase provided additional benefits, principally in the form of international travel and the payment of mobile phone bills, to both Mr Noone and another member of the RDC, Mr George. Over the relevant period, RDC (and subsequently AT) conducted tendering processes through which Projenz secured significant roading contracts. None of the benefits being provided by Projenz (or the fact of its financial relationship with Mr Noone) were disclosed during those tender periods.

Within the scope of each contract awarded, the contractor could achieve more or less commercial success depending upon the allocation of work by RDC and AT. From the start to end of the relevant periods, Projenz enjoyed an extraordinary uplift in its RDC and AT contract work and consequently in its overall profits.

In the High Court, Messrs Borlase, Noone and George were each charged and convicted under section 105 of the Crimes Act for offences relating to the bribery of a public official. The conviction appeal that was subsequently brought turned on a single issue, namely whether the trial Judge erred in finding that the ‘intent to influence’ element to s105(2) of the Crimes Act did not require that the giver of the bribe intended that the official act improperly.

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<sup>1</sup> [2017] NZCA 514.

<sup>2</sup> Note that the sentence handed down in the High Court was also appealed by both Borlase and Noone and was rejected.

## The legal issues

### *Rejection of the transactional approach*

The facts in this case were at odds with the traditional conception of corruption occurring in a transactional manner, i.e. the payment of a bribe being directly connected with the performance (or omission) of a specific act by the public official. The High Court considered and rejected this narrow view of how corruption might occur and made it clear that the legislature had deliberately cast the provisions relating to corruption in broad terms. The Court of Appeal confirmed that this approach was correct.<sup>3</sup>

Specifically, Justice Fitzgerald in the High Court accepted that in some cases there will be distinct acts that can be pointed to in connection with payments, but importantly she held that it was not a requirement. The Judge went on to note that “cases of more insidious corruption of officials, where an official is effectively ‘on the payroll’ of the paying party, with the intent that the official will ‘look after’ the payer generally in their official capacity ... are no less serious than cases of a distinct official act or event, and are arguably more damaging to society, given their ongoing and insidious nature.”<sup>4</sup> The only causal connection required by s105(2) was that the official carries out official acts that are causally connected to the payer of the bribe’s business activities. In this case, the ability to influence both the tender process and the subsequent allocation of work was found to be corrupt without needing to establish a specific quid pro quo arrangement. The Court of Appeal left this conceptual approach to the payment of bribes intact.

In this case, the insidious impact of the bribes that were paid is probably best exemplified by the increase in net sales for Projenz from approximately \$1 million to over \$8 million in the seven-year period that followed the appointment of Mr Noone to a position of influence within RDC and then AT.

### *Extra intent?*

The appellant’s central argument on appeal was that simply establishing intention to influence wasn’t enough for the Crown to prove its case. Rather, he contended that the Crown must also establish an intention to influence the officials to act improperly, or otherwise outside the scope of their duties.

In rejecting this argument, the Court of Appeal drew on the reasoning by the Supreme Court in the *Field v R* case.<sup>5</sup> In *Field*,<sup>6</sup> the Supreme Court held that, although there was no evidence that Mr Field had acted ‘improperly’ in the sense of doing something that a Member of Parliament would not, the acceptance of a benefit in connection with acts done in his official capacity was ‘corrupt,’ because it was fundamentally inconsistent with the performance of official functions. It also had a tendency to promote a culture of officials coming to expect similar benefits in the future and of members of the public coming to expect they will not receive assistance without providing such benefits.<sup>7</sup>

Following this line, the Court of Appeal was satisfied that ‘corruptly’ did not require dishonest, dishonourable, or improper actions, but merely that the recipient knows the benefits they are receiving are provided in connection with their official capacity. The Court went on to say that the purpose of s105(2) was to proscribe conduct which is intended to influence the acts or omissions of

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<sup>3</sup> See note 1 at [20].

<sup>4</sup> *R v Borlase* [2016] NZHC 2970 at [131].

<sup>5</sup> See note 1 at [19].

<sup>6</sup> [2011] NZSC 129. Mr Field, an MP, advised a number of Thai nationals on immigration matters, and received ex post facto benefits in the form of work performed on his property.

<sup>7</sup> See note 7 at [59] – [62].

public officials performed in their official capacity. It did not require proof of the additional element of an intention to influence the official to act in a certain way, whether proper or improper.<sup>8</sup>

Justice Fitzgerald in the High Court had previously looked to the legislative history behind ss100-105 of the Crimes Act for additional guidance and found that there was nothing in the precursor provisions to suggest a requirement that the official carry out 'improper' acts in exchange for benefits. On the contrary, it was clear that the legislation in this area had historically drawn a distinction between benefits provided before and after the event, rather than between proper and improper acts.

The Court of Appeal also swiftly dealt with the submission that reference should be had to the Bribery Act 2010 (UK), (which does require proof of improper acts) by simply noting that the differently worded English statutory provisions were of no assistance in construing s105.<sup>9</sup>

The Court of Appeal ultimately concluded that it would be inconsistent with a proper construction of the corruption provisions (as well as the underlying legislative history and intent examined in the High Court) to add the 'significant gloss' of a requirement that the provider of the benefit intends the official to act improperly.<sup>10</sup> The impropriety was found to be effectively self-contained within the payment and receipt of the bribe in connection with official acts. That said, the Court of Appeal still felt able to observe that although it was not a required element, it was implicit in the arrangement that the payer's intention was to influence the recipient to act improperly.

#### *The power of inference*

Outside the decision that the Court of Appeal was ultimately required to make, it is also worth observing that even if the appellant had been correct that proof of an intention to influence Mr Noone and Mr George to 'act improperly' was required, the addition of these words would (or at least should) not have changed the outcome at trial.

In the High Court, Justice Fitzgerald explicitly noted that the parties' intentions in cases such as this were most likely to be established by inference from the facts and surrounding circumstances. This was on the basis that it would be a rare case where there was direct evidence that the parties intended improper influence, as corruption is typically hidden and intentions and expectations are not recorded.

The reality is that the Judge's finding that Mr Noone was effectively on Projenz' payroll through a sham consultancy arrangement would seem to be ample basis for an inference that Mr Borlase (acting through Projenz) intended Mr Noone to act other than as his duties required him to.

In fact, as the Judge found, the only logical inference that could be drawn from the nature of the payments he received and their sheer scale, was that they were intended to influence Mr Noone to act improperly in his official capacity.<sup>11</sup> Accordingly, the somewhat illusory requirement of 'extra intent' would likely have been met in this case in any event.

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<sup>8</sup> See note 1 at [17].

<sup>9</sup> See note 1 at [22]. Note also that ss100-105 of the Crimes Act were in fact based on the Canadian Criminal Code (1954). Clause 102 of the Canadian Code provides that that it is irrelevant whether the official is actually able to exercise influence or not and makes no mention of the official act or the connected behaviour needing to be improper or immoral, which is consistent with the drafting of s105 of the Crimes Act.

<sup>10</sup> See note 1 at [17].

<sup>11</sup> See note 4 at [614].

## **Red flags**

There were a number of red flags present in this case that simply weren't acted upon. Taking the facts of this case, together with our experience in other similar matters, we highlight the following:

- Organisations should consider where their risks lie in relation to possible corruption. In this case, RDC and AT were involved in large-scale ongoing procurements, which suggest that this area of the business required a particular scrutiny that it did not receive.
- It is not enough to just have processes in place. While rigorous interest disclosure, gift declaration, procurement and invoice approval processes are important, they must be followed without exception (regardless of the person's experience, seniority or level of trust) to be effective. A complacent culture will defeat even the best processes.
- An individual within an organisation should not be allowed to maintain exclusive or unusually close control over a business relationship. Attempts to do so can suggest that normal controls and processes are being deliberately avoided.
- If a lifestyle is being maintained that seems inconsistent with a person's legitimate compensation (particularly when seen alongside other warning signs), then it may be a warning sign.
- There needs to be a culture where inappropriate behaviour can be called out. This starts at the top, as staff will typically not feel able to report questionable behaviour if it is being sanctioned (even implicitly) by management.
- Alongside this culture, there needs to be a clear avenue for reporting potential corruption, which sits outside the usual management lines.

## **Conclusion**

New Zealand is at the top of the Transparency International Corruption Perceptions Index for 2017. We should be rightfully proud of this position, but one of the biggest challenges to this status is complacency.

The AT case demonstrates that while we may not have institutional corruption, we are not corruption free. Also, in an increasingly global economy, we will inevitably be doing business with countries where corruption is entrenched. This reality demands that as a country we take a proactive approach to combatting corruption.

This will include organisations in both the public and private sector reviewing their systems and controls, and perhaps most importantly, their cultures, to ensure they are making every effort to reduce the risk of corruption occurring. If corruption is suspected, then it should be referred to the SFO. For its part, the SFO will continue to take a zero tolerance approach to corruption in New Zealand.