

**TAITO PHILIP HANS FIELD**

Appellant

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**v**

**THE QUEEN**

Respondent

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Hearing: 21 June 2011

Coram: Elias CJ

Blanchard J

Tipping J

McGrath J

William Young J

Appearances: H A Cull QC and M Karam for the Appellant  
D B Collins QC, S J E Moore SC and D G Johnstone for  
the Respondent

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**CRIMINAL APPEAL**

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**MS CULL QC:**

May it please Your Honours, I appear with Mr Karam.

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**ELIAS CJ:**

Yes Ms Cull, Mr Karam.

**SOLICITOR-GENERAL:**

Mr Moore and Mr Johnstone with me today Your Honours.

**ELIAS CJ:**

Thank you Mr Solicitor, Mr Moore, Mr Johnstone. Yes Ms Cull?

**5 MS CULL QC:**

I propose to start with an overview and then I would like to take Your Honours to the submissions. This is the first case in New Zealand in which a Member of Parliament has been charged with corruption and bribery under section 103 of the Crimes Act 1961. The Court of Appeal has found that there is, in fact, no such offence as  
10 corruption and bribery of a Member of Parliament in New Zealand's Criminal Code, and you find that at paragraph 48. The offence is redefined as corruptly accepting a bribe. The Court went on to find that "bribe" is a neutral term and "corruptly accepts" means a Member of Parliament is knowingly outside the recognised bounds of his duties. In my submission the offence is now corruptly accepting a benefit.

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The Court accepted that this was a gratuity case but that it was caught by section 103 of the Crimes Act. The Court also stated that there was limited, if any, assistance in ascertaining the precise Parliamentary intention from the legislative and parliamentary history of this provision, yet found that Parliament used words that  
20 direct that rewards for acts done or to be done are criminally culpable. The Court said specifically that Parliament contemplated that a legal gratuity type offending was criminally culpable under section 103(1), and you'll find that at paragraph 83.

There was a comprehensive explanatory note to the introduction of the Crimes Bill  
25 1959 and a further one in 1961. The 1959 explanatory note confirmed that frequent references were made to recent legislation in other countries and in particular the Canadian Criminal Code of 1954. It was noted that some of the new provisions and some of the alterations in existing law were based on sections of the Canadian Criminal Code.

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The introduction of the new provision, section 103, was specifically noted that bribery and corruption had been revised and extended to include, and I underline the word as I have in the submission, the bribery of public servants, Members of Parliament and others. There was no contemplation or mention of illegal gratuity type offending,  
35 or temptation for that matter, despite the illegal gratuity provision contained in the Canadian Criminal Code. Although this will be canvassed fully in the submissions, and are contained in the submissions, it is important at the outset to emphasise that

Parliament adopted the bribery section from the Canadian Criminal Code but not the illegal gratuity provision.

5 There is a critical distinction between the two distinct types of criminal offending, namely bribery and illegal gratuity receipt. An illustration of the distinction is described by the US Supreme Court in *United States v Sun-Diamond Growers of California* 526 US 398 (1999), where Scalia J emphasised the critical differences between the two distinct offences. He says, the Court stresses that “for bribery there must be a quid pro quo – a specific intent to give or receive something of value in exchange for an official act. An illegal gratuity, on the other hand, may constitute merely a reward for some future act that the public official will take, and may already have determined to take, or for a past act that he has already taken. The punishments prescribed for each of those offences reflect their relative seriousness”.

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Bribery in the United States may be punished by up to 15 years’ imprisonment, a fine of 250,000 or triple the value of the bribe, whichever is the greater, and disqualification from holding government office. Violation of the illegal gratuity statute, on the other hand, may be punished by up to two years’ imprisonment and a fine of up to \$250,000. The same distinctions are made in Canada. In the Canadian Criminal Code, the penalty is 14 years for bribery and five years for illegal gratuity. The distinctions between the two offences are important and in my submission were recognised by the Court of Appeal which acknowledged that this case was a reward or gratuity case, you’ll find that at paragraph 99, as opposed to a quid pro quo bribery case, also referred to at paragraph 185.

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In reaching its conclusion, the Court of Appeal has determined that the work of section 103 is done by the word “corruptly” as “bribe” is value neutral. This is, with respect, problematic as the definition of “corruptly” is in impressive disarray, as the authorities and the commentators have indicated, and the English legislature has enacted the Bribery Act deleting all reference to corruptly for that very reason.

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The result of the Court’s decision is that there is no offence of bribery in New Zealand when the appellant was charged with, convicted and sentenced on charges of corruption and bribery. The Crown in closing addressed the jury on bribery charges and the sentencing Judge frequently referred to these charges as bribery and

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corruption. And I will take you to that as part of the submissions that I wish to canvas.

5 Turning to the grounds of appeal, there are three broad grounds to the appellant's argument. The first is that the Court of Appeal has adopted the wrong test for the meaning of "corruptly". The second is that section 103 does not capture illegal gratuities and the third is that there are two adverse consequences of the decision of the Court of Appeal, namely the jury were not directed on what the appellant says is the new test and the indictments were not framed in the alternative.

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With that overview, Your Honour, I now wish to turn to the submissions and I'd like to take you to the first round and that is –

**ELIAS CJ:**

15 Ms Cull, I should indicate that for my part, and come to it when it suits you, I would be helped if you could explain to me why the Court of Appeal is right in saying that the case turns on the word "corruptly" because it seems to me that the case really turns on the linkage that the, that section 103 is about the linkage between the thing of value obtained and the doing of an act or having done an act in the capacity as  
20 Parliamentarian. It may not be helpful to start with the word "corruptly".

**MS CULL QC:**

If I understand Your Honour's request you are asking for the linkage between the receipt of the benefit and how that links back to corruptly?

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**ELIAS CJ:**

Well, I have understood you to say that you are going to really start, and your submissions are framed around the meaning of "corruptly" and you've referred to what the Court of Appeal said about that. I want to make it clear that for my part it is,  
30 it seems to me that section 103 is really concerned with knowledge of the link between the value received and the act.

**MS CULL QC:**

Act.

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**ELIAS CJ:**

Yes. So that if you start with corruption you maybe a bit far down the track for me.

**TIPPING J:**

Well, perhaps I could add that it seems at least arguable that knowledge of the link or proof of knowledge of the link is proof of corruption.

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**ELIAS CJ:**

Yes, that's really what I meant, that corruptly can be taken to be a conclusionary introduction in that way of emphasis that we used to see in a number of old statutes.

10 **WILLIAM YOUNG J:**

That "corruptly" means "wilfully" or "knowingly".

**ELIAS CJ:**

Yes.

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**WILLIAM YOUNG J:**

On the basis that to take money, knowing it's a reward for official services is, in the view of the legislature, corrupt.

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**MS CULL QC:**

If I can just pause for a moment. Your Honours are directing, then, attention to the way in which the leave Judge and the trial Judge defined "corruptly" and meaning "knowledge", and perhaps if I can just –

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**ELIAS CJ:**

Well, on an appeal, I would have thought, an appeal against conviction, it would be good to start with the directions that were given to the jury. We're really starting with the way the Court of Appeal viewed it, and some additional language it may have built around it but, for my part, I will want to be convinced that the direction given by Hansen J was wrong, and it is based on knowledge of the linkage.

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**MS CULL QC:**

Yes, well, thank you for that direction. Perhaps if I could take you to volume 7 of the case on appeal, at tab 1, page 1 of that volume and, assuming that Your Honours are focused still on the word "corruptly", because I would like to deal with the definition of "corruptly" before I deal with "bribe". But if I can take you to the issues and

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definitions, which perhaps is the most easy way of seeing, I think, what Your Honour is asking me, or Your Honours are asking me. "Corruptly" was, as defined by the lead Judge and the trial Judge as, "Knowledge or belief that the benefit, namely the work, was done to reward or to influence the accused in respect of immigration assistance provided or to be provided." Now, in my respectful submission, "corruptly", as defined in the authorities, goes beyond mere knowledge, and, indeed, that was the thrust of the submissions before the Court of Appeal. So, I wonder if I could take you, in my submissions –

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**ELIAS CJ:**

While you are just at page 438, it might be thought that the direction here is favourable to the accused because it is not based on the statutory linkage, which simply is of connection, but suggests that knowledge, the knowledge, be of – that it's reward or influence. It may not be necessary to go so far on the statutory language, it may be enough if the accused knows that it's in connection with his, with an act of his, as a parliamentarian.

20 **MS CULL QC:**

Well, Ma'am, that's why I opened on the distinction between "bribery" and "illegal gratuity", because –

**ELIAS CJ:**

Well, I will need to be convinced that you're right in your terminology there because, it seems to me, that this isn't gratuitous, because it's linked, that's the Crown case. A gratuity, a gratuitous payment, which the law could proscribe and which it does in Canada, as you've pointed out, may have no connection with any act to be undertaken by the parliamentarian. But if there is such a link, it's not gratuitous, in terms of section 103.

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**MS CULL QC:**

Perhaps I could deal with it this way, and I will come back to my submissions –

35 **ELIAS CJ:**

Yes.

**MS CULL QC:**

– in relation to “corruptly” in a moment. But if I could just address it this way: there is a two-step process with bribery. The receipt of the benefit is in order to influence or reward someone, in their official capacity, to do something wrong, “improper” is the way that that UK legislation has now grappled with it, “moral depraved” is how we’ve had it in an earlier decision in New Zealand, “something wrong”, “illicit”. Now, in my submission –

**WILLIAM YOUNG J:**

Do you mean that it’s only an offence if the Member of Parliament is doing something which shouldn’t be done, leaving aside altogether for the moment the money that’s paid?

**MS CULL QC:**

That’s correct.

**ELIAS CJ:**

Well, where do you get that in the statute?

**MS CULL QC:**

Well, I’m wanting to come to, obviously, the cases on the differences, but –

**ELIAS CJ:**

Well, can you just take us though first to the terms of section 103(1) and explain how, just as a matter of text, you obtain that position?

**MS CULL QC:**

Because of the use of the word “bribe” and “bribery”, the section is named, “Corruption and bribery of a Member of Parliament,” and it’s –

**ELIAS CJ:**

But, as you acknowledge, “bribe” is defined simply in terms of value.

**MS CULL QC:**

In my submission, Your Honour, “bribe” and “bribery”, in the context of where our Parliament put it in the 1961 Act, clearly imported the Canadian statute, the codification of “bribery” from Canada.

**TIPPING J:**

Well, how can you say that, because “bribe” is – if you simply substitute the definition “bribe” into section 103(1), you have, “accepts or obtains,” et cetera, “anything of value,” effectively.

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**MS CULL QC:**

Well –

**TIPPING J:**

10 It’s just simply a convenient way of describing anything of value.

**MS CULL QC:**

Well, with respect, Sir, “bribe” is defined for a number of sections here, and it has been –

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**TIPPING J:**

Are you asking that the definition be read up or something for the purposes of this section?

**MS CULL QC:**

I’m asking, Sir, that the same way that Canada treated its bribery section at the time, and what New Zealand Parliament understood it was doing, was extending the section to encompass “bribery”, as it says in the explanatory note, “bribe”, as it’s defined in section 99, collects together what has been described in the Canadian  
25 Code precisely in its definition and, in my submission, the reference in the 1961 explanatory note simply notes that “bribe” in section 99 has been defined to apply to sections 101 through to 105. Now, in my submission, on the basis of the intention of the New Zealand Parliament, the mischief of the section was “bribery”, and it came directly from Canada. The “illegal gratuity” provision was available, and I’ve set that  
30 out in my submissions, have to take you there, but the New Zealand Parliament didn’t adopt that. It did adopt “influence peddling” but didn’t adopt “illegal gratuity”. And, in my submission, when one is now charged –

**TIPPING J:**

35 Well, a gratuity in this context is something of value, isn’t it? If you don’t get anything of value you’re not really getting anywhere.



**MS CULL QC:**

Well, it's not necessarily "of value", it's a "benefit" –

**ELIAS CJ:**

5 And if there's a link –

**MS CULL QC:**

– "benefit", whether direct or indirect.

10 **TIPPING J:**

Well, a benefit must be something of value for the recipient, surely? And that's what they've done, they've just simply simplified this, I would have thought.

**MS CULL QC:**

15 Well, in my respectful submission, using the word "bribe" and naming the section, "Bribery," raises the very issues about the intention of what is –

**TIPPING J:**

20 Well, "bribery" goes with subsection (2) and "corruption" goes with subsection (1), I would...

**MS CULL QC:**

With 103 it's together, "Corruption and bribery of a Member of Parliament."

25 **TIPPING J:**

Yes, I know, but I would have thought if you, if one wants to be precise about the two words in the heading to the section, it's corruption when you receive the bribe and it's bribery when you make it, under subsection (2), give it or offer to give it.

30 **MS CULL QC:**

Well, with respect Sir, bribery is a corrupt bargain. It is where there is a meeting of minds.

**TIPPING J:**

35 Well, I'll signal this and then I'll keep quiet. What I cannot understand is why we just don't simply apply the language of this section, with a proper understanding of what corruptly means, because once you do that, it seems to me to be pretty

straightforward. "Corruptly", I agree, is a debateable term. That seems to me where the full force of this argument lies, not some subtle point about bribery.

**MS CULL QC:**

5 Well, Sir, I was starting with "corruptly" and I'm now dealing with –

**TIPPING J:**

Let's put to you that "corruptly" here simply means, knowing of the linkage.

10 **MS CULL QC:**

Well, in my –

**TIPPING J:**

And you've got to show that it means more than that –

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**MS CULL QC:**

Yes.

**TIPPING J:**

20 – because that's how the Judge summed up. Isn't it as simple as that?

**MS CULL QC:**

Well, Sir, if I can just answer it this way. We have submitted that knowledge is not sufficient –

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**TIPPING J:**

I know, but you've got –

**MS CULL QC:**

30 – under the section.

**TIPPING J:**

– develop, I go cold on this bribery argument. I think that the real issue here is what does "corruptly" mean and it's been put to you that it means simply with knowledge of  
35 the link. Now, I think, and that's how the Judge summed up.

**MS CULL QC:**

Yes.

**TIPPING J:**

Now I think you have to try and persuade us that it means more than that.

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**MS CULL QC:**

All right, thank you.

**ELIAS CJ:**

10 And if you're going to persuade us by reference to notions of gratuity, you have to answer my concern that it can't be said that accepting payment is gratuitous, if it is in the knowledge of the link.

**MS CULL QC:**

15 Well, I understand Your Honour's question to me, that is answered by the numbers of Canadian cases on illegal gratuity, where knowledge that there was a connection does not mean that you –

**ELIAS CJ:**

20 But there may be –

**MS CULL QC:**

– are convicted for bribery.

25 **ELIAS CJ:**

– overlap in the Canadian statutory scheme, there maybe overlap, but that doesn't mean that if there is a linkage and it is – section 103 isn't appropriately invoked. Anyway, you can develop that, but, but I'd like to flag it because it seems to me you don't have a gratuitous payment if you, if it is connected with any action you will take as a Parliamentarian.

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**MS CULL QC:**

Connection is, with respect, underwriting or reading down the seriousness of corruption and bribery. Corruption and bribery has –

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**ELIAS CJ:**

In respect of.

**MS CULL QC:**

In respect of the act to be done.

5 **ELIAS CJ:**

Yes.

**MS CULL QC:**

10 One can receive a bottle of wine for something that was done really well. Under the present definitions and indeed if we're going back to the Randerson and Hansen JJs definitions of corruptly just being knowledge, that is enough to catch the section and indeed, if Your Honour is correct that knowledge is the test, then a parliamentarian receiving a salary is caught by the section. It is an official, acting in official capacity, knowingly receiving a benefit. If that is where Your Honours are taking me, in  
15 relation to section 103, that is the result.

**BLANCHARD J:**

Why not?

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**MS CULL QC:**

That receiving a salary is a benefit and therefore makes a Parliamentarian guilty of corruption and bribery.

25 **BLANCHARD J:**

No, no, I obviously didn't mean that. The point is –

**TIPPING J:**

We'd all be guilty.

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**MS CULL QC:**

Exactly, exactly.

**BLANCHARD J:**

35 – that the salary, the salary is supposed to be all you get.

**MS CULL QC:**

But let me, I accept that of course, potentially, not for Members of Parliament. They can receive emoluments, they can receive other benefits. Now, since 2005, they have to put it on a register. So if they're receiving payments from a trust, or they've got some employment contract event, they're still entitled to receive that as a  
5 Member of Parliament. This is the capacity in which he was charged. So just, just dealing with Your Honours, Your Honours' point and I'm sorry if I took that too far, but if one comes back to knowledge is the test, then it leads to the absurdity to which the Court of Appeal did refer, that there may need to be some legislative intervention here to provide some defences, because if knowledge is all, then that makes  
10 everyone in these official capacities liable. The difference, and that is why there is a difference recognised by Canada and the United States in particular, is that there must be something improper. You don't receive a bottle of wine for having actually taken something to Parliament, which everyone's been asking you to, to necessarily make yourself guilty of corruption and bribery in Parliament, It is a gratuity.

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**McGRATH J:**

There may be de minimis exceptions though, which we don't have to explore in this case because it's clearly not of that nature.

20 **MS CULL QC:**

Well, then it's a question of not just principle, but then grades of how big a gift is all right. Under the – under the 2005 standing order, any gift that's received over \$500, gift over \$500 is required, so a very, very lavish Christmas box being put at the door of an MP, money paid for –

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**McGRATH J:**

I really don't see what the parliamentary measures, designed to achieve transparency, have anything to do with interpreting what the Crimes Act prohibition is.

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**MS CULL QC:**

Yes.

**McGRATH J:**

35 I mean, this is a, this provision prescribes conduct, which may expose MPs to the temptation of carrying out duties, in the hope of deriving some advantage. It's, it's aimed at that and it seems to me that if, as the Chief Justice has put it, the Member

knows the conduct involves accepting a benefit for doing his or her job as an MP, that satisfies the element of corruptly, because it is aimed at, the section's aimed at prescribing conduct of a kind that will give rise to temptation. It has a tendency to corrupt as it is put in some of the old cases.

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**MS CULL QC:**

Well, with respect, Sir, corruption has, does have clear meanings within the authorities. Temptation is something that one could also say about theft or dishonesty charges. That was not at the forefront of Parliament's intention, if one takes the explanatory notes, at the time that the Crimes Act came into force and indeed, if that had been the case, my argument is that they would have taken in the illegal gratuity provision, made it absolutely plain that temptation is receiving any sort of gifts for an act done in your capacity. Don't worry about whether it's a quid pro quo agreement. We don't need a nod and a wink and a corrupt bargain. We need you to know that any, any gift that you get is caught by the illegal gratuity section. So with respect, Sir, and I'm going to come to it, but the United Kingdom Law Commission rejected what they call the radical approach to the temptation suggestion. I see the Crown has adopted that in their submissions. That was rejected as being a far too draconian test for corruptly.

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**McGRATH J:**

Well, the law reform may perhaps be appropriate, but we're dealing with the section that it seems to me has been followed in other jurisdictions. The way our provision's framed, for example, seems to fit fairly neatly with that in *Singh v State of Trinidad and Tobago* [2005] UKPC 35, [2006] 1 WLR 146 and some interesting comments there on what the scope of the offence was and Lord Bingham's judgment, citing actually counsel for the defence.

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**MS CULL QC:**

I will come to that, but they still needed something that was illicit. It was still a bargain that was being reached because there was an understanding that there was something that would show favour. Show favour, I think, was one of the, and I may be being confused between *United States v Sun-Diamond Growers of California* but I will come to *Singh* in a moment, that the point about corruption and bribery is to stop greasing the palm of a person who has an ability to favour one over the other. There is no suggestion of that here.

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**McGRATH J:**

Just to my mind, where I'm at at the moment, and I am influenced by Lord, what Lord Bingham had to say, is that this offence is solely concerned with proscribing conduct which may expose MPs to temptation to carry out their duties in the hope of getting an outside pecuniary advantage. It's the focus on that and that if known the sort of act is involved, it has the connection that the Chief Justice has been referring to. That's all that corruptly requires.

**MS CULL QC:**

And if one looks at the facts in *Singh*, there you had a solicitor, asking the partner for \$40,000 because he was going to bribe the prosecutor and the magistrate, in respect of charges that were to be brought. Now there was a clear intention, it was a corrupt intention. A bargain was reached –

**McGRATH J:**

I know the facts of the case have nothing to do with it but what is interesting is the way Lord Bingham in that case described a straightforward case, a straightforward reward case, and that seems to me, helps make clear what the purpose of this provision is. It's not to be found in the parliamentary materials. It's rather to be found in seeing what others with a similar sort of provision –

**MS CULL QC:**

Have done.

**McGRATH J:**

– have done and the way they've seen it is a provision proscribing conduct that will have a corrosive effect because it exposes public officials to temptations to have a hope or prospect of financial reward for doing their job.

**MS CULL QC:**

For doing something wrong.

**McGRATH J:**

No, for doing their job, not for doing something wrong, not at all. What is corrosive is that people get the expectation that they, or the hope that if they, do their job they will get extra money for that and they can properly take extra money for that and the section wants to stamp that out.

**MS CULL QC:**

Well, with respect, I understand what Your Honour is putting to me, and I do say that the, Lord Bingham's approach in that case does need to be matched to the facts  
5 because apart from *R v Greenwood* (1991) 67 CCC (3d) 435 (Ont CA), which is the Canadian decision of a gratuitous buying of a television set for a prosecutor by a lawyer. Two were friends, lawyer buys the television set for the prosecutor. There was no – he was charged an illegal gratuity provision, the prosecutor, but there was no evidence that any favours had been advanced by the prosecutor to the  
10 lawyer friend. Now that, with respect, is the type of situation we have here. There was no prospect that, and we're not talking about money, and nor are we talking about the amount that the Crown is saying was received, that is highly contentious. It's been based on an estimate of what a surveyor has said, so it could be much, much less. In fact we say it's even less than half –

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**McGRATH J:**

But we're not dealing with a de minimis situation.

**MS CULL QC:**

20 Well, well, Sir, no, because it covers a number of properties but certainly much less than \$52,000. It's closer, if we are going to go there, in approximately \$20,000 terms so de minimis I accept. But nevertheless there is no, there was no suggestion that there were favours being bestowed on the Thai immigrants. Indeed, their applications went along with every other application. A lot of them were  
25 unsuccessful.

**McGRATH J:**

It was a normal, routine –

30 **MS CULL QC:**

It was a normal –

**McGRATH J:**

– submission by a Member of Parliament –

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**MS CULL QC:**

Through his office.



**McGRATH J:**

– to assist people in his constituency with immigration problems.

**MS CULL QC:**

5 That's right.

**McGRATH J:**

I didn't think that that was an issue at all.

10 **MS CULL QC:**

No.

**ELIAS CJ:**

15 And if it hadn't been that way then the sentence, as Justice Hansen said, would have been a lot more severe. If it had been for, to achieve an improper result it would have been a much more serious offence of its type, but that doesn't answer whether it's within the provision.

**MS CULL QC:**

20 And I understand what Your Honours are asking me. So if I now may take you to the submissions and what I'll do is I'll take you to page 27 of the submissions which is the approach by the leave Judge and was adopted by the trial Judge, which deals with Your Honour's question to me about, the Chief Justice's question to me about knowledge.

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**ELIAS CJ:**

Well, except that Hansen J's directions are not entirely on all fours with some of the remarks made by Randerson J, are they?

30 **MS CULL QC:**

Well –

**ELIAS CJ:**

Anyway, carry on.

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**MS CULL QC:**

With respect, I understood corruptly was taken from the leave decision and that's, and that adopted the Randerson J test. Unless I'm mistaken.

**ELIAS CJ:**

5 All right. You might be right in that.

**TIPPING J:**

There wasn't, you might say there wasn't a material distinction –

10 **MS CULL QC:**

No.

**TIPPING J:**

– he phrased it somewhat differently but there was, you suggest, not a material  
15 distinction?

**MS CULL QC:**

That's correct. Could I take you to paragraph 5.11 of the submissions and this is where Randerson J stated he was following English authority and finding that  
20 "corruptly" involves knowledge by the Member of Parliament that the bribe has been given or offered. Now, with respect, this does not follow English authority and departs from New Zealand authorities and in upholding the High Court's approach, which the Court of Appeal did, the Court of Appeal, in my respectful submission, failed to correct the misconception that the English line of authority held knowledge  
25 or belief satisfied the test for bribery. Randerson J had cited the following passage from *R v Mills* (1978) 68 Cr App R 154 (CA), "In our judgment it is enough that the recipient takes the gift knowing that it is intended as a bribe. By accepting it as a bribe and intending to keep it he enters into a bargain, despite the fact that he may make to himself a mental reservation to the effect that he is not going to carry out his  
30 side of the bargain. The bargain remains a corrupt bargain, even though he may not be intending to carry out his intended corrupt act."

So that met the argument that a private decision, that actually he wouldn't carry it out is no defence. If you make the bargain and you hold yourself out as going to do that, then a corrupt bargain is made, and any private reservation is irrelevant. But the  
35 important thing I wish to stress here is that it is bribe in the sense that the appellant would have you regard bribe, and I understand what the statute says, but in the English line of authority it is, it is to do something wrong, the two step process. It's

not just the receipt that does it. It's what you're going to do as an official, as part of your act. Whether you forebear or whether you don't.

**ELIAS CJ:**

5 Well when you say the English line of authority, what are you referring to? You're not referring to *Cooper v Slade*?

**MS CULL QC:**

10 That is where Randerson J refers to the English line of authority in support of the proposition that the English line of authority indicates that corruptly involves knowledge or a belief on the part of the recipient that the consideration or benefit offered or given was intended for the purposes of influence or reward in respect of some act done, or to be done, by the Member of Parliament. Now, Your Honour stopped me about *Cooper v Slade* (1858) 6 HLC 746, 10 ER 1488 (HL) and I was  
15 going to deal with that under "corruptly" but can I just say this before I get to it? *Cooper v Slade* was an election provision and it was clear that the corrupt act was contained within the statutory provision, namely that any payment to a voter on election day was a corrupt act because it was clearly designed to influence the voter to vote for the Parliamentarian involved. Now, in looking at the section, Mr Willes J  
20 says, we don't need to define "corruptly" because it's turning to corrupt, it is in, well sorry –

**ELIAS CJ:**

It is a bit –

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**MS CULL QC:**

It is and turning to corrupt –

30 **ELIAS CJ:**

It is a bit striking that you have in Willes, Blackburn and Bingham, probably three of the greatest Judges of all time, that you're up against.

**MS CULL QC:**

35 I am aware of that and I'm not suggesting that Willes was – in terms of *Cooper v Slade* I'm not saying that that case was decided wrongly. It made perfect sense given the statute that the House of Lords was dealing with.

**ELIAS CJ:**

I'm not talking about the decision. I'm talking about the statement of policy which is really, as McGrath J put to you, that that's the policy behind these provisions. The  
5 tendency and the temptation.

**TIPPING J:**

Ms Cull, if we look at the formulation of Randerson J, which is in para 47 of his judgment, and then we look at Hansen J's formulation that he directed on, although  
10 there's a little bit of rearranging, in substance it perhaps could be said that they're the same. Now what is it that should have been said more or differently in your submission? I'm having a little bit of difficulty grasping what you say the Judge should have said as opposed to what he did say. It's understandable he followed Randerson J –

15

**MS CULL QC:**

Yes, of course.

**TIPPING J:**

20 – but that's no insulation. What should he have said?

**MS CULL QC:**

It's the missing bit is that it is to do an act improperly.

**TIPPING J:**

25 What, an act known to be improper?

**MS CULL QC:**

Yes. So he –

**TIPPING J:**

30 Is it the knowledge –

**MS CULL QC:**

35 It's not just that he acts in official capacity, he is acting and has official capacity in a improper –

**TIPPING J:**

You say you must – I want to note this – you must know more than the link – you know what I mean by the “link”?

**MS CULL QC:**

5 Yes.

**TIPPING J:**

Yes, you must know more than the link, you must know what?

10 **MS CULL QC:**

You must know that that benefit is being conferred on you for you to go and do something improperly.

**WILLIAM YOUNG J:**

15 That is, improper, irrespective of whether or not you are bribed to do it?

**MS CULL QC:**

Yes. Well, can I take –

20

**WILLIAM YOUNG J:**

So, in this case to put up a dishonest submission to the Minister?

**MS CULL QC:**

25 Yes. Or in this case, the dishonesty would have been to go to the Minister of Immigration – remember, we’re not dealing with someone who can make a decision here, he’s the agent in that sense of a conduit between the constituents and the decision maker. Dishonestly carrying out his duty would have been to only put the Thai immigrants’ applications before the Minister, saying, “These are the ones  
30 I want through, don’t worry about this other pile,” that would be improper, because he’s showing favour, he’s been bribed to show favour to these, to the bribe – the briber, sorry.

**WILLIAM YOUNG J:**

35 So, what, the prosecution would have to show that other constituents or other people who came to him, who didn’t pay money or provide tiling services, weren’t getting representations made?

**MS CULL QC:**

That's correct – well, a number of things, that consistently he only ever put up the applications for people that were working for him, that's one aspect. The other  
5 aspect is that the Minister of Immigration only ever received these applications for certain Thai residents and the others were put in a different pile or rated down, there was no evidence of that, or that there was some discrimination in the way in which he was presenting these Thai immigrants' applications, and, needless to say, a number of those were unsuccessful, along with all the other immigrant applications, being it  
10 Niuean, Samoan...

**TIPPING J:**

So there must be something inherently improper –

15 **MS CULL QC:**

Yes.

**TIPPING J:**

– in what you're being asked to do –

20

**MS CULL QC:**

Asked to do.

**TIPPING J:**

25 – or rewarded for doing.

**MS CULL QC:**

For doing, yes.

30 **TIPPING J:**

Something inherently improper.

**MS CULL QC:**

Improper.

35

**McGRATH J:**

Do you say there has to be an agreement, a prior agreement, for which, over conduct, for which the reward is ultimately given?

**MS CULL QC:**

5 Yes, I do, and that comes back to the corrupt bargain requirement. It doesn't have to be a formal bargain, which was where a number of the passages in the decision dealt with the Randerson approach to, you know, you don't need a bargain as such, a nod and a wink will do, but you – it goes beyond just knowledge, it's, "I know why you are giving this to me." Can I give you an example? *R v Nua* [2001] 3 NZLR 483 is,  
10 perhaps, the classic quid pro quo bribery case in New Zealand – \$250,000 paid to a customs official to close his eyes, so he doesn't see this importer's odometer readings on the cars that he's bring in. So, over a period of time, he's receiving a lot of money, doesn't do his job, and it obviously has results for the briber and, obviously, as the bribee, he receives a considerable benefit, or a benefit. Now, that  
15 is not just –

**McGRATH J:**

Well, that's a prior agreement case.

20 **MS CULL QC:**

It is, it is, but it's not just knowledge, it is a knowledge that this is why it's being done and, in my submission, the knowledge part of the definition is problematic because, as I've just said before, it would lead to absurdities to have knowledge only as the criterion of the link, because it doesn't make it corruption and bribery anywhere else  
25 in the world.

**TIPPING J:**

Are you saying that you would then be guilty of corruption if you, just by receiving your salary?

30

**MS CULL QC:**

Yes, if you take –

**TIPPING J:**

35 Surely there must be an implication that it's, you're receiving anything beyond what you're officially entitled to?

**MS CULL QC:**

Well, now you're introducing words into the statute which are not there.

**TIPPING J:**

5 Well –

**MS CULL QC:**

So the very thing that you're saying I'm doing –

10

**TIPPING J:**

Well, that is a fair criticism, Ms Cull, but I mean your proposition is so nonsensical as to invite something to counter it.

15 **MS CULL QC:**

Well, Sir, I accept, I accept that that's your view, but can I just put this to you? If you are going to read this section, ignore the title about what bribery actually means and has meant in the common law and in the authorities, and ignore the fact that at the time that this was brought in you didn't take on board the illegal gratuity, let me say  
20 that the United Kingdom have now put in an illegal gratuity provision in the Bribery Act, so everyone now knows that if you receive a gift you've got to look carefully at whether you are contravening the Bribery Act –

**TIPPING J:**

25 Just pause there, could you? This so-called illegal gratuity, is this something that is not linked to your services or your actions, in your capacity as a Member of Parliament?

**MS CULL QC:**

30 It is simply a thank-you payment for listening to us. There is no link between – there's no link between rewarding the appellant for having got the immigration through, it is simply –

**TIPPING J:**

35 Well, if –

**MS CULL QC:**



– that I'm grateful that you've even listened to us.

**TIPPING J:**

Well, if it's that, then it's not caught. If there isn't a link, it's not caught by our section  
5 103.

**MS CULL QC:**

That's correct.

10 **TIPPING J:**

There may be cases, difficult ones, at the margins, where the issue will be whether there is a link.

**MS CULL QC:**

15 But the link, the link has got to be more than just, these people are wanting to do these things for me now. I will pay them. If they don't want to give me a bill, okay, I won't, I'm not going to push that, but it has nothing to do with what he then does with all of the constituent applications from his office in Mangere and going to the Immigration Minister. He doesn't say to the Immigration Minister, just these ones,  
20 and that is what is required, in my respectful submission, for corruption, and I make the bold assertion that that is consistent with the authorities, that corruption and bribery requires the two-step process, gratuity is a one-step process, it's a thank you. It might be a very generous thank you, but it's a thank you for actually doing a job.

25 **TIPPING J:**

But it's a thank you for – the question is, what's the thank you for?

**MS CULL QC:**

For doing your job, for just listening to us, not, not –  
30

**TIPPING J:**

That would be caught.

**MS CULL QC:**

35 – for showing favour.

**TIPPING J:**

That would be caught.

**MS CULL QC:**

Well, in my respectful submission, that makes a mockery of bribery.

5

**TIPPING J:**

Well, never mind bribery –

**MS CULL QC:**

10 Well –

**TIPPING J:**

– I'm interested in the section and the way it's framed.

15 **ELIAS CJ:**

And one has to take a – looking at it in terms of policy, it's not just the corrupting effect on Parliament, it's the corrupting effect more generally in society. It's gullible people being induced by hope to part with their money in circumstances where they shouldn't be. It's, it's the tendency to corrupt, spoken of by Willes or maybe Willis J, it is, it seems all to be captured in section 103, whereas the illegal gratuity is – I mean, the difference is, if one is to take a trivial example, which probably wouldn't be caught because it is de minimis, tickets to the World Cup. If you get tickets to the World Cup as an MP, that's probably a gratuity, it's coming to you because of your status as an MP. If you get tickets to the World Cup because there's something coming up in Parliament and you know it's because of that link that you're getting this favoured treatment, then you're within section 103.

25

**MS CULL QC:**

But it assumes, doesn't it, that if you get your World Cup tickets and you are an MP and there's something coming up, then you are doing something to favour the person who's given it to you?

30

**ELIAS CJ:**

If you know that there's a link between the two, if you know there's a link between the two, it's corrupt.

35

**MS CULL QC:**

Well, in my respectful submission, corrupt, yes, requires that you know that this is, if you like, priming you to favour the person who gives you the tickets, that's where the cases look at that.

5 **ELIAS CJ:**

But it's any act, the statute says, "Any act in your capacity," so it's more specific than that, you're an important man and one day it might be useful that I've had you in my box.

10 **WILLIAM YOUNG J:**

One reason why gratuities might be criminalised is because it may be hard to prove a corrupt bargain, it may be easy to prove that the money, the service was done, the cash was paid, but it maybe hard to prove that a –

15 **ELIAS CJ:**

A linkage.

**WILLIAM YOUNG J:**

Well, it may be difficult to prove that there had been an agreement before the  
20 services were provided that the cash would be paid and it may simply be, as it were, a shortcut.

**MS CULL QC:**

Well, just to, I'm sorry, I haven't answered that proposition put by the Chief Justice,  
25 but just to answer your proposition Sir, that is why the illegal gratuity provision, as prescribed in Canada, and in the United States, and now in the United Kingdom, makes it clear that it's almost a strict liability offence. I'm using that in a loose term, I'm not saying it is strict liability but it is the fact that you have received a gift in your capacity puts it into, into that category. So that we're not saying it's bribery, and  
30 they're not called bribery charges either, they are called illegal gratuity. You know that if you receive it in your capacity that gives rise to this charge being made and you're right that the Crown then don't have to prove a quid pro quo, a nod a wink, or a corrupt bargain. But that's the –

35 **TIPPING J:**

Sorry, Ms Cull, you get this inherently proper purpose, or to do something improper, from the word "bribe" I take it.

**MS CULL QC:**

Bribe and bribery.

5 **TIPPING J:**

Yes.

**MS CULL QC:**

10 And if this is a reward case, and again reward has problems in relation to what  
reward actually means. Reward comes from a lot of the statutes, particularly the  
English statutes, and indeed in our Secret Commissions Act, that reward is to reward  
you for having done the deal or got the favour or the payment to influence. So  
influence or reward in the English statutes are specifically prescribed. Here we don't  
15 have reward so we don't charge him with actually receiving a reward and if it is a  
reward case then indeed that makes it difficult because if the prosecution were to  
bring a reward case how are they going to do that in relation to section 103? You  
would have to extrapolate from the word "benefit" that this includes reward or gift  
when it's not included in the statute, unlike other statutes where it clearly is labelled,  
and that's why I am saying that the Canadian statute captures "gift" under  
20 illegal gratuity, we only capture "benefit" under the bribery section and that's where  
our legislature went.

**McGRATH J:**

25 Isn't the phrase "benefit, whether direct or indirect" a very broad phrase that  
encompasses "reward" as a narrower term?

**MS CULL QC:**

30 Well, Sir, I'm saying in this case if you are going to say this is a reward case, as the  
Court of Appeal said, from start to finish, it was effectively a reward case, then that  
makes the distinction within the section which hasn't been made in terms of different  
penalties, different regime, potentially, and you are now going to, as a prosecutor,  
say how am I going to frame this in the indictment? Am I going to say received a  
benefit namely a reward although it's not included in bribe and it's not included in  
35 section 103 and with respect –

**McGRATH J:**

I'm suggesting the word "benefit" has been chosen to cast the net widely so that it will cover a reward, a gratuity or any of these more specific terms.

**MS CULL QC:**

5 Well, I understand that, I understand that view but at the time that we put "benefit" in, that was the definition given by the Canadian Code section and "gift" was specifically not mentioned because it was dropped down into the illegal gratuity section, which I'll take you to.

10 **McGRATH J:**

I understand that you're referring to the sort of the legislative history as a contextual aid but we have a statute in New Zealand that's been very broadly expressed, it seems to me. And it seems to me that when you come to look at section 103, the words "in respect of any act done" or to be done, but any act done is clearly  
15 contemplating a situation in which there was no prior agreement. The "to be done" does contemplate a prior agreement and covers the inducement, inducing you to do. Just the act done is getting back to what I have suggested may well be the purpose of this provision, just basically endeavouring to ensure that MPs are not influenced in their duties by the prospect that they may gain something additional on top of their  
20 salaries.

**MS CULL QC:**

Or rewarded for having done the improper act. Not giving a gift for being grateful. So I take Your Honour's point and that's what I addressed in the submissions  
25 because similarly the Court of Appeal said, well Parliament clearly intended that because you've got an act done and, my submission is, that is consistent with bribery. You have a quid pro quo arrangement to either influence or reward you for having done something improper in your official capacity.

30 **ELIAS CJ:**

But you keep sliding back into that but it was put to you on the basis of any act done not necessarily on the basis of any improper act done.

**MS CULL QC:**

35 Well, and that, I could understand that if the section wasn't framed as a corruption and bribery section. If we're saying this is just an act that was done by any Member of Parliament.

**ELIAS CJ:**

But it's a, there's a legislative judgment in that, in there that this is corrupt to accept a benefit for any act done in your capacity as a Parliamentarian.

5

**MS CULL QC:**

Well, with respect, Ma'am, that brings you back then to what does "corrupt" mean. What does "corruptly accept" or "obtain" mean.

10 **ELIAS CJ:**

Well, and back to whether it's knowingly or whether you have to know it's for an improper purpose.

**MS CULL QC:**

15 Correct. So in terms of the proposition put, otherwise it's almost a strict liability offence. You receive your very –

**ELIAS CJ:**

20 It's not a strict liability offence because knowledge is part of it. You have to know that there is a connection.

**MS CULL QC:**

So that comes back to knowledge within the "corruptly" definition.

25 **ELIAS CJ:**

Yes.

**TIPPING J:**

Knowledge of the link is proof of corruption.

30

**MS CULL QC:**

Well, it's got to be knowledge more than just, look this is really nice that you have given me the World Cup tickets, all these expensive rugby jerseys by the touring team, I think was the reference in the Court of Appeal decision, or a very, very lavish

35 –

**ELIAS CJ:**

Or doing this act as a Parliamentarian.

**MS CULL QC:**

Or for just –

5

**ELIAS CJ:**

If you know that it was for doing that or for doing it in the future then it's corrupt.

**MS CULL QC:**

10 Well, with respect, Ma'am that puts this New Zealand section into, in my respectful submission, into what I am calling almost a strict liability offence. You just –

**ELIAS CJ:**

Well, it's not strict liability as long as there's knowledge in there.

15

**WILLIAM YOUNG J:**

It's a stricter liability than you think should be imposed, that's all.

**MS CULL QC:**

20 That's true but if one goes back to the illegal gratuity section in Canada –

**WILLIAM YOUNG J:**

Well, can I just ask you to look at that because –

25

**ELIAS CJ:**

Where do we find it?

**WILLIAM YOUNG J:**

30 Sorry, our sections are really modeled on section 100 of the 1953 Canadian Criminal Code.

**ELIAS CJ:**

Where do we find that?

35

**WILLIAM YOUNG J:**

It is tab 12 of volume 1 of the appellant's bundle. So what our section has done is they've created three offences where a single offence is created by section 100 of

the Code and it's otherwise very similar. We've taken the word "bribe" out of the – we've defined the word "bribe" whereas the words are all in full in the Canadian section.

5 **MS CULL QC:**

Yes. If one goes to tab 12 at, it's actually 398 but it's section 100.

**WILLIAM YOUNG J:**

10 Okay and then you've got section 102, which you say is the gratuity section, but it's actually aimed at a different category of person, isn't it?

**MS CULL QC:**

Can I just –

15

**WILLIAM YOUNG J:**

Or an overlapping perhaps?

**MS CULL QC:**

20 102(1)(a) is the influence peddling and 102(1)(c) is the illegal gratuity provision.

**WILLIAM YOUNG J:**

25 Yes but it's a different, they're targeting different people. Mr Field wouldn't be within the scope of section 102 if it had been an act in New Zealand because he's an MP, he's not an employee of the government. Section 100 is targeted on Judges, Cabinet Ministers and Members of Parliament or the provincial legislatures.

**MS CULL QC:**

30 That is correct, section 100 is, is in relation to bribery of judicial officers and Members of Parliament.

**WILLIAM YOUNG J:**

35 Whereas section 100 is aimed at officials or employees of the government, which is a rather differently constituted group.

**MS CULL QC:**



All right, although the section was applied to a senator in *R v Cogger* [1997] 2 SCR 845 (SCC).

**WILLIAM YOUNG J:**

5 Was it?

**MS CULL QC:**

10 Yes, where the senator was charged under the illegal gratuity or the equivalent of illegal gratuity provision. So there was a distinction drawn and I was going to take you to *Cogger*, but can I just before we leave this section, accepting what Your Honour is saying about the official or employee of the government, here is the gratuity section that defines reward, advantage or benefit. So reward is specifically  
15 legislated for and the acceptance of a gift is how it's put in the side margin, "Acceptance of commission or gift without consent."

**ELIAS CJ:**

And there's no linkage required here?

20

**MS CULL QC:**

That's correct because the gratuity is gratuitous.

**ELIAS CJ:**

25 It's gratuitous.

**MS CULL QC:**

I mean, it is gratuitous.

30 **ELIAS CJ:**

Yes, which is why I cavil at your attempts to characterise what happened here as a gratuity, because on the Crown case it was linked.

**MS CULL QC:**

35 Well, the link and knowledge can also, I can answer that in two ways. Under the illegal gratuity section you can still have knowledge that you're accepting a gift, but that doesn't make it bribery. That's, that is the point I am making, you can know –

**ELIAS CJ:**

But it's not bribery –

5 **MS CULL QC:**

– that you're getting a gift.

**ELIAS CJ:**

– it's not bribery within the meaning of section 103 because it is not linked to an any  
10 act that you do in your capacity as Parliamentarian.

**MS CULL QC:**

But if you are in your official cap – well, if you're in official capacity and you receive a  
gratuity –  
15

**ELIAS CJ:**

Well, then you have to have permission.

**MS CULL QC:**

20 That's correct.

**ELIAS CJ:**

Under this provision, that's a wise prophylactic probably, which we don't have, but we  
have an anti-corruption provision which says that if you accept a benefit and that's  
25 very broadly defined, which is linked to any act in your capacity as Parliamentarian,  
and it's done corruptly and the question is whether that means with knowledge, then  
you've committed an offence, what's wrong with that?

**MS CULL QC:**

30 Well, I'm saying that that goes beyond what the section was aimed to deal with and I  
am saying that it was aimed to deal with bribery. It was called bribery and bribery, in  
all of the authorities, do go to, does go to a quid pro quo –

35

**BLANCHARD J:**

But we have a definition of bribe and Parliament hasn't put that extra element into the definition.

**MS CULL QC:**

5 Not in, not in bribe, no, I accept that obviously. That bribe has simply been defined as this is what it includes and we've got it as a bribery section, bribery has been extended.

**BLANCHARD J:**

10 And it could hardly be wider.

**ELIAS CJ:**

And it's for the very good policy reasons described by Willes J and by Blackburn J and described by Bingham J. It's to stop the tendency.

15

**MS CULL QC:**

But, well, agreed, but that personally that wasn't said at the time that this was brought in and I accept that we can use aids to a certain extent, that is not everything, but importantly if it was to be that wide in 1961, then there would have had to have been some statement that gifts received by Members of Parliament, or indeed, other public officers were going to be caught and that didn't start happening in New Zealand until 2005. Certainly with Parliamentarians, with the standing orders that were introduced in relation to pecuniary interests –

20

25 **ELIAS CJ:**

But it's very difficult using this language, because as soon as you say gift, then that may be something that's entirely gratuitous, not linked to any action that you're taking. It's –

30 **MS CULL QC:**

But the gift that was, let's just break that down in relation to the facts here. The gift that was given by the Thai immigrants, numbers of people as the Crown have said, numbers of people were working on painting or tiling very houses in New Zealand and one in Samoa. A number of those people didn't have immigration applications before, before Parliament or for consideration. The applications were going through a process quite apart from what was being done for Mr Field. So Mr Field was in a capacity as a Member of Parliament, that that is the only real link because there was

35

no further link between saying, I know you're doing this and I'm going to make that your application gets through.

**TIPPING J:**

5 The jury rejected his defence that there was, either there was no link, or that he was unaware of any.

**MS CULL QC:**

10 Well, that was on the basis that corruptly had been defined simply as knowledge or belief.

**TIPPING J:**

15 Yes, that's right, but there's nothing, that's not before us, that issue. We can't take a different view of that.

**MS CULL QC:**

I accept that, but what this appeal is about is that the definition of simply knowledge that was to reward or influence, is insufficient for a bribery section.

20 **TIPPING J:**

Does your argument mean that an MP who's interviewing constituents on a Saturday morning about their manifold travails could receive \$100 from one of them, knowing that it was to do with listening to them, as I think you said a few minutes ago, and that would be all right, would it?

25

**MS CULL QC:**

30 No, Sir, context of that is different. Firstly, the payment of money across the table has got to immediately raise warning bells. Here is a payment by someone who is asking their MP to consider his –

**TIPPING J:**

35 But I thought you'd said earlier that that would be all right and I found that a little startling, are you saying that would be caught?

**MS CULL QC:**

I mean, no, no, just can I deal with your fact situation first. You are saying, here's somebody sitting at the desk –

5 **TIPPING J:**

Yes.

**MS CULL QC:**

– handing over \$100 as he's –

10

**TIPPING J:**

No, saying, look I've got a problem with this, whatever you call him, you know, have you got anything you can advise me and the MP says, oh, well I'll think about that, come back next Saturday. Fellow hands over \$100 saying, thank you very much for your time and for listening to me.

15

**MS CULL QC:**

And he would have said, no look this is not something I'm, I'm –

20 **TIPPING J:**

Would that be caught by the section, in your submission, or not?

**MS CULL QC:**

Well, he'd have to know and he would have to have had –

25

**TIPPING J:**

He'd be pretty dumb if he didn't know in those facts.

**MS CULL QC:**

30 Yes, exactly, but there was a nod and a wink, that's the corrupt bargain. If you're going to hand something like \$100 on the table saying, I'd like you to fix this problem for me and leave it there, then I'm saying, that's caught by a corrupt bargain. That is quite a different proposition –

35 **TIPPING J:**

Why do we have to introduce all these notions that are not in the section, like bargains, gratuities, rewards? Why do we not just apply the words of the section?

**MS CULL QC:**

Because –

5 **TIPPING J:**

With a proper understanding of “corruptly”.

**MS CULL QC:**

Well, I’d like to come to corruptly, but, but corruptly does require something more  
10 than just knowledge, in my respectful submission –

**TIPPING J:**

Yes.

15 **MS CULL QC:**

– and bribery –

**TIPPING J:**

And you’ve told us what more it is, that you’ve been given the consideration, if you  
20 like, to do something improper.

**MS CULL QC:**

Yes, or dishonest.

25 **TIPPING J:**

Oh yes, well, yes.

**MS CULL QC:**

Because I want to come to dishonest, because I think the dishonest approach –  
30

**TIPPING J:**

So the battle line is, is it just knowledge of the link, or is it knowledge that you’re  
being asked to do something –

35 **MS CULL QC:**

Do something improper.

**TIPPING J:**

– intrinsically improper.

**MS CULL QC:**

5 Improper.

**TIPPING J:**

That's a correct articulation of the divide is it?

10 **MS CULL QC:**

Yes, yes.

**TIPPING J:**

Between the Crown's position and yours?

15

**MS CULL QC:**

20 Yes, because it requires that step, that step down to receiving a, a benefit to do something wrong. To do something wrong, improper, illicit, morally depraved to use Your Honour's expression, or wicked and some have used the word "term" or the term "dishonest".

**TIPPING J:**

25 Is it receipt of something, to do something inherently wrong or known to be inherently wrong?

**MS CULL QC:**

30 Well, on the authorities that I've taken you through in the submissions, it's now about "known", it is to do something inherently wrong. The *Nua* situation, he was paid to close his eyes, he was doing something wrong and he knew why he was getting a bribe, but the "knowingly" I think, with respect, is, poses difficulties.

**BLANCHARD J:**

35 So, would it have been all right for Mr Field to say to every one of these people who came to him, "I'm not going to do anything here that is unlawful, but I will process the

applications, in the sense of sending it on to the Minister for you, but I want \$100 for doing that”?

**MS CULL QC:**

5 That's is wrong, because he's saying, "I will process this –

**BLANCHARD J:**

But he –

10 **MS CULL QC:**

– “for you for a hundred dollars.”

**BLANCHARD J:**

Yes.

15

**MS CULL QC:**

That, I am saying, is his misuse of his position as an MP, I want that so that I show favour to you. You pay me, I'll make sure your ones go ahead of the pile.

20 **BLANCHARD J:**

What if he doesn't say that at the time, but afterwards he says, well, I've now done the job for you, I want \$100?

**MS CULL QC:**

25 That is, well, that is the reward in relation to influence or reward for –

**BLANCHARD J:**

So it's okay if you do it afterwards?

30 **MS CULL QC:**

No, no, no. What you've just put to me is that the MP is seeking a reward for having done something specific for that person, I have done the job, I now want to be paid, and this, I'll take you to some of the cases –

35 **BLANCHARD J:**

Isn't that what happened here?



**MS CULL QC:**

No, no, it isn't.

**BLANCHARD J:**

5 On the findings of the jury?

**MS CULL QC:**

Well, on the findings of the jury, one has – well, I can't second guess what the jury were thinking but, on the findings of the jury, they were simply asked whether he  
10 knew that the work was done in respect –

**BLANCHARD J:**

Whether there was a linkage.

15 **MS CULL QC:**

Well, whether it was done in respect of the immigration assistance that was provided.

**BLANCHARD J:**

And the jury must have concluded that there was that linkage and that he knew of it.  
20

**MS CULL QC:**

Yes, but, in my respectful submission, that is not the correct test for bribery. You must take the benefit to do your job improperly. Now, he shouldn't have received the gifts. If necessary he should have gone to the, you know, pecuniary interests register  
25 or the gift register, as it came in, in 2005, that was two years after this work started. So, this offending started in 2003. So there were things brought in 2005 through 2006, which started to make it more clear what Parliamentarians should do in this situation, or in any situation where they're getting gifts. People turn up with gifts all the time, and that's referred to in the evidence, particularly Pacific Islanders, and also  
30 a number of the immigrant classes of people would provide gifts, and that was sort of, thank you for listening to us, but there was no correlation between that and his deciding that he would only put forward the applications for those that were doing his tiling and painting, and that's where the cases capture bribery, in my respectful submission, that's where the quid pro quo, that's where Scalia J talks  
35 about the difference between quid pro quo and the gratuity.

**TIPPING J:**

Is there any case closer to our language in our section than *Singh*?

**MS CULL QC:**

5 Than –

**TIPPING J:**

Upon which you can rely for your proposition –

10 **MS CULL QC:**

Well –

**TIPPING J:**

– because I think *Singh* is against you, because there's all sorts of authorities all over  
15 the place, as we know, because of the context being different.

**MS CULL QC:**

Yes, exactly. Can I take you to that?

20 **TIPPING J:**

Now, here we have Members of Parliament and a section expressed quite widely  
and, unless I've got the wrong case, I think *Singh* was rather similar legislatively.

**McGRATH J:**

25 It covered every person, I think, rather –

**TIPPING J:**

Every person.

30 **McGRATH J:**

– than Members of Parliament.

**MS CULL QC:**

Can I take you to it?

35

**McGRATH J:**

But otherwise was very close.

**TIPPING J:**

Otherwise, yes.

5

**MS CULL QC:**

Can I take you to the offence section, and it's –

**TIPPING J:**

10 Is this in *Singh*?

**MS CULL QC:**

Yes.

15 **TIPPING J:**

Sorry, I haven't got the – could you just help me with the reference?

**MS CULL QC:**

Yes, appellant's bundle of authorities and volume 2, tab 27, at page 150.

20

**TIPPING J:**

Yes, as my brother says, it's every person, but I don't think that's a material –

**MS CULL QC:**

25 No, it isn't.

**TIPPING J:**

– distinction here.

30 **MS CULL QC:**

In fact, at paragraph 11, with respect, the offence, the appellant was charged under section 3(1) of the Prevention of Corruption Act, section 3 provides, "Every person who, by himself or in conjunction with any other person corruptly solicits or receives or agrees to receive for himself or for any other person any gift, gift, loan, fee, reward  
35 or advantage whatsoever, as an inducement to or reward for or otherwise on account of an agent doing or forbearing to do anything in respect of any matter or transaction

whatsoever, actual or proposed, in which the State or a public body as concerned, is guilty of an offence.”

**TIPPING J:**

5 Yes, yes.

**MS CULL QC:**

Now, with respect to Your Honour’s proposition to me, that is, in effect, what is captured by the *Singh* decision and so, when you look at the solicitor –

10

**TIPPING J:**

Just pause, would you? I think, in material terms, that section is close to ours. It’s more expansive than ours but, conceptually, it’s very similar, and it has the word “corruptly”. Now what did the Privy Council say “corruptly” meant in that context?

15

**MS CULL QC:**

If you’d just go over the page? Can I just pause there and –

**TIPPING J:**

20 Of course, but I want you to come to that.

**MS CULL QC:**

I will, I will. I would raise the question with Your Honour, that that section makes it very plain that that gift or reward does capture the bribery, corrupt bargain, that I’ve been advocating, that section –

25

**TIPPING J:**

Well, it doesn’t, it says, “In respect of,” you see, “In respect of –

30 **MS CULL QC:**

“As an inducement or reward, as an inducement or reward for –“

**TIPPING J:**

But it doesn’t capture any idea of doing anything improper, it’s just for doing what you’re...

35

**MS CULL QC:**

“Of doing or forbearing to do –

**TIPPING J:**

Yes.

5

**MS CULL QC:**

“– anything in respect of any matter or transaction”

**TIPPING J:**

10 Yes.

**WILLIAM YOUNG J:**

Obviously “reward” is in contrast to “inducement”, isn’t it?

15 **MS CULL QC:**

Yes, it is.

**WILLIAM YOUNG J:**

That’s what the disjunctive –

20

**MS CULL QC:**

Yes, it’s one or the other, that’s – yes, I agree.

**WILLIAM YOUNG J:**

25 It does, so, it’s a payment that has no, for which there is no element of inducement involved, it’s an after the fact –

**MS CULL QC:**

Well –

30

**WILLIAM YOUNG J:**

– it’s a payment, something done –

**MS CULL QC:**

35 Yes.

**WILLIAM YOUNG J:**

– rather than to be done.

**MS CULL QC:**

5 Right. But in the “reward” cases, in that sense of the inducement or reward, there is an understanding, and again I come back to not just knowledge, there was a, there is an understanding that this is being, you are being rewarded for what you have done, and I’d like to come to two other English authorities about that.

**TIPPING J:**

10 But, or –

**ELIAS CJ:**

Or otherwise on account of.

15 **TIPPING J:**

Yes, or –

**ELIAS CJ:**

I mean, doesn’t that take it as broadly as ours?

20

**TIPPING J:**

Or, “Advantage whatsoever.”

**ELIAS CJ:**

25 Yes.

**TIPPING J:**

I don’t think this is materially, it’s more expansively worded, ours is more economical, but I think in material terms it’s pretty well the same, so it would be very interesting to  
30 know what the Privy Council read “corruptly” as meaning.

**MS CULL QC:**

Well, can I take you to the next page, at 152, and I think probably it would be best to start with paragraph 15. “The principle which has underpinned the English  
35 authorities was first clearly formulated in *Cooper v Slade*, the case concerned with bribery of voters contrary to the Corrupt Practices Prevention Act,” and there is the classic –

**TIPPING J:**

Yes.

5 **MS CULL QC:**

– statement. But can I just take you to that, because that is where *Cooper v Slade*, with respect, is unhelpful in terms of just referring to “corruptly” as meaning “not dishonestly, but in purposely doing an act which the law forbids as tending to corrupt.” If you look at the voters’ Act, it is quite clear. But let’s just go on. I think the  
10 word “corruptly” in the statute means, “Not dishonestly, but in purposely doing an act  
–

**ELIAS CJ:**

Sorry, just hold up there. Why is that unhelpful, because it’s about purposely doing  
15 an act which the law forbids as tending to corrupt? Here, if it’s purposely, if it’s with  
knowledge doing an act which the law forbids, which here is providing a benefit  
connected with an action in your capacity as Member of Parliament, why isn’t it quite  
helpful?

20 **MS CULL QC:**

Well, if you, with respect, if you move on from, “Forbids as tending to corrupt voters,”  
“whether it be to give a pecuniary inducement to vote, or a reward for having voted in  
any particular manner. Both the giver and the receiver in such a case may be said to  
act ‘corruptly’”. It is contained within the statute. If we go to *Cooper v Slade*, it’s  
25 obvious that any payment to a voter on election day is a corrupt act because it is  
plainly meant to induce or reward someone for having voted for a particular person.  
And my submission to Your Honour was, just saying “corruptly” means purposely  
doing an act which the law forbids as tending to corrupt, as we have in the  
New Zealand authorities, that is very difficult to apply without having some proper  
30 definition to the word “corrupt” because it was so linked to the corrupt act which was  
defined. Now, in my respectful submission, my reading of section 103 does not  
contain a corrupt act.

**ELIAS CJ:**

35 What this is saying is that the law forbids some actions as tending to corrupt. If you  
do that purposely, then you are acting corruptly. That’s on all fours.

**MS CULL QC:**

Well, with respect, the corrupt act, in my submission, is not defined in section 103. You corruptly accept – now I hear what Tipping J is saying, I want to hear about a corrupt man, we'll come to that – but the actual actus reus, the corrupt act has not  
5 been legislated for as it was in *Cooper v Slade*.

**ELIAS CJ:**

The corrupt, the act is accepting a reward. The mens rea is purposely, or with  
10 knowledge that it is linked, accepting it.

**MS CULL QC:**

Well, again I'm hesitating about just knowledge because I don't think knowledge –

**TIPPING J:**

15 Well, this –

**MS CULL QC:**

The connection, the connection between the payment and who you are doesn't  
20 necessarily make that a corrupt act, even though you are still doing your job.

**ELIAS CJ:**

Well that's though what the law says. The law says it's that, it's that connection and  
what Willes J is saying is that if you accept the reward knowing that purposely then  
you are acting corruptly.

25

**TIPPING J:**

Some commentators have seen a difficulty in the, which the law forbids, as tending to  
corrupt because they say it's circular but I don't think that's valid. I think that's simply  
capturing the value judgment of the legislator.

30

**MS CULL QC:**

Well, with respect, Your Honour in *Broom* we have that very difficult problem –

**TIPPING J:**

35 I know, I know.

**MS CULL QC:**



– about this is potentially circular –

**TIPPING J:**

I did say that.

5

**MS CULL QC:**

– as did Gallen J.

**TIPPING J:**

10 I did say that but I may have repented that, Ms Cull.

**BLANCHARD J:**

Have you looked at the case of *Parker*?

15 **MS CULL QC:**

Yes, I have and I'd like to take you to that because I think –

**McGRATH J:**

I've got something I want to take up with you in relation to this case before we go –

20

**MS CULL QC:**

Yes, well perhaps should we –

**ELIAS CJ:**

25 Yes, you wanted to take us first to what is said.

**McGRATH J:**

I'd certainly like Ms Cull to finish dealing with *Singh* before we move too far away.

30 **MS CULL QC:**

Okay.

**McGRATH J:**

35 What I was going to ask you about, Ms Cull, was at the previous page, page 151, because what attracted my attention, it's what I was referring to earlier, at (b)(c) is this observation about what counsel had said, counsel for the appellant, about the object of the section: "to ensure that public officers should not be influenced in

performance of their public duties by any hope or prospect of any pecuniary or other advantage. Thus the receipt of any such benefit is proscribed. So also is the soliciting of such an advantage. And it makes no difference that the benefit received or solicited may not, in fact, have any influence on the performance of the public officer, since the section proscribes conduct which might expose public officers to any temptation to betray their duty.”

**MS CULL QC:**

To betray their duty. To betray their duty, with respect, Sir, is in my submission key –

**McGRATH J:**

Any temptation to betray their duty.

**MS CULL QC:**

Well, the, well, I wish we'd called the section the temptation and bribery of Member of Parliament but this, coming back to that point, the duty is about doing what you are supposed to be doing in a proper official way. Betraying your duty, or intending to betray your duty, is to have not just a knowledge but a mind that you will do something to betray it, namely do something improper. So going back to the earlier part of that passage, Your Honour, on behalf of the appellant Mr Fitzgerald, “The object of the section was to ensure that public officers should not be influenced in the performance of their public duties.” That, in my submission, is –

**McGRATH J:**

But go on. “By any hope or prospect.”

**MS CULL QC:**

“By any hope or prospect of any pecuniary advantage.”

**McGRATH J:**

Yes, yes.

**MS CULL QC:**

But the fact that they are going to be influenced in the performance indicates, indeed, that they are not going to do their duty the way they should. They're going to be

influenced about the way they're going to do it, just like the facts in here that the solicitor was definitely trying to influence the magistrate and the prosecution by passing money across, wanting them not to do their duties properly, favour me. Here's your reward or here's the influence or I will tell you I'm going to pay you if you do it right for me. Each of those parts of that passage you've taken me to exposes public officers to a temptation but it's to betray their duty, it's not just the temptation and this –

**McGRATH J:**

10 Isn't the provision concerned with proscribing conduct that has a certain tendency rather than actually how it might turn out in any particular case?

**MS CULL QC:**

All of the cases –

15

**McGRATH J:**

The tendency is so bad that it's going to be stopped by proscribing it.

**MS CULL QC:**

20 All of the cases on similar, on a similar vein, talk about, it's not necessary that it actually happens, which I think was part of the defence here, and he tried to make another excuse about why the \$40,000 was raised. But the point is that it is still, it is still the intention that you are going to do something wrong and it's the betraying your duty. Betraying your duty to do what you should be doing right that's, that's the gravamen here.

25

**BLANCHARD J:**

The reason I mentioned *Parker* is that it referred to on page 151 with evident approval, "It covers the payment of money after the event, even in the absence of any agreement beforehand."

30

**MS CULL QC:**

I want to, can I take – I understand that that's what is referred to in this case. I would like to take you to the *R v Parker* (1985) 82 Cr App R 69 (CA) decision if I may because it actually, with respect, is not that simple. It's in the Crown volume – it's in the respondent's bundle, volume 1, tab 15. It's the respondent's bundle of authorities Sir which has that spine on it, volume 1.

35

**BLANCHARD J:**

Anyway, I've got a copy of *Parker*.

**5 MS CULL QC:**

Can I deal with it this way? I want to make four points about this case and these are the points. Parker was chairman of a district council planning committee. He was the decision maker. He received sums of money given to him by representatives of a building firm. He denied, Parker denied that he'd acted improperly, stating his  
 10 conduct had not been influenced by any money received which was merely reflecting the firm's pleasure at having been granted planning permission and so the question then was, were the jury directed correct that corruption included the receipt of money for a past favour without any prior agreement and accordingly as soon as the councillor accepts a reward he might find himself guilty of corruption. Now when one  
 15 goes to page, I've got the – page 71 marked, and I'm not sure whether that's what Blanchard J is, the same – the same authority. If we can go halfway down the page I would like Your Honours to just have regard to this. In regard to count 1 of the indictment there is a building company called Kayes, and they apply for planning permission on behalf of a number of developers. So count 1 related to the payment  
 20 after consent had been granted, and I want to draw your attention to the end of that paragraph where it says, mid-paragraph, so it starts with in regard to count 1 of the indictment. Drop to the last sentence, "There was evidence of conversations with Stewardson before the application was made and while it was being processed and discussions about the likelihood of consent being granted." Now he then,  
 25 Stewardson, handed to the decision maker £150 pounds once he got the decision and it sets out what Parker says about what he can remember or not and I am suggesting in this case that there was clearly a credibility issue. But more important here, in count 2, the same person comes back to the appellant and you'll see on the second count, Ruskin Brothers who contacted that company owned some land which  
 30 had been problematic in getting consent.

Halfway down, a further application was made, same man, by Kayes on behalf of the same developers on April the 17<sup>th</sup> 1972. Stewardson said he told the applicant they were going to attempt again to get permission and had asked him, "Could anything  
 35 be done for it possibly to get through?" It was a very difficult case but the appellant's attitude was favourable, provided there was money up front. There were frequent

discussions between Stewardson and the appellant. Money was definitely mentioned at some time, according to Stewardson, and eventually \$750 in case.

Count 3 again, concerned Kays in relation to some land owned by another developer.  
5 So here he is, knowing that this is a forward looking provision. He's already rewarded him for the count 1, paid in advance for count 2, coming again in count 3 and there was a further payment of money, this time after the application had been granted. Planning permission was granted within an exceptionally short time and it was accepted he might have been paid but there was no problem with the site and it  
10 wasn't given in an improper manner.

And the fourth count, this was another person, Mr Gibbs, who had nothing to do with it, but he sent an envelope with money at the time he was making his application, I think in respect of a scrap yard. Now that was clearly a series of counts which  
15 showed a, a system of knowledge about how Mr Parker was going to treat applications and the, if I can say, the past reward for count 1 was clearly a forward looking bribe, which has been described in the American authorities and indeed we give you a reference to both *Agastino* and indeed an article on *Sun-Diamond* that says, it's not just payment for something having been done, it can also be a payment  
20 which indicates to the decision maker that this is a forward looking way of receiving bribes and, in my respectful submission, when one looks at the facts in *Parker*, it was plain that it wasn't just as has been summarised in the decision we've just been to in *Singh*, it was a series of actions taken by the decision maker. So four points, Parker was the decision maker, the payment was a reward for showing favour, no question  
25 about that. It was only favour shown to this particular developer who made the payment. Three, the payments by Stewardson were forward looking. Count 3, three counts involved Kayes and four, it was obviously known that Parker could be bribed, when you looked at count 4, which was the tenor of that.

30 **BLANCHARD J:**

Well, that all may be very clear comment, but could I draw your attention to the bottom of page 72, where there is a transcript from the summing up and the Judge says, "Corruption for this purpose includes receipt of money for a past favour, without there having been any agreement beforehand. So that really the position for  
35 practical purposes, is that a counsellor must not accept a reward for having done something in the course of his public duty. That is a very severe view, of course, for the law to take, but the reason it takes that severe view is in order to protect the

public service from being put in a position of temptation,” and on page 74 the Court, in the penultimate paragraph, says, “In our judgment, the learned Judge in his summing up gave impeccable directions to the jury. His description of the law was without fault of any kind.”

5

**MS CULL QC:**

Can I just, can I just take you back to the passage on page 72 and the first part of that quote. You’ll see from that that this wording does not only catch the ordinary bribe, where someone agrees to do something in return for a sum of money, corruption for this purpose includes receipt of money for a past favour, without there having been a prior agreement. I accept that that’s what the direction was, but I’m also saying that this case actually did have a clear understanding that there was a corrupt bargain or agreement.

15

**McGRATH J:**

I think, Ms Cull, you may want to take this up after the morning adjournment, but also the key passage to my mind, or a key passage at the foot of 73, when they’re reviewing the words of the direction, “But as soon as the counsellor accepts reward for doing that, he may find himself guilty of corruption. The offence lies not in showing favour to the application, but in accepting a reward for doing so.” Then if you turn the page and look at the second paragraph of 74, you find that that is expressly endorsed by Lord Bingham and I think that it’s that passage that he is picking up. But in any event, what you have to get over, I think, is the coming back of the words of Lord Bingham himself, prior to the reference to *Parker* where he’s speaking of a section that is cast in very similar terms to our own. It covers the payment of money after the event, even in the absence of any agreement beforehand and that’s at page 151(f). I mean, that’s what Lord Bingham was saying. It seems to me *Parker* does support that, but whether or not it’s so, that is what Lord Bingham was holding for the Privy Council in *Singh*.

30

**TIPPING J:**

Well, *Parker* clearly supports that because the first half of page 83 just reinforces other points that have been made elsewhere.

35

**COURT ADJOURNS: 11.37 AM****COURT RESUMES: 11.53 AM**

**ELIAS CJ:**

Yes, thank you, Ms Cull.

**5 MS CULL QC:**

Perhaps if I could start by answering the passages that were referred to me in the *Parker* decision, and with Your Honour's leave I'd just, I'd like to take you to page 73, halfway down. Following Blanchard J's passage that he put to me at page 72 at the bottom, can I just take you to the second paragraph on 73 – the third paragraph,  
10 sorry – “However, the matter does not end there, because the learned Judge went further with this matter in his directions,” and there he picks up on the phrase “corruptly”, saying it doesn't not mean for this purpose “dishonestly”. “Corruptly’ means deliberately, deliberately doing an act which the law forbids as tending to corrupt, so it is not a defence for a counsellor who has accepted a reward in this way  
15 to say he did not think what he was doing was against the interests of his authority. If he deliberately accepts a reward for doing or forbearing to do anything in respect of any matter actual or proposed, he commits an offence,” and he goes on, “Of course, it does not follow from that that every payment which is made to a counsellor is unlawful. It is only unlawful if there is a link,” which is the Chief Justice's word,  
20 “between the payment and him doing something in pursuance of his public duty. The reward must relate to something done or omitted in respect of a matter in which his counsel's concerned.” In my respectful submission, the link there is to ensure that payments may be made but, in light of that earlier paragraph as well, I'm submitting to Your Honour that that link requires them to do something which is improper in the  
25 exercise of his duty, and we take it from that earlier paragraph above.

**BLANCHARD J:**

It doesn't say that, though, does it?

**30 MS CULL QC:**

Well, it is, “To say he did not think what he was doing was against the interests of his authority,” so obviously – again, this has got to take its flavour from the four counts that we've just referred to, but it is clearly against the interest of not only his public duty but the authority to accept payments for letting, or show favours. If I can just  
35 take you then to the top of page 74 where, I think, Your Honour's referred me – “The offence lies not in showing favour to the application but in accepting a reward for doing so.” In my respectful submission, there is always, there's always a connection

between the reward for favours shown or to influence to procure favours in this context, particularly where he's a decision maker, so –

**McGRATH J:**

5 You've got to read the next paragraph, of course, too, which is –

**MS CULL QC:**

Yes, which you've done.

10 **McGRATH J:**

– the comment on it.

**MS CULL QC:**

That that was not sufficient, there should have been added a phrase such as, "Might  
15 be proof that the reward was corrupt," and the Judge rejects that, he rejects that submission, and then goes back and says –

**McGRATH J:**

Corrupt in the mind of the recipient, that he's saying, "No, that's not an element of it."

20

**MS CULL QC:**

"That's not enough." But showing favour to the application and receiving a reward for showing favour, that is the essence of bribery and corruption.

25 **TIPPING J:**

That would often be very, very difficult to establish, that the decision turned on the giving of the reward, particularly if it was an after-the-event reward.

**MS CULL QC:**

30 Well, with respect, the United States authorities say, "You can accept a reward for having done something like that, with a view to giving future favours –

**TIPPING J:**

Yes, you could.

35



**MS CULL QC:**

– to the person,” which is exactly this type of situation in *Parker*. So, just to take up Your Honour’s point, it ties in directly to what has happened here, that the reward has happened for the favour being granted, and the fact that he’s –

5

**TIPPING J:**

But the favour depends on the premise that the decision would otherwise have been against.

10 **MS CULL QC:**

That’s – well, not necessarily. If he’s getting a reward – assume that the application had not been given favourably and there was reward, that also – I mean, there was a payment. It’s, it’s in the context of what the payment’s made for.

15 **TIPPING J:**

What I’m putting to you, Ms Cull, is it seems to me that Parliament has deliberately steered away from this sort of thing because of the difficulties of proof.

**MS CULL QC:**

20 Well, in 1961, Sir, I’m not certain that this was high on the –

**TIPPING J:**

Well –

25 **MS CULL QC:**

This is 1985, and New Zealand went to Canada. New Zealand did not follow England in this. It did in other aspects of the Crimes Act.

**TIPPING J:**

30 Well, I think I know what you’re talking about, we don’t need to revisit Canada, although it’s always tempting to need to contemplate that.

**MS CULL QC:**

Of course. But, not only tempting, New Zealand did, we did find –

35

**WILLIAM YOUNG J:**

All right, is there any case – and this is a straightforward question – is there any case in Canada where what was section 100 of the 1953 code was held not to apply to reward? I know there's section 102 that might pick it up, but was there any case where this section wasn't applied to a reward?

5

**MS CULL QC:**

For a reward?

**WILLIAM YOUNG J:**

10 Yes.

**MS CULL QC:**

The Canadian authorities charged even Members of Parliament, Members of Senate, under the Illegal –

15

**WILLIAM YOUNG J:**

I know there are charges –

**MS CULL QC:**

20 Yes.

**WILLIAM YOUNG J:**

– under the gratuity or reward section, but are there any cases where section 100 and its successor have been held not to apply to a straightforward reward case?

25

**MS CULL QC:**

I think the answer to that, to be fair, Sir, is, no, not to my knowledge, but in *Hinchey v R* [1996] 3 SCR 1128 (SCC) – I deal with this under Canada, Sir. In – just give me one moment.

30

**ELIAS CJ:**

Sorry, where are we going to?

**BLANCHARD J:**

Canada.

35

**MS CULL QC:**

I understand the significance of Canada.

**ELIAS CJ:**

What volume are we going to?

5 **MS CULL QC:**

Perhaps, I'm sorry, I'm just deciding how to answer Young J's question, volume, the appellant's bundle of authorities, volume 3, can I take you first to tab 43. Look, it doesn't answer your question precisely, Sir, but this is the *Arseneau v R* [1979] 2

10 SCR 136 (SCC) decision where the appellant had been in practice with his partner. He later became a Minister of Tourism and he was still receiving money from people that he'd known in the practice and he could obtain favours from the Minister of Tourism for \$10,000 is essentially the gravamen of what is at issue here. If we go to  
15 page 151, this looks at the difference between the offence of bribery and influence peddling. So, in other words, he is using his position as an agent being able to obtain favours for the person who pays him and if you just look at the middle paragraph there, the difference between the two sections is further accentuated by the fact that a person convicted the offence of bribery is liable to 14 years. It's abundantly clear that Parliament regarded section 108 as creating the more serious  
20 offence and bearing this in mind, it is indeed unlikely that Parliament should have, at the same, intended that section 108 was to have no application to bribery of a member of the legislature, acting in his official capacity as a Minister of the Crown. Now, that was, he was being paid to do something, so it was either influence peddling or bribery and he was –

25

**WILLIAM YOUNG J:**

But isn't that, isn't this address to the point that I raised with you earlier this morning as to whether what was section 102 was apt to capture of conduct of an MP on the basis that there must be a question mark as to whether an MP is an officer of the  
30 government?

**MS CULL QC:**

Yes.

35 **WILLIAM YOUNG J:**

And what they're saying is, well, we're going to give that a big reading because –

**MS CULL QC:**

Yes.

**WILLIAM YOUNG J:**

- 5 – which is sufficient to capture, in this case, a provincial legislator in a Quebec case, a member of the Legislative Council of Quebec, and in the *Cogger* case a senator.

**MS CULL QC:**

10 Yes, one should just say, Sir, that it was that the 1954 provisions were subsequently amended, but nevertheless, both in this case and *Cogger* who was a senator, were captured by the illegal gratuity provisions. So what I'm saying here is that the reward, even though it is a reward, is looked at in terms of whether it still falls within the bribery section, as opposed to gratuity or influence pedalling and perhaps it might be easier if I take you to the back of the submissions where we've tried to summarise  
15 for you some of the Canadian and various decisions from the jurisdictions, of which perhaps gives an overview to the question that Your Honour is asking.

So if we go to the heading of Canada, it is in appendix 1, Greenwood was charged with accepting a benefit under the Illegal Gratuity Act and this is the fact situation I  
20 told you about, the solicitor being good friends with the prosecutor. He brought him a television, they became friends and they've had a value of \$225 and the superior was not aware of the gift, but there was no suggestion of any benefit upon Greenwood as a consequence of the gift. So in other words, the benefit did not accrue to the briber, if one can put it in that term, terms and both were acquitted.

25

*Hinchey* perhaps comes closer to what Your Honour was asking me and here this was where the accused was the engineer for the provincial transportation department and his wife was put on the payroll of a company that obviously sought contracts from the transportation department, so she was never asked to do any work, but was  
30 still paid regularly and all the other flag wavers were terminated, had their employment terminated. Now the accused there was aware his wife was not asked to perform any work. He was aware that a flag person would not be paid without working and he had not obtained the consent of his employer to receive any such benefit. Now that was clearly payments in the hope of obtaining favours, but he was  
35 charged under the illegal gratuity section for that and it was, in effect, an ongoing payment. Which raises the question about gift as opposed to reward. He wasn't

being rewarded for doing anything, but he was receiving gifts as a future looking, priming if you like, for favourable consideration.

**ELIAS CJ:**

5 Sorry, I'm just trying to link this back to the Canadian Criminal Code. What, this was under section 102 was it? It couldn't have been under 100 though, could it?

**MS CULL QC:**

No.

10

**ELIAS CJ:**

No.

15 **MS CULL QC:**

Ma'am, the Canadian provisions changed and if I can take you to volume 1, set them out there, if I could take you to volume 1 of the appellant's bundle of authorities and tab 12 sets out the Canadian Criminal Code as I've taken you to in 1954. On tab 14 the Canadian Criminal Code is set out for 2010. So we've got the, oh, sorry, perhaps  
20 if I take you to 12, tab 13 I beg your pardon. So tab 12 is 1954. We've got the Tremeeears commentary in 1962, which is the commentary on it, and then we've got the updated Criminal Code of 2010.

**ELIAS CJ:**

25 But *Hinchey* –

**MS CULL QC:**

Now *Hinchey* was still under the 1954 provision.

30 **ELIAS CJ:**

Yes, so he couldn't have been charged under section 100? He didn't fall within the categories covered by section 100. So what are you taking from this?

**MS CULL QC:**

35 I'm sorry, I was answering the question.

**WILLIAM YOUNG J:**

What I'm trying, what I was trying to find out was whether there were any cases where the former section 100 of the Canadian Criminal Code had been held not to apply to reward?

5 **ELIAS CJ:**

Yes and so this doesn't –

**WILLIAM YOUNG J:**

And I think the answer is no.

10

**MS CULL QC:**

No, I understand that. I'm not sure that I can take you to that. Perhaps a better way of answering this is to go to *R v Cogger*. That sets out the Court's attitude towards the different payments and the different sections. So that's volume 3, tab 47. Now if

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we go to page 2 it sort of sets out what had occurred here. The accused was a lawyer appointed to the Senate in about 1986. For about a year prior he'd acted as the lawyer for two companies and made representations to government in an effort to obtain grants for the companies. Following his appointment to the Senate, the accused continued to make efforts to obtain grants on behalf of the companies.

20

Although his efforts did not ever produce a result, he was paid fees totalling \$16,200.

Now, there was also a payment of a loan to the accused from one of the shareholders of the companies and I think perhaps, in light of Your Honour's questions to me, it may be answered by going to page 10 of the report,

25

paragraph 13, and that is the argument about what intention needs to be possessed, "Did the accused possess an intention to commit the acts, combined with a knowledge of all relevant circumstances, in order to come within 121(1)(a)?" which is set out at page 8 of the decision, or whether it is more appropriately 121(1)(a)(ii), and the discussion there takes you through to page 12, "Designed to prevent Government

30

officials from undertaking for consideration, to act on another person's behalf." Now, this was a charge under 121(1)(a) of accepting a benefit, as opposed to a gratuity, and I'm not sure whether that's answering Your Honour's question to me, but the Courts there set out the differences –

35

**ELIAS CJ:**

Well, what can you –

**MS CULL QC:**

– at page 13 –

5 **ELIAS CJ:**

What can you take from this case of benefit for your argument, because it's on an entirely different, the entirely different provision, and it's explicitly not dealing with the offence which requires a link?

10 **MS CULL QC:**

Well, Ma'am, His Honour asked me, "Is there a case in Canada that shows that reward doesn't fall within the bribery section?" as I understood the question.

**WILLIAM YOUNG J:**

15 Yes.

**MS CULL QC:**

So if I go to page 13 – and that's all I'm answering here, Ma'am – at paragraph 20, halfway through that paragraph, "It's clear that for a person to fall within the confines  
20 of 121(1)(a)," – now, that is accepting a benefit, it's not the bribery section, I accept –  
"contrary to 121(1)(c), his or her actual integrity will have to have been  
compromised." So, for an offence, an accused will have had to have agreed to deal  
with the Government on another's behalf for consideration. Now, contrary to what  
the respondent submits, it's not necessary for the official to believe his or her integrity  
25 is being compromised. On the contrary, this automatically follows from the engaging  
in of the prohibited quid pro quo action, as *Hinchey* – and reference to *Greenwood*,  
121(1)(c), which is the gratuity provision, is markedly different, in that the recipient of  
the benefit need commit no additional action, it is the appearance of integrity with  
which that provision is most concerned. Now, I'm not sure whether that answers the  
30 question but –

**WILLIAM YOUNG J:**

I don't think it does, actually.

35

**MS CULL QC:**

– down in paragraph 22, again, the essence of receiving a benefit – and we’re using that term “benefit” – is the quid pro quo arrangement, which is not a requirement under 121(1)(c). So that, with respect, deals with a difference between if you’re accepting a benefit there is a quid pro quo arrangement, as has happened here, the lawyer is on the Senate, still receiving benefits from people he used to act for, and what a gratuity section is about. And, in my submission, the appearance of integrity and the question of temptation is the type of provision that the illegal gratuity provision was aimed to deal with, as opposed to the bribery section, and the submission is quite plain that, if this is a bribery section, then there is a quid pro quo arrangement required. And, in this case, as Your Honour quite rightly points out, wasn’t charged under section 100 because, of course – I mean, he could have been, but he was charged under 121(1)(a), but they still saw, the Court still saw that accepting a benefit brought it into the quid pro quo bribery context, but gratuity was quite separate.

15

Now, there was one other matter that McGrath J asked me to deal with, and that is in relation to *Singh*, coming back to Lord Bingham, and if I could, could I take you please to – now this appears in the appellant’s bundle, volume 2, tab 27, paragraph 15, so it’s page 152, if I may take you there?

20

**WILLIAM YOUNG J:**

Sorry, what tab are we...

**MS CULL QC:**

25 Sorry. Volume 2 of the appellant’s bundle, tab 27.

**WILLIAM YOUNG J:**

Thank you.

30 **MS CULL QC:**

Page 152, on the left-hand side, and just coming down to the paragraph 15. I think, just before the break – I’m sorry – just before the break, McGrath J had asked me to look at BC on page 151, and I think I answered that by saying you still have to have a breach of your duty, “Betray their duty,” was the way it was put. I would just like to now take you please to paragraph 15 of the judgment, and there is the formulation by Willes J, Mr Willes J, in *Cooper v Slade*, and can I just take you to the next paragraph? This principle was applied in *R v Smith* [1960] 2 QB 423 (CA) above. It

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also applied in *R v Wellburn & Ors* (1979) 4 Burr 2494, a case involving both payers and receivers. “Applying the principle to this case, the Board concludes that if the facts alleged by the prosecution were established,” and that’s the solicitor going and getting the \$40,000 to bribe the magistrate and prosecutor, “the appellant purposely  
5 did enact, which section 3(1) forbade as tending to corrupt public officers, in soliciting and receiving money for the express purpose of bribing them.”

Now, I’m drawing your attention to this because the word “bribe” does not appear in the statute with which the Court was concerned. If we go back to the previous page  
10 at paragraph 11 and, indeed, they called it the “Prevention of Corruption Act,” not even “bribery”, but there is no reference there to any use of the word “bribe” but, in my respectful submission, that reinforces my submission that there must be, not just the link-in knowledge that somebody is doing something for you and you are an MP, but you must be receiving money for the express purpose of doing something  
15 wrong. In this case it was bribing the Judge and the prosecution. In Mr Field’s case, in my submission, that is absent, and it’s on that basis that I am saying that these authorities do support the submissions that have been made on behalf of the appellant.

20 **WILLIAM YOUNG J:**

Thank you.

**MS CULL QC:**

If I may now perhaps come back to the submissions, and if I could take you, if  
25 Your Honours please, to the first ground, because unless the Chief Justice wishes me to deal with knowledge any further, I have taken you to the passage where –

**ELIAS CJ:**

Yes.

30

**MS CULL QC:**

–Randerson J’s test was challenged, and some of that was put there because that was the basis of the argument before the Court of Appeal in relation to how knowledge, in my respectful submission, was misconstrued in relation to this  
35 definition. So, coming then to the Court of Appeal’s formulation of the test for corruptly accepting, I would like to take you just to paragraph 3.1 of the submissions on page 4, and I just want to come back to the Court of Appeal’s test for section 103

and that is, "That a bribe is corruptly accepted, if in accepting the bribe the particular member of Parliament is knowingly outside the recognised bounds of his or her duties." Now that appears at paragraph 64 of the decision in the case on appeal, volume 1.

5

In my submission, that is a novel test and if I can take you to paragraph 3.6 at the top of page 5. I deal there with the basis for the Court reaching that decision on the line of authorities *Cooper v Slade* and following and we've already dealt with the *Cooper v Slade* case indirectly, but I'm happy to take you to that case to show you what the actual statute provided there, which made the corrupt act so express, if that would be of assistance to Your Honours?

10

**McGRATH J:**

What would assist me, Ms Cull, is finding out where this concept of knowing the acting outside the bounds of duties or the bounds of office or proper bounds came from? It's sprinkled in throughout 61, 63 and 64 of –

15

**MS CULL QC:**

Yes.

20

**McGRATH J:**

– the judgment. And I'm not actually sure I understand it and if you had anything about its provenance, I certainly would be interested in that.

25

**MS CULL QC:**

Well, Sir, like you, I spent some time looking for that and it appears that that may well have had its genesis in the Law Commission's report on corruption and that's my term. So what I might do to answer you is to ask the Court to take the Crown authorities, volume 3 and if I could take you, just while we're on corruptly, before I get to the breach of duty, while we're opening this, at tab 37, this is the paper on reforming bribery, I'm sorry I said corruptly, but I'm taking you to bribery first.

30

**TIPPING J:**

This is the English Law Commission?

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**MS CULL QC:**

This is the English Law Commission, the United Kingdom, I'm sorry, I think I said UK, I beg your pardon, United Kingdom Law Commission, at tab 37. I'd like to take you please to page 11, paragraph 2.33 because just before we advance on breach of duty, I would like to take you to, at least a view, of course it is just a view, about the meaning of corruptly and you will see there that the Law Commission is essentially, with respect, saying that the majority of the House of Lords in *Cooper v Slade* took the view that corruptly did not mean dishonestly, but rather doing an act which the law forbids is intending to corrupt. This was thrown into doubt by *R v Lindley* [1957] Crim LR 321 and *R v Calland* [1967] Crim LR 236 and you'll recall that the Court of Appeal called that the second line of authorities, which I've dealt with in the submission. Those suggested that dishonesty must be proved, so that was the agent or the servant cases, where you take a bribe to get favours for the person bribing you. Yet *Smith* and most recently appellants authority favour the earlier view, requiring proof of intent to corrupt without needing dishonestly. The lack of clarity surrounding the critical verb, adverb, weakens the effective application of the law of bribery and it is on that basis that the United Kingdom have rejected the use of the word "corruptly" in their legislature and in adopting the Bribery Act.

But now to deal with McGrath J's question to me. If I could take you please now back to tab 36 in the same volume at page 52 and it's called, *The Essential Character of Corruption* is the title, paragraph 5.4 on page 52. You'll see that there's reference to their consultation paper where they attempted to analyse the essential character of corruption. In it they describe the mischief with which the law of corruption was concerned, in terms of the fundamental mischief and you might see some echoes of this in the Crown submission, being B's breach of duty and the mischief of temptation, A is temptation of B by bribery to breach B's duty, which is the last part of that paragraph.

Now if you go to 5.5 just below. The Commission was strongly criticised for introducing the concept of breach of duty in the corruption context and perhaps it's highlighted first at the top of page 53 with the problem and the problem is, introducing a breach of duty leading to protracted legal argument concerning whether a duty is owed and if so, what constitutes a breach, matters which, as far as commercial relationships are concerned, are primarily the province of the civil law.

35

**McGRATH J:**

Sorry, what paragraph are you at now?

**MS CULL QC:**

That's just at the top of page 53. It follows on from –

5 **McGRATH J:**

Oh, yes, right, thank you, got that.

**MS CULL QC:**

– 5.5, it's one of the criticisms, so you know, we're calling it really the civil law test  
10 and that's problematic in a criminal context for this.

**WILLIAM YOUNG J:**

Who is Mr Field's principal, in terms of the drift of this discussion? Because this a  
tripartite problem.

15

**MS CULL QC:**

True.

**WILLIAM YOUNG J:**

20 There is the briber, the person who takes the bribe and there is the principal of the  
person who takes the bribe who's missed out, so it's a Secret Commission situation.

**MS CULL QC:**

It is the equivalent of a Secret Commission situation, but you've asked, I've been  
25 asked where I think the breach of duty has –

**WILLIAM YOUNG J:**

Okay, sorry, yes.

30 **MS CULL QC:**

– arisen, and this is where I'm taking you to it, but just in terms of not taking any  
definition, but Mr Field was the conduit between the constituents and the Minister.  
He wasn't the decision maker and that, I've drawn attention to that in my  
submissions, that that has raised some questions in an academic commentary about,  
35 if you have a Member of Parliament who isn't the decision maker, whether you  
actually can be guilty of bribery. But in any event, this seems to be the genesis, if I'm  
not mistaken, about that and can I take you, after a full discussion, could I take you to

page 111 of the same report because I think this summarises the dangers of dealing with a breach of duty, in the way that the Court of Appeal, with respect, has formulated it and you'll see, 111 8.1 there, "In a consultation paper we analysed the functions of the law of corruption in terms of the fundamental mischief and the mischief of temptation."

Can I drop you then to 8.2 in a the consultation paper the Commission provisionally rejected the radical approach of introducing one or more offences of an agent acting contrary to his or her duty, and I accept that as we're talking about the agent here, but just moving on. The criteria, which was put up by the Commission, were considered by them, after receiving commentary back, to be inevitably elusive and controversial and further, this is the middle of 8.2, "We took the view that criminalising the breach of duty directly would have failed to reflect the widely understood meaning of corruption as something which destroys or perverts another's integrity or fidelity." And then 8.3, "For the reasons set out above, we remain of the view that it would be wrong to criminalise breaches of duty directly and we therefore do not recommend the adoption of the radical approach." It should be noted that at 8.2 the Commission concluded, "It should be an offence for an agent to perform his or her functions corruptly. That is, either in return for a corrupt inducement, or in the hope of a corrupt reward," and then they go on about corruption by means other than bribery.

Now I'm taking you to those sections because it seems that that's where breach of duty was first premised, in the criminal context and then rejected. And if I can also, just for completeness, take you to tab 37, under the Reforming Bribery paper, page 33 and there is obviously a lot of commentary, I won't take you to all of it, but at the bottom of page 33, I take you just to the conclusion and that's at 3.96, "The various objections have led us to the conclusion that the restriction of the duty in bribery cases to a legal or equitable duty is unnecessary. Indeed, the need to establish such a duty might, in many cases, add nothing in terms of certainty, and prove to be no more than a complicating distraction."

However, in terms of just formulating breach of duty in a corruption context, can I take you just back up on the same page, to 3.92, because I think that highlights what is under appeal here? "Moreover, the need to find there was a breach of a legal or equitable duty as a matter of civil law, before leaving the question of breach of the jury [*sic*], was a stricture disliked strongly by the counsel of Circuit Judges, Higher

Court Judges and the Crown Prosecution Service.” Perhaps it’s captured best at 3.93, “We take issue with the suggestion that the presence of one of these duties will normally be a question of law for the Judge, even though the question of whether such a duty existed, may involved the Judge in the determination of some questions of fact. The Judge’s role should extend no further than determining whether the facts are capable of establishing the duty. Thereafter, it will be for the jury to determine, as one of the issues in the case, whether or not the relevant duty in fact existed on the facts. The counsel of Circuit Judges said, ‘Once what should be a simple concept becomes, as a result of definition, partly a question of law for the Judge and partly a question of fact for the jury, then it’s complicated still further. If the Judge decides the elephant is capable of being grey, the jury then decides whether it is.’” And, in my respectful submission, when you hear from the Crown in relation to ground 3, it is strongly submitted that it was not Hansen J saying that he recognised the bounds of the duty had been breached. Because that, actually, if that’s how it’s to be formulated, should have been a jury question.

**TIPPING J:**

I would have thought if we wanted to have duty as a key determinant here, we’d find it in the section. And what Parliament has done is to focus on the capacity in which the person is (inaudible) and why do we need to go beyond that?

**MS CULL QC:**

No.

**TIPPING J:**

And this time I think I’m with you.

**MS CULL QC:**

Well, I’m pleased to hear that.

**TIPPING J:**

But, there’s a sting in the tail, because the capacity is a broad concept. It obviously has some boundaries, but that would be ultimately for the Judge to rule on capacity and the jury to rule on whether it was so.

**MS CULL QC:**

Mmm.

**TIPPING J:**

Is that really your submission, Ms Cull?

5

**MS CULL QC:**

Well –

**TIPPING J:**

10 You're saying that this is no good –

**MS CULL QC:**

Yes.

15 **TIPPING J:**

– this reference to duty?

**MS CULL QC:**

Well, I'm saying it's wrong.

20

**TIPPING J:**

Yes.

**MS CULL QC:**

25 I think the definition is wrong. But, I mean, I'm dealing with the ground that was proved here, that the Court of Appeal wrongly adopted the test, or did they adopt the right test for section 103? So I'm saying clearly, it's wrong, but –

**TIPPING J:**

30 But what is crucial, surely, is whether the trial Judge got it right?

**MS CULL QC:**

Yes, well, that was my concern, that if –

35 **TIPPING J:**

If the Court of Appeal were, hypothetically for the moment, to be wrong, so what, if the trial Judge got it right?

**MS CULL QC:**

Well, I think that's problematic too, which I try to address in ground 3.

5 **TIPPING J:**

Oh, I know.

**MS CULL QC:**

10 But can I come back to your formulation first, why do you think the Court of Appeal went beyond the section and formulated a breach of duty? I'd like to answer –

**TIPPING J:**

Well, that's not my question.

15 **MS CULL QC:**

Oh.

**TIPPING J:**

I'm not actually too worried about that.

20

**MS CULL QC:**

Oh, okay. Well, I'd quite –

**McGRATH J:**

25 Well, I think you've –

**MS CULL QC:**

– like to answer that, if my question...

30 **TIPPING J:**

Well, no, I'll just say, it's my brother's question, not mine, but answer it by all means.

**ELIAS CJ:**

35 I must say, I think it does seem odd that the Court of Appeal would – your answer is that they've got it from the UK Law Commission Report, but as the UK Law Commission Report is quite against it, it seems strange. But, I too, don't find the notion of duty at all helpful, given the terms of our statute. Indeed, it seems really to



be putting it around the wrong way, because the statute talks about acts in the capacity as MP, so there's no question of, that that's a factual matter.

**MS CULL QC:**

5 Yes.

**TIPPING J:**

You might be acting as an MP, but you have no duty to so act.

10 **ELIAS CJ:**

Yes, it's irrelevant.

**MS CULL QC:**

Well, I'm sorry, I did formulate the question.

15

**McGRATH J:**

Well, anyway, I think you've given me the context which is, as far as you're concerned, where they must have got it from. You –

**MS CULL QC:**

20 Well, as far as I –

**ELIAS CJ:**

I wonder whether it's the Lanham article that might have been...

25 **MS CULL QC:**

That might have sparked it.

**ELIAS CJ:**

30 That might have sparked it. Because there do seem to be a lot of complexities which arise out of my quick reading of that article, which had found its way into the Court of Appeal judgment.

**MS CULL QC:**

35 It did, and I provided it, in volume 3 of the appellant's authorities, because it was footnoted by –

**ELIAS CJ:**

Yes.

**MS CULL QC:**

– the Court of Appeal in looking at the problem, well, the impressive disarray, of the  
5 definition of “corruptly” –

**ELIAS CJ:**

Yes.

10 **MS CULL QC:**

– and where it had led to. But I’ve perhaps stepped out of my role and formulated a  
question that I really wanted to answer, and I’m sorry if I’ve misconstrued the  
question, but the reason that I believe the Court of Appeal looked for another way of  
dealing with the definition of “corruptly” was that knowledge gave such anomalous  
15 results, that by limiting the definition, as the trial and leave Judge did, to knowledge  
and belief that the benefit was done, led to the anomalies that the defence put up or  
the appellant put up to the Court of Appeal, that you would have to then deal with  
things that are obvious, like receipt of salary, so then the Court say, “Well, okay, it’s  
got to be outside the bounds of the duty to make it caught within the section,” I think  
20 that’s how it happened, but, look, this is surmise and –

**ELIAS CJ:**

Yes.

25 **MS CULL QC:**

– obviously it’s not a formal submission.

**TIPPING J:**

But they don’t say that, they just sort of pluck it from somewhere.

30

**MS CULL QC:**

Yes, yes, I –

**ELIAS CJ:**

35 Well, I wonder whether it’s necessary for you to develop this ground further, because  
it does seem that, subject to what the Crown might say, and you might wish to return

to it in reply, that the critical issue for you is whether the directions given to the jury were incorrect.

**MS CULL QC:**

5 Well, on that indication perhaps I should then – and I understand that Your Honours don't want to be taken to "bribe" and "bribery", because we have set it out fairly extensively in the submissions.

**ELIAS CJ:**

10 Yes.

**MS CULL QC:**

15 So, I am saying that's the corrupt bargain of "bribe" and "corruption" in the way that I've taken you to it, and certainly in the authorities that's where you see it coming back to. But, all right, I'll take you now to the third point on appeal.

**TIPPING J:**

20 Doesn't this point, without wishing to foreclose, Ms Cull, really depend on the success or otherwise of your first submission?

**MS CULL QC:**

Yes. Well, in – I don't know – in part.

25 **TIPPING J:**

I mean if "corruptly" means what you say it means, then there's a problem with the summing up.

**MS CULL QC:**

30 Mmm.

**TIPPING J:**

If the Court is against you with that, I don't think you can suggest there's a problem.

35 **MS CULL QC:**

Well, I –

**TIPPING J:**

Well, you can try, but...

**MS CULL QC:**

5 Well, I beg to differ. Yes, I can try, try to differ.

**TIPPING J:**

I mean, clearly, there's a problem –

**MS CULL QC:**

10 In my submission –

**TIPPING J:**

– if the law is as you submit it is, but I'd like to see what the problem is if we're against you on that.

15

**MS CULL QC:**

All right. The – yes, I understand what Your Honour's asking me, it really is to re-raise the arguments we raised –

20 **TIPPING J:**

Oh, no, no, no –

**MS CULL QC:**

The Court of Appeal about that knowledge –

25

**TIPPING J:**

– I don't want you to re-raise all that. I'm just saying, if the law is as it's been put to you, as opposed to what you submit, is there a problem with the summing up and, if so, what is it?

30

**MS CULL QC:**

All right, I'll attempt to answer that. Because I am saying that I do not, do not, and we never did, accept that the way in which the test was formulated by the leave and trial Judges was correct, for the reasons –

35

**TIPPING J:**

No, no, but you were on full notice of them. You can't say you were prejudiced, because you didn't know the Judge was going to sum up in these terms, can you?

**MS CULL QC:**

5 No, no, no, no, sorry, I must admit, I'm sorry, misunderstand.

**TIPPING J:**

A misunderstanding, all right.

10 **MS CULL QC:**

Yes, I'm sorry. It's coming back to the definition of "corruptly" being "knowledge or belief" –

**TIPPING J:**

15 Yes.

**MS CULL QC:**

– and, in my submission, that is a test that the appellant says is wrong and –

20 **TIPPING J:**

I hear all that –

**MS CULL QC:**

Yes.

25

**TIPPING J:**

– and I'm just waiting to hear the other side of that.

**MS CULL QC:**

30 All right.

**TIPPING J:**

But, assuming you're wrong on that, what's wrong with the summing up if the test is according to Randerson J?

35

**MS CULL QC:**

Well, I see what Your Honour – I'm sorry, I see what Your Honour is asking. If this Court approves the knowledge test –

**TIPPING J:**

5 Yes, knowledge of the link.

**MS CULL QC:**

Well, it's knowledge, yes, it's knowledge that the immigration assistance was being rewarded –

10

**TIPPING J:**

Yes, the link.

**MS CULL QC:**

15 – specifically. Well, I'm saying the link requires more than just a knowledge.

**TIPPING J:**

I'm just trying to be succinct, Ms Cull.

20 **MS CULL QC:**

Then obviously if you approve that, that direction, then that's how Hansen J directed and you see it in his summing up and also in the issues and definitions put to the jury. My submission to this Court is that the Court of Appeal has stated a new test and if I can take you to paragraph 5.2 –

25

**TIPPING J:**

Frankly, I thought you were given quite a big hint by the Chief Justice that we're not very attracted to the Court of Appeal's test and, subject to what the Crown may say, you can come back to that. So you needn't worry about what the Court of Appeal said at this stage for the purposes of the summing up and unless I misunderstood what the Chief Justice was putting to you.

30

**MS CULL QC:**

Yes.

35

**TIPPING J:**

The question is –

**MS CULL QC:**

Yes I understand –

5 **TIPPING J:**

– was the Judge’s summing up wrong?

**MS CULL QC:**

10 – was the summing up wrong, right. Now, can I, can I ask the Court then, in light of indicating to me that the new test of corruptly may not be upheld, that the Court also agrees with the Court of Appeal about its view of bribery and bribe.

**ELIAS CJ:**

15 I’m sorry, what do you mean by the new test of “corruptly”, I thought it was the old test?

**TIPPING J:**

It’s the duty point I think, it’s the duty point.

20 **MS CULL QC:**

It’s the bounds of duty, it’s what I call new test –

**ELIAS CJ:**

Yes, sorry.

25

**MS CULL QC:**

And Tipping J is saying to me, look move on.

**TIPPING J:**

30 Well, you get another go at that.

**MS CULL QC:**

Yes.

**TIPPING J:**

35 If the Crown gets legs on it, or even tries to support it, but and if you’re right in your primary submission, Ms Cull, then clearly the summing up is defective. But are you

suggesting there's some sort of intermediate position that would still make the summing up defective?

**MS CULL QC:**

5 Well, I'm submitting, Sir, on the indication that you've given me, that the summing up was done still on the knowledge test and I'm submitting that is wrong, but furthermore, the suggestion by the Crown, and indeed upheld by the Court of Appeal, that this was from start to finish, a reward or gratuity case and it's done as gratuity case, and that there is no such offence of bribery and corruption on a Member of  
10 Parliament. In other words, there is no such offence of bribery in New Zealand and that bribe is value neutral. In my submission, also raises concerns about the summing up. Now you'll see that in my third ground, I have dealt with the Court of Appeal and then I take you to the approach by Randerson, J, page 27 to which I referred earlier and I think we got diverted onto the decision in *Mills*.

15

Can I take you to, I'd like to deal with the knowledge point first and then I'll deal with the bribery position second.

**ELIAS CJ:**

20 Is this really a distinct argument because, reading the submissions, I had trouble seeing that it was. If we're against you on the first argument that you put to us, where do you go with this so called third ground?

**MS CULL QC:**

25 So, I'm sorry, if you're against us on the, the acting outside the bounds of the duty –

**ELIAS CJ:**

The knowledge. If knowledge of the link is insufficient, that's your argument. If we're not with you on that, what's this third ground, where does that take you really? Isn't  
30 this just another, another point that you take issue with the Court of Appeal on?

**MS CULL QC:**

I have framed it and that's what I understood I was directed to do.

35 **ELIAS CJ:**

Yes.



**MS CULL QC:**

If the Court upholds the Court of Appeal's decision on corruptly, then there were two serious adverse consequences and that's what I've set out at paragraph 5.1. So what I'm understanding from Your Honour is that we have addressed the corruptly as defined by the Court of Appeal as being in breach of the duty, acting outside the bounds of the duty.

**ELIAS CJ:**

Yes.

10

**MS CULL QC:**

And I'm saying that that was not part of the direction and indeed it wasn't even the case that the appellant faced.

15 **ELIAS CJ:**

But the indication that has been given to you is that, provisionally, we're not particularly attracted to the idea of the breach of duty. Therefore, the direction wouldn't need tweaking.

20 **MS CULL QC:**

Right, so –

**ELIAS CJ:**

On that account.

25

**MS CULL QC:**

Right, so then we're in the step down position that you are saying, if the trial Judge's direction to the jury on knowledge or belief was done in light of the leave Judge's formulation, what do we have to say about that?

30

**ELIAS CJ:**

Yes.

**MS CULL QC:**

35 And that's, I've taken you to the preliminary, but let's come to page 28 520 and without wishing to cover old ground, but I am saying that in the directions to the jury the Judge stated that, "Knowledge or belief was the requirement for establishing

corruption. There was no requirement for a corrupt bargain in order to establish bribery, which the appellant contends should have been included.” The Judge referred to the issue sheets and explained to the jury, “The term ‘bribe’ encompasses the provision of services without charge or at an undervalue.” The explanations in  
5 his direction of the examples of a bribe and how the bribe must have been received, “Emphasises there must be a causal relationship between the giving of the work, the provision of a benefit and the immigration assistance that’s been given that that’s a direct causal link.” That I am doing this because you are putting my application through, or you will, or you’ll give me favours and that’s where the appellant says that  
10 that has not, that has not been addressed and it should have been. And then the Judge emphasised, “The lack of wrongdoing and the performance –

**ELIAS CJ:**

Sorry, sorry, it has not been addressed where?  
15

**MS CULL QC:**

In the direction because we’re simply on knowledge or belief and I’m saying that, that that direction on the law in New Zealand is wrong.  
20

**ELIAS CJ:**

I understand that but that’s a submission that you’ve already made to us. But you don’t have any additional criticism about the emphasis of the causal relationship do you?  
25

**MS CULL QC:**

Well I do, because at 5.22, I come back and set out for you that the Judge then emphasises, “That it’s no part of the Crown case there’s anything unlawful or  
30 improper about the immigration assistance provided by Mr Field, that –

**ELIAS CJ:**

Well, that’s the argument you’ve already advanced to us.

35 **TIPPING J:**

Yes, yes.

**MS CULL QC:**

That's right, that's right and in my submission that doesn't constitute corruptly. Now if, if that is going to be the way in which the definition of corruptly is to be viewed, then we do have a problem in the way in which this matter was put to the jury  
5 because this was put as a bribery and corruption case and if, as the Court of Appeal has upheld, that this is a reward case, and I'm saying that in the gratuity case as opposed to a quid pro quo bribery case, then everything before the Court was about bribery and I can take you through how that happens. The Crown opening –

10 **ELIAS CJ:**

Yes.

**MS CULL QC:**

– referred to the charges of bribery. The defence, it talked about the exchange, that  
15 it has to be in exchange for –

**ELIAS CJ:**

Yes, I understand all that, we've read your submissions, Ms Cull, but you will have to convince us that these classifications are useful and that the, that section 103 doesn't  
20 embrace them all. Of course there may be different degrees of culpability within the provision, but the language of section 103, on its face, seems perfectly apt to cover what you are calling rewards or gratuities.

**MS CULL QC:**

25 Gratuity.

**ELIAS CJ:**

I mean, that is the argument that you've already developed, because you say there's an additional requirement of improper outcome.  
30

**MS CULL QC:**

Yes, yes and I am saying that the problem with this jury direction is that by saying payments are received to influence or reward, captures the lower with the higher, so that this appellant has now been convicted of corruption and bribery, where the goal  
35 posts, in my respectful submission, have changed and everyone is accepting that this was a gratuity case, with a different sentencing range.

**ELIAS CJ:**

Well, that, as I've suggested to you, turns on whether those are classifications that are useful to use in connection with section 103.

5 **MS CULL QC:**

Well, in that case, Your Honour, what I can refer you –

**ELIAS CJ:**

I mean, you might want to develop that a bit more, Ms Cull, I'm not trying to cut you  
10 off there. I'm trying to understand your argument on it.

**MS CULL QC:**

Well, the Court – can I start with the Court of Appeal, because we did – the  
Court of Appeal did accept this was a gratuity case –  
15

**WILLIAM YOUNG J:**

They were wrong to do that, weren't they, because there was an element of  
inducement that was always alleged in an issue, was there not?

20 **MS CULL QC:**

Well, in my submission, we take issue with that, and we say there wasn't an  
inducement, that this was a gratuity. I mean, you will hear from the Crown that two of  
the counts, they say, come close to inducement but, from the appellant's point of  
view, there was nothing which induced him to do, because he didn't do anything  
25 wrong.

**WILLIAM YOUNG J:**

But –

30 **MS CULL QC:**

He didn't do anything that we see in *Parker* or *R v Andrews Weatherfoil Ltd* [1972] 1  
WLR 118 (CA) or *Cogger*, for that matter.

**WILLIAM YOUNG J:**

35 Sorry –

**MS CULL QC:**

Sorry.

**WILLIAM YOUNG J:**

Well, there are two ideas here. Some of the tiling services were provided at a time  
5 when immigration assistance was still being provided?

**MS CULL QC:**

10 It was, yes – well, it was sought. I mean, the application went in, it was going  
through the process. I mean, it would – that a connection or the causal link between  
Mr Field and the ultimate outcome was not ever criticised as being on the normal  
quid pro quo bribery framework. The most he did was put the applications forward,  
or gave advice through his office about this.

15

**TIPPING J:**

Well, he acted in his capacity as a Member of Parliament, surely?

**MS CULL QC:**

20 He did, as a Member of Parliament, take it – he wasn't the decision maker –

**TIPPING J:**

No, no, I know that.

25 **MS CULL QC:**

– nor could he influence favours, except –

**TIPPING J:**

I know, I know that, I know that.

30

**MS CULL QC:**

– if he did it wrongly.

**TIPPING J:**

35 But it couldn't possibly be argued he wasn't acting in his capacity as a Member of  
Parliament.

**MS CULL QC:**

No, that's true, I mean, I accept that.

5

**ELIAS CJ:**

And I'm not sure that it's useful even to talk about inducement, given the terms of section 103, because it's simply "in respect" of any act done or to be done.

10 **TIPPING J:**

It will usually be inducement and it will usually be reward, but why do we need these complications in a very straightforward section?

**MS CULL QC:**

15 Well, the jury were asked to look at reward or influence.

**TIPPING J:**

Yes, because that gave it some flavour, if you like, or some context.

20 **ELIAS CJ:**

It may have been the Crown case.

**TIPPING J:**

Yes.

25

**ELIAS CJ:**

It was tailored to the particular case. But that, surely, is to your client's favour, which is what I suggested at the outset, that really the directions may in fact have been more tailored than they – well, than they needed to have been.

30

**MS CULL QC:**

Well, with respect, the knowledge or belief leads to problems, as I've said, about receipt of gifts.

35 **ELIAS CJ:**

Yes, I understand that, yes.

**MS CULL QC:**

And that is problematic –

5 **TIPPING J:**

That's about the only point, with respect –

**MS CULL QC:**

– anomalous.

10

**TIPPING J:**

– that slightly troubles me, but I think it's easily answered.

**MS CULL QC:**

15 Well, it has a number of categories in which this has happened. I mean, here, we don't even have payment of money. I know you're going to say it's benefit indirect or direct, but people doing –

**TIPPING J:**

20 The problem is that it could literally catch your salary.

**MS CULL QC:**

That's right.

25 **TIPPING J:**

That's the point, and clearly it can't possibly be intended to. So, a way has to be found to deal with that.

**MS CULL QC:**

30 Well, with respect, if a way has to be found, and it's with the greatest of respect, if a way has to be found to deal with the way in which the section is just simply being read on its face then, similarly, similarly, the authorities on bribery should also inform this section because it is about bribe or bribery. You don't accept a gift, saying, "Thank you for the bribe." This is – a bribe is not value neutral, despite, despite the  
35 fact that it's being defined in the way it is, "bribe" is pejorative, "bribery" is also telling the population and the Law Commission and wherever you go – even Mr Johnstone, in cross-examination of Mr Field, put what everyone understood as "bribe" or

“bribery” and put the classic propositions of quid pro quo bribery. Now, my submission is that if this really was a quid pro quo bribery case, then the jury should have been directed that there is something that they’ve got to look for as well, it’s not just knowledge that someone’s painting his house and he’s paying a bill and it’s  
5 under value if other people say so but that’s the bill that was paid by Mr Field. So this wasn’t just a receipt of money in an envelope, to go and put forward this particular thing in favour. So if we’re dealing with quid pro quo bribery, then that had to be clearly put to the jury.

10 My submission addresses the fact that there was an acceptance, even by the trial Judge at the end, to a certain extent, and certainly the Crown are saying now, “There’s no offence of bribery per se,” when the trial was littered with references to bribery and bribes, and I can take you through all of those references: Crown opening, corruptly received benefits from his constituents in exchange for work,  
15 which he did for them as a Parliamentarian – and that’s in the case on appeal volume 2, page 91; page 93, “In recognition and in exchange for services;” it’s also the defence opening, “Trying to deal with this exchange of work for a benefit.” The cross-examination has been set out at 5.31, and there’s the hypotheticals, “You do something for me and I’ll do something for you. I’ll do something in exchange for you  
20 do something back for me,” and, in my submission, even when we come to sentencing, he’s being sentenced on offences of corruption and bribery and, with respect, it makes no sense for the Court of Appeal now to say, “Well, this isn’t such an offence in New Zealand, it’s now corruptly accepting a benefit,” because that’s not how this is framed. Everybody referred to bribery and, even in closing, Mr Davison  
25 on behalf of Mr Field said he was dealing with quid pro quo bribery, it’s volume 6 pages 10 and 11.

And the Judge’s summing up talks about charges of bribery and corruption. And in page 48 of the summing up, “Comes closer to the commonly understood idea of a  
30 bribe.” Why would you say that you have a common understanding of the idea of a bribe if bribe is value neutral and simply means “value”, which I think Your Honours put to me earlier. So all bribery and corruption counts are measures of how the Judge put that to the jury, and they were invited to take the normal meaning of “bribe” and “bribery” and, despite the issues in definitions, the Judge does say it comes  
35 closer to the commonly understood idea of a bribe. The Court of Appeal, at paragraph 98, was driven to say that by the time the trial had closed – although it had always been principally so since the beginning of the trial, and I take issue with that –



the Crown was arguing that Mr Field's role was simply to accept a reward for doing the job he was paid to do and, with respect, when one looks at the context of this trial, there is no doubt that everyone was talking about quid pro quo bribery.

5 Now, if the, if, as Your Honour has, as the Chief Justice has said to me, if the Court of Appeal's test is not upheld on "corruptly", the observations about the two-tier provision and a lower sentencing range for a gratuity case, if that does factor in your consideration, then the appellant has not been able to defend that, or nor was the jury given an option. You have murder, you can find manslaughter. We've talked  
10 about the commonly understood idea of "bribe". You can also put that to one side, you can deal with this as a gratuity case, and perhaps you may find it is a gratuity case. But that was not the position. So, the position has been reached now that if this is a gratuity case, and if it was included in section 103, then that was not made clear to the jury and, certainly, the defence did not address it on that basis through  
15 the trial, because they were meeting the Crown's statements about exchange for value, exchange of work for favours and the cross-examination and Mr Davison is dealing with the Crown's allegations.

**ELIAS CJ:**

20 But if we're to be a little realistic here, how could it help if it was grat – well, it can't have been gratuitous in the sense of not connected because the section required connection and the Judge's directions required the connection. So it's not gratuitous in that sense, not a gift that just arrives out of the blue. So it's gratuity in some –

25 **MS CULL QC:**

Well, in the Canadian and United States sense.

**ELIAS CJ:**

Well, I'm not sure about that. On your submission it's a, it's not an inducement to do  
30 something improper.

**MS CULL QC:**

And it's not a reward for having done something improper.

35 **TIPPING J:**

That's the key point in the case.

**ELIAS CJ:**

Yes.

**TIPPING J:**

5 If you can persuade us that it corruptly involves that, you're making good progress. If you can't, I would have thought that was the end of all issues.

**WILLIAM YOUNG J:**

10 The indictment is in terms of acts done or to be done and in that sense is broadly expressing alternatives in a way that I think is consistent with it at section 334 or 335 of the Crimes Act. So what is the complaint about it?

**MS CULL QC:**

15 What I'm saying is that there are two-tier, there's a two-tier approach, you've captured the lower with the higher.

**WILLIAM YOUNG J:**

20 But we've got a whole series of ideas floating around here. One is, and can we just put it to one side for a moment your contention that it's only bribery if Mr Field was to do something that is independently dishonourable or corrupt. So forget taking the money or taking the services. The Crown has to prove that he acted dishonestly, corruptly, in some reprehensible way and only if that can, the payment of the money then can be seen as referable to that, can there be an offence, is that right?

25 **MS CULL QC:**

Well, taking the way in which Tipping J has put it to me, taking a reward for doing, for acting improperly in the capacity of his office –

**WILLIAM YOUNG J:**

30 All right, okay.

**MS CULL QC:**

– would be how I would frame it.

35 **WILLIAM YOUNG J:**

Would you accept, say it's an after the fact reward. Mr Field does something absolutely appalling and then the beneficiaries of his actions say, we'll do some tiling for you, would that be corrupt?

5 **MS CULL QC:**

No.

**WILLIAM YOUNG J:**

No.

10

**MS CULL QC:**

Well, it goes back to my submission. None of this corrupt, unless you're going, unless you're doing it with an improper motive. Unless you're doing it dishonestly or illicitly.

15

**WILLIAM YOUNG J:**

Who's "you"?

**MS CULL QC:**

20 Sorry, the person in the capacity. The MP is saying, I'm in this position. I'm getting this reward. I'm going to act. I'm accepting this corruptly, namely, I am going to accept this reward, do my job improperly.

**ELIAS CJ:**

25 I think you're applying the mens rea to the wrong thing. It's the accepting the benefit that is the actus reus. It's not actually doing something improperly in your capacity. It's taking a benefit for acting in some way in your capacity as MP.

**MS CULL QC:**

30 So that includes any, any gifts, any gifts?

**ELIAS CJ:**

Yes.

35 **WILLIAM YOUNG J:**

Well, there maybe de minimis exceptions. I mean some of that Lanham article suggests that from the very outset there were de minimis exceptions and that at a

very low level, the gift might be so trivial as not to be sensibly seen as being referable to the performance of the function. And, I mean, I simply don't accept that the payment of a statutorily authorised salary can be corrupt.

5 **MS CULL QC:**

Well –

**WILLIAM YOUNG J:**

I mean, there just has to be a carve out for that, and it may be in the –

10

**TIPPING J:**

It cannot be corrupt because Parliament, in passing the other statute, says it's not corrupt.

**MS CULL QC:**

15 Well, with respect, I mean, if, it comes down to how you are going to construe that section. If you're saying knowledge, in your capacity as a Member of Parliament, and you are getting these because you are a Member of Parliament and you've helped some people – I mean, can I just come back to the question that's being posed really, and that is, how can I get the reward into a corrupt acceptance? It's corruptly  
20 accepting if you know that you are being paid to try and do something in your capacity for that person.

**TIPPING J:**

To do something naughty.

25

**MS CULL QC:**

Or do something naughty.

**TIPPING J:**

30 Mmm. That's what you –

**MS CULL QC:**

Improper. Improper.

35 **TIPPING J:**

That's your –

**MS CULL QC:**

Yes.

**TIPPING J:**

5 Yes.

**MS CULL QC:**

And it comes back to *Broom v Police* [1994] 1 NZLR 680 (HC) and it comes back to *Hall v Wellington District Court* HC Wellington CP256/98, 25 September 2008 and –

10 **TIPPING J:**

Well –

**MS CULL QC:**

It is, it is corruptly –

15

**TIPPING J:**

But you keep, we keep, we're just going in circles, Ms Cull, we just keep coming back to the fundamental point on which the appeal turns.

20 **MS CULL QC:**

Well, yes, but if we go to *R v McDonald* [1993] 3 NZLR 354 (HC), any of our authorities, it is that the mental element which an offender must have on accepting a gift, namely, that degree of deliberate criminal intent necessary not only to perform the act itself but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party's business which is Williamson J in *R v McDonald*. The "corruptly" is about doing something wrong, illicit, improper. The UK provision of the Bribery Act is improper. In my submission, that is not the connection here. People at various times were doing tiling and painting who had no immigration applications before Parliament.

30

**TIPPING J:**

But you would say, presumably, that just helping them with their immigration business wasn't doing anything wrong, because he wasn't trying to spin it in some way in their favour?

35

**MS CULL QC:**

No, no. His office was doing, he took them to the Minister –

**TIPPING J:**

Yes, yes.

5

**MS CULL QC:**

– there was no connection in his mind about –

**TIPPING J:**

10 Well, the point you raise has to be tested against that premise, that he wouldn't be doing anything wrong here so he hasn't breached the section.

**MS CULL QC:**

15 That's right, that's right. But that's why I am saying that knowledge or belief is not enough, to just simply have a causal connection. All the cases – and I do say all the cases, even the English authorities – still require a performance of something improper.

**ELIAS CJ:**

20 Does that really wrap your submissions up, Ms Cull?

**MS CULL QC:**

If I may just take the lunchtime to consider some of the...

25 **ELIAS CJ:**

Yes, that's fine.

**COURT ADJOURNS: 1.07 PM**

**COURT RESUMES: 2.14 PM**

30

**ELIAS CJ:**

Thank you, Ms Cull.

**MS CULL QC:**

35 Yes, thank you, Ma'am. There are just a few more matters I wish to raise and I'll be brief, but I do want to raise them in relation to the questions that have been raised, and I want to come back to the question of the definition of "corruptly". Just to

reinforce, Ma'am, that we were addressing the approved ground as to whether the Court of Appeal stated the test correctly, so, that is the way in which the submissions have been premised. And I want to come back to the point about knowledge of the link for "corruptly" and, in my submission, that is insufficient for the definition of "corruptly", and why the direction to the jury by the trial Judge and the lead Judge's definition is not appropriate and is indeed wrong. And I say it for these reasons.

Firstly, the rejection of the leave Judge of the New Zealand authorities is of concern, because the New Zealand authorities – and I have set them out at page 6 paras 315 to 319 – do require a deliberate criminal intent and is consistent with the authorities in Australia, the US and South Africa. Now, without taking you through the submissions, I do want to just alert the Court to page 7 para 3.25, which is the decision of Brooking J in *R v Dillon and Riach* [1982] VR 434, where he did again reinforce that an act is done corruptly by an agent if he receives a benefit in the belief that the giver intends it shall influence him to show favour in relation to the principal's affairs.

I'd also like to take the opportunity of referring Your Honours to two other decisions which, in my respectful submission, do deal with two aspects, dishonesty and knowingly, and I'll do it briefly. In the Crown authorities, the respondent's bundle of authorities volume 2, that has the spine like that at tab, at the last tab, 30, this is the decision of *C v Johnson* [1967] SASR 279 at 291 (SA), it's the Supreme Court and, as you can see there, the decision is of Travers J. This involved an appeal by a land agent, who had been convicted of a secret commission's offence of corruptly accepting, and there was a question about whether that involved dishonesty, such that he could be deregistered under the Land Agents Act. And this, if you like, is sort of the corollary or the mirror image of whether dishonesty fits with "corruptly".

And I'd like to take you to page 283 of that decision, two-thirds of the way down the bottom, with the paragraph starting, "It seems to me that most of the questions involved in these arguments, namely, whether the conviction was for an offence involving dishonesty and whether he had bona fide belief based upon reasonable grounds he was legally entitled to do that but there could be no finding of dishonesty." This is where the Judge goes, halfway down that paragraph, "The Board, in the exercise of its powers, must take as it finds it the conviction by the Court of summary jurisdiction, upheld as it was by Judge Mayo. It may be possible

for an ingenious mind to think of some circumstances which would be corrupt within the meaning of the Secret Commissions Prohibition Act, but not involving dishonesty within the Land Agents Act,” and this is the part I’m wanting to draw Your Honours’ attention to, “I am unable, myself, to think of any such circumstances. One meaning of the word ‘corrupt’ given in the Shorter Oxford Dictionary is ‘dishonest’, and I think that accords with the popular usage of the two expressions. The only decisions I have found at all helpful,” and he sets out *R v Scott*, *R v Stevenson* and *R v Lindley* and goes on, “I do not, however, think it necessary for the purpose of this case to decide whether, in all the circumstances, a finding of corrupt conduct is also necessarily something which involves dishonesty within the meaning of the Land Agents Act. I have only to consider whether one expression equates the other in relation to the particular conviction which was before the Board.”

Now, I draw that to your attention because it is difficult to find where something is corrupt that does not have an element of dishonesty. And I’m not talking about dishonesty in the *Hayes* or *Ghosh* sense. If we go to *R v Ghosh* [1982] QB 1053 CA in the United Kingdom and, indeed, if you go back to the United Kingdom Law Reform Commission reports they do deal with the concept of dishonesty, that’s the first matter I wanted to take you to, and the second matter –

20

**ELIAS CJ:**

Do you have any other authority that’s not a secret commission type case in support of that proposition?

25 

**MS CULL QC:**

I’d like – well, there are –

**ELIAS CJ:**

30 

Because one can see that in those cases, where it’s the actions vis-à-vis the principal that are behind it, that a touchstone of dishonesty, in the sense of at least of acting without the principal’s knowledge, may be appropriate.

**MS CULL QC:**

35 

Yes, well, of course you’ve got the *Lindley* and *Calland* decisions, which are the servant-master-servant relationships.



**ELIAS CJ:**

Yes, but we're really in a public law area, aren't we?

**MS CULL QC:**

5 We are, we are, Ma'am, but if I can say this, and it's not comparable, I know, to a secret commission, although it could have been, but the act which Mr Field was undertaking was as an MP, not as a decision maker, and that is the analogy, that he was the conduit, he was the agent – not the Minister's agent in that sense, and I hasten to add that, but what I'm saying is –

10

**ELIAS CJ:**

It did strike me as fairly far fetched, the analogy.

**MS CULL QC:**

15 Well, the analogy may be, but it captures if this is to be corrupt acceptance, what is it that he, in his capacity as a Member of Parliament, is doing improperly, other than simply receiving the benefit, and that's why we've put up the submissions about a level gratuity, because that is the receipt of the benefit. But, yes, just to answer Your Honour's question, the other decision that I do wish to take Your Honour to –

20

**McGRATH J:**

Just before you leave *Johnson*, did you want to refer us to the Court of Appeal decision, which is in the same report, because that's –

**MS CULL QC:**

25 Yes.

**McGRATH J:**

– at page 289, there's a reference by Bray CJ, this is about, just beyond halfway down the page, "There's no doubt that in some statutes the word 'corruptly' has been  
30 construed so as not necessarily to import the idea of dishonest."

**MS CULL QC:**

Yes, and that was the reference back to *Cooper v Slade*.

35 **McGRATH J:**

Indeed.

**MS CULL QC:**

Yes, but, but, the “corruptly not meaning dishonestly,” really is brought into counterpoint when one looks at whether corrupt can actually be done without some element of dishonesty. It doesn’t mean, “dishonestly as such” and isn’t an ingredient,  
 5 but the question is whether the word “corruptly” gave some additional meaning to the words of the section in question, and –

**McGRATH J:**

If you don’t want to, if you don’t think it’s in point, I don’t want to take it further.

10

**MS CULL QC:**

All right. Well, I’m sort of drawing your attention to the fact that “corrupt” is very difficult to define, unless you have some element of dishonesty or impropriety or something illicit. And if I can take you now to the US Supreme Court, which is the  
 15 decision of *Arthur Anderson LLP v US* 544 US 696 (2005) Supreme Court in the United States. It appears in the appellant’s bundle of authorities, volume 2, at tab 35. Now, this is where – and I’ve set that out in the submissions – but this was the Enron’s auditors’ instruction to its employers to destroy documents, defined “corruptly”, and the section there is whether the crime is knowingly corruptly to  
 20 persuade another person with intent to cause that person to withhold documents or alter documents for use in an official proceeding.

Now, obviously, different circumstances, but nevertheless just in terms of whether “knowing” and “knowledge” should be sufficient, I’m drawing Your Honours’ attention  
 25 to the bottom of the page, “Knowingly corruptly persuades, phrases key to what may or may not lawfully be done in the situation presented here.” The Government suggests the “knowingly” does not modify “corruptly persuades”, but that is not how the statute most naturally reads. “Knowledge” and “knowingly” are normally associated with awareness, understanding or consciousness, and “corrupt” and  
 30 “corruptly” with wrongful, immoral, depraved or evil. Joining these meanings together makes sense both linguistically and in the statutory scheme.

Now, that obviously is where “knowingly” is part of the statutory wording, but just in terms of dealing with knowledge of the link, in my submission, once “corruptly”  
 35 appears as “corruptly accepts” then, in my submission, that does import a finding, as we’ve got in New Zealand, Australia, or in New Zealand so far, Australia, United States, that it is something improper, and I simply wanted to bring

Your Honours' attention to that. And, indeed, if I may just say that if, if the receipt of a salary, for instance, is seen to be caught on a strict and what I say a read down view of section 103, then of course you do have to have some measure of control about not convicting people who are entitled to receive salaries of whatever. But if

5 "corruptly" is defined the way that all the authorities, bar those English authorities that say *Cooper v Slade* is "tending to corrupt", putting that to one side, because I'm still saying that *Cooper v Slade* was explicable on its facts, because it was a corrupt act that was defined, then there would be no need to have to deal with exceptions to section 103.

10

And that raises just – and this is the final point, Your Honours – the question of whether the leave Judge should have the responsibility of trying to deal with such matters. In my submission, even in reference to this case, the leave Judge would be put in a position of having to decide what ultimately would obviously be found to be a

15 jury question: were the delivery of five cartons of champagne trivial enough to make this a prosecutable offence under section 103, or is that something that should go to trial, even though it was delivered to an MP's door by one of the constituents?

**ELIAS CJ:**

20 Where leave is required for criminal prosecutions, it does generally entail the Judge forming some view of the merits, even though ultimately the merits will be a matter for the jury, that's my understanding. I'm just thinking about the examples that I'm familiar with.

**MS CULL QC:**

25 Well, when one looks at the criteria that Randerson J looked at, whether it's in the public interest, and the other criteria, in my submission it makes it very difficult to rule out for a leave Judge those elements of what is going to be an acceptable receipt of a benefit and what is not. The prosecution's being brought in good faith under the

30 section –

**ELIAS CJ:**

I'm sorry, I'm just trying to understand your submission. Is it that, unless we accept your submission, we will be put in the inconvenient position that a leave Judge will

35 have to form a view of the merits? Because, if that's your submission, I'm saying that I think that follows whenever leave is required.

**MS CULL QC:**

I understand that response, but what I am saying is that I'm going back to the Court of Appeal saying, well, there needs to be some legislative intervention here to stop anomalies under the section, if the definition of "corruptly" is defined in a way  
5 other than "with an improper purpose", and I'm saying, well, the only other way of doing it is the leave Judge, but, with respect to the leave Judge, that is quite a heavy burden, depending on the type of amounts or gifts or whatever it may be. And, in my submission, if "corruptly" is defined in the way that is common to almost all the jurisdictions, then there is no need for any intervention or requirement of the leave  
10 Judge to have to go through that exercise, apart from ensuring that there's sufficient strength to the evidence and the prosecutions abort in good faith, which are two of the considerations that Randerson J gave at the time of the leave decision. And unless there's anything else, Your Honours, those are my submissions.

**15 ELIAS CJ:**

No, thank you, Ms Cull. Mr Solicitor, you've heard the exchanges. We have been very much assisted by the lengthy and comprehensive submissions for the Crown so you may wish to concentrate on perhaps some of the matters that have been dealt with this morning.

20

**SOLICITOR-GENERAL:**

Thank you very much, Your Honour and that was my intention. I anticipate that I will be about 30 minutes in my submissions, Your Honours. Your Honours, the Crown's case is that the trial Judge's direction to the jury was right. Now, although the leave  
25 question posed by this Court actually asks whether or not the Court of Appeal's definition of "corruptly" in section 103 was correct, it must, of course, be the true focus of this Court as to whether or not the High Court Judge was right.

The essence of the argument really does focus upon what is meant by "corruptly"  
30 and in ascertaining the meaning of "corruptly" in section 103 in my respectful submission the Court should focus first upon the purpose of section 103 and then draw upon what assistance it can from cognate jurisdictions with provisions similar to section 103. It is the Crown's submission that section 103 reflects society's expectations that those who are elected or appointed to a high office in this country  
35 will maintain the highest standards of conduct when discharging their duties. And a corollary of the very high standards imposed upon public officials is that the threshold for breaching those standards has been set deliberately low by Parliament. Section

103 exists to deter Members of Parliament from accepting rewards or benefits over and above those that are prescribed for doing their duty. If a Member accepts additional benefits for doing their job then they will be in breach of section 103.

5 The mischief which section 103 is directed at is twofold. First, a Member acceding to a temptation to accept additional benefit for doing their job in section 103(1) and secondly, the temptation of a Member of Parliament by others who may wish to induce a Member of Parliament into accepting additional benefits for doing their job and that's subsection (2). Under either scenario, if a Member of Parliament accepts  
10 additional rewards for doing their job then they will be in breach of the section. Now, the purpose of section 103, as I have just articulated, can be found in case law. I invite the Court to go to the case of *R v Boston* (1923) 33 CLR 386 (HCA), which is in the respondent's bundle of authorities, volume 2, tab 22. This is a judgment, I'm sorry –

15

**McGRATH J:**

It's 27 I think.

**SOLICITOR-GENERAL:**

20 *Boston* is 27, yes. This is a judgment of a High Court of Australia and if Your Honours turn to page 400, the third line, the High Court emphasises that, "The fundamental obligation of a Member," and I'll add of Parliament, "in relation to the Parliament of which he is a constituent unit," and it is these words which I emphasise, "... is the duty to serve and in serving to act with fidelity and with a single-  
25 mindedness for the welfare of the community."

To assist the Court in understanding the context in which the word "corruptly" is used in section 103, I have prepared a chart which is on the second page of the documents which I've just handed to you. It will take me a few moments to explain  
30 the chart but I think that it will assist the Court in understanding the statutory context in which the word "corruptly" is used. The vertical axis deals with differing degrees of additional culpability in relation to offences in which the word "corruptly" is used by Parliament. The lateral axis deals with persons of different status. So if I can illustrate this. If we look at the first instance, section 262 of the Crimes Act, section  
35 262 of the Crimes Act prohibits the obtaining of an additional, of rewards for the recovery of stolen property in certain circumstances. Now, that's an offence that can be committed by any person. The prosecution can be commenced in the ordinary

way but it's in the context of a situation in which rewards for the return of stolen property can be perfectly legitimate and lawful. So something more is required than just simply the attempt to obtain a reward. A high degree of culpability is required and it is for this reason the Crown would take no exception to the approach which is  
5 His Honour Tipping J took in *Broom* where he required the existence of wicked or depraved conduct.

**TIPPING J:**

That's a matter of relief Mr Solicitor.

10

**SOLICITOR-GENERAL:**

If we move across to the mid-point, we start to deal with persons who are in a special relationship and there are two types of cases which I am going to refer to here. First, the Secret Commissions Act type cases and the second is where there is an  
15 employment situation where another, a third party is interfering with the employment situation. Now, I agree entirely with Ms Cull that in relation to those Secret Commissions Act cases, which are based upon a breach, really, of a fiduciary duty, a degree of dishonesty is required. So in *McDonald* we find the New Zealand High Court saying that those types of cases require dishonest intention and in *Lindley*  
20 and *Calland* dishonest intention is also emphasised where there is an attempted disruption of a master/servant relationship.

Now, the third category of cases concerns officials and it is the Crown's submission that there is virtually a zero tolerance of accepting any form of additional benefits or  
25 rewards or gratuities, regardless of how they're phrased, but the threshold for establishing a conviction in these types of cases is particularly low and, in my submission, that's what we've got here in *Field* and of course I can take Your Honours through all of those cases, most of which are, all of which are English cases or one Privy Council case as this Court is aware. So the structure of the way  
30 in which the word "corruptly" is used in legislation varies depending on the context and that in the context of what I might call ordinary criminal offending, such as in 262 of the Crimes Act, a high level of culpability needs to be proven. In situations where there is a special relationship, such as those governed by the Secret Commissions Act, a degree of dishonesty is required, but where you're  
35 dealing with officials, an official, such as a Member of Parliament, who accepts an additional benefit in the knowledge that that additional benefit is linked to their official activities, commits an offence. And it will not have escaped Your Honour's attention

that the legislature has built in safeguards. So in relation to the Secret Commissions Act prosecutions, it is necessary for the Attorney-General's fiat to be obtained before a prosecution can be brought. And as we know, in relation to the prosecution of a Member of Parliament, Parliament has gone the additional step of placing, putting in place, the ultimate form of safeguard, namely, the approval of a High Court Judge, before a prosecution can be brought. And, in my respectful submission, the introduction of those safeguards clearly illustrates that Parliament was making sure that the trivial cases would not be occupying Courts' time, but it also was introduced to ensure that the low threshold was not abused in any way whatsoever. Now –

**TIPPING J:**

Mr Solicitor, I wonder if I could just raise a point, but it may or may not be a convenient moment. I'm a little puzzled – and this is not something raised, as I understand it, by Ms Cull, she'll forgive me if I've overlooked something – but when you look at subsection (2) of the section we're concerned with, the word "corruptly" is used with the need for an intent to influence. Now, I don't know whether it's going to matter much, but I just wonder what "corruptly" adds in that context. Because if you have an intent to influence, can one – it can't be signalling there the knowledge of the link, I wouldn't have thought, because with intent to influence must –

**SOLICITOR-GENERAL:**

Automatically occur.

**TIPPING J:**

– carry that with it.

**SOLICITOR-GENERAL:**

Yes, must automatically occur.

**TIPPING J:**

So, it's something that's just been puzzling me during the course of the discussions that we've been having during the day. Is there anything that your researches or your inspiration might be able to – I'm not sure quite where this leads one, but it is a little odd.

35

**SOLICITOR-GENERAL:**

I agree, it is a little odd, because I, and because I do agree with Your Honour that the knowledge of the link is automatically built in.

**TIPPING J:**

5 It must be.

**SOLICITOR-GENERAL:**

Yes.

10 **TIPPING J:**

Now, there is an argument that because that is built in that – but there's a converse argument, of course, that Parliament has made a studied decision not to require intent to influence, or knowledge of intent to influence, if you like, in the counterpart subsection 1 –

15

**SOLICITOR-GENERAL:**

Yes.

**TIPPING J:**

20 – so it's all a little strange.

**ELIAS CJ:**

Well, unless "corruptly" is the legislative judgment that what follows is corrupt, that if you accept a benefit in the knowledge of the link, that's corrupt under (1), and in (2), if  
25 you agree to give a bribe with intent to influence –

**SOLICITOR-GENERAL:**

Influence, that's corrupt.

30 **ELIAS CJ:**

– that is corrupt.

**SOLICITOR-GENERAL:**

Yes.

35

**TIPPING J:**

Well, it would simply be declaratory, then, it would not be an ingredient.



**ELIAS CJ:**

It may be flavour. It may, in fact, be the pointer which allows you to say, well, accepting a salary provided by Parliament can't possibly be characterised as corrupt.

5

**SOLICITOR-GENERAL:**

Look, can I get rid of that example?

**ELIAS CJ:**

10 Yes. Yes, please.

**SOLICITOR-GENERAL:**

Salaries for Members of Parliament are paid pursuant to a statutory authority that's conferred upon the Remuneration Authority. That must be the end of the argument, surely?

15

**TIPPING J:**

Well, I'm not troubled by it, Mr Solicitor.

20

**WILLIAM YOUNG J:**

The word "benefit" doesn't extend to –

**TIPPING J:**

25 No, no.

**WILLIAM YOUNG J:**

– due remuneration.

30 **TIPPING J:**

No. And it may be that this curiosity, and it may be the Chief Justice is right, it's not a curiosity but, to my eye at the moment, it is a bit of a curiosity, but I'm not sure that it damages the Crown's argument.

35 **SOLICITOR-GENERAL:**

No.

**ELIAS CJ:**

Isn't it an old-fashioned form of drafting? I mean, I'm just thinking about feloniously doing things and –

5 **SOLICITOR-GENERAL:**

Yes, yes.

**ELIAS CJ:**

– that sort of thing.

10

**SOLICITOR-GENERAL:**

Yes. And it's reminiscent of the language, "corrupt practice" or "tending to corrupt", which could also be found in the 19<sup>th</sup> century legislation. It really is a conduct offence rather than a results offence, to reiterate some of the Canadian jurisprudence on that very point.

15

Now, Your Honours, I'm very, very happy to take some time going through each of the cases, but I think that the analysis which I have provided you in that chart will reveal that the use of the word "corruptly" is very context specific and that, in the case of officials and elected personnel such as those governed by section 103, "corruptly" means "receiving additional benefits for doing your work, knowingly receiving additional benefits for doing your job", and that's the very evil which Parliament wished to stamp out, because without criminalising that sort of conduct, the entire fabric upon which society elects and trusts Members of Parliament to do their job for the community would be put at risk.

25

**TIPPING J:**

So it doesn't matter if the job is being done splendidly or improperly or carelessly or whatever, it's just for doing the job?

30

**SOLICITOR-GENERAL:**

If you're getting an extra benefit for doing your job, you are acting corruptly.

**ELIAS CJ:**

35 I wonder whether it's really though necessary to go as far as that, because it is in respect of any act or omission done in official capacity, and that's the same

terminology used in respect of Ministers of the Crown also, so it does contemplate some action in your capacity as Parliamentarian or Minister.

**SOLICITOR-GENERAL:**

5 I think we are saying the same thing, Your Honour. I say, –

**ELIAS CJ:**

But it's really saying that –

10

**SOLICITOR-GENERAL:**

– “doing your job,” meaning that.

**ELIAS CJ:**

15 Well, I just wonder though whether it's a little glib to say, “getting additional benefit for doing your job.” It's receiving a payment in respect of an action that you are going to take.

**SOLICITOR-GENERAL:**

20 I accept that, Your Honour, yes.

**ELIAS CJ:**

So –

25 **SOLICITOR-GENERAL:**

Yes, yes, I think we are on the same wavelength. I might be expressing it just a little more loosely than it needs to be.

**BLANCHARD J:**

30 You meant, “in addition to salary”?

**TIPPING J:**

Yes.

35 **SOLICITOR-GENERAL:**

Sorry, Your Honour?

**BLANCHARD J:**

You meant, “in addition to salary”?

**SOLICITOR-GENERAL:**

5 Yes.

**ELIAS CJ:**

10 Yes, but I’m not sure that that is a – I’m just not sure that that doesn’t take you a little bit too far, that it is in respect of particular acts that you are asked to undertake in your capacity, it’s not just getting, I don’t know, a free –

**SOLICITOR-GENERAL:**

I understand.

15

**ELIAS CJ:**

– bus ticket or something, or –

**SOLICITOR-GENERAL:**

20 Yes.

**ELIAS CJ:**

– that goes to all MPs, I’m not sure that that sort of thing...

25 **SOLICITOR-GENERAL:**

Well, I agree, Your Honour, yes.

**ELIAS CJ:**

Yes.

30

**SOLICITOR-GENERAL:**

Yes, and I’m sorry if my expression of this proposition has caused you to think that you and I are not in agreement, I think we are in total agreement.

35 **ELIAS CJ:**

Right.

**SOLICITOR-GENERAL:**

It has to be linked to an activity that a Member of Parliament does as part of their duties as a Member of Parliament –

5 **TIPPING J:**

In their capacity as, I would respectfully prefer to, as part of their duties.

**ELIAS CJ:**

Want to keep away from duties.

10

**SOLICITOR-GENERAL:**

Okay.

**WILLIAM YOUNG J:**

15 Well, they don't really have any duties.

**SOLICITOR-GENERAL:**

Sorry, Your Honour?

20 **WILLIAM YOUNG J:**

They don't really have duties in the sense that if they don't do something it's against the law.

**SOLICITOR-GENERAL:**

25 Correct, yes. But I am very happy, Your Honour Tipping J, to use the word "incapacity".

**TIPPING J:**

Because otherwise the duty becomes the duty not to accept a bribe, if –

30

**SOLICITOR-GENERAL:**

Yes.

**TIPPING J:**

35 – I can speak colloquially, so that's self-defeating.

**SOLICITOR-GENERAL:**

Yes, so it's in the capacity as a Member of Parliament, I accept that. Now, I'm very, very happy to go through all of the authorities, but I detect that Your Honours are  
5 actually well and truly on top of the authorities, but I'm quite happy to take you through them. I think –

**TIPPING J:**

This case doesn't involved us, I wouldn't have thought, Mr Solicitor, in saying  
10 anything very much about the concept of where your capacity as an MP begins and ends –

**SOLICITOR-GENERAL:**

No.  
15

**TIPPING J:**

– because the Crown makes the submission, as I understand it, that wherever you draw that line, this is well on the wrong side of it.

**SOLICITOR-GENERAL:**

Absolutely. The Crown's case was that Mr Field was accepting additional benefits in the form of labouring services, either for immigration services that he would provide in the future or in respect of immigration services he had provided or, indeed, in some cases, that he was in the process of providing, there was almost a  
25 contemporaneous element to it. And the Crown's case was really, can be distilled down to three basic points. One, was the temporal connection between the services that were being provided and the – sorry, the labouring services that were being provided and the immigration services which Mr Field was undertaking. Second, the understanding of the Thai nationals as to why it was that they weren't going to be  
30 paying Mr Field – why Mr Field was not paying them, I'm sorry, for the labouring services which they provided and thirdly, and this is perhaps the most crucial point, Mr Field's case at trial, and indeed it was the only defence that was available to him at trial, was that there was, in his mind, absolutely no connection between the labouring services which he received for the houses in Auckland and the house in  
35 Samoa, and the immigration services that he was providing for various Thai nationals. That was his defence and quite plainly it was rejected by the jury.

**McGRATH J:**

Are you going to elaborate on temporal connection because Ms Cull has put it to us that the Crown really started off on a broader basis which would have encompassed both of the elements of the offence in section 103(1) and then came back to only the  
5 reward element?

**SOLICITOR-GENERAL:**

Yes. Can I express it in a different way, Your Honour and can I explain my terminology?  
10

**McGRATH J:**

When you're ready, yes.

**SOLICITOR-GENERAL:**

15 I've analysed all 11 counts that Mr Field was convicted of and as part of that analysis I've looked at the dates that the labouring services were provided, and I've looked at the dates that the immigration services were provided by Mr Field and in relation to count 1, in my assessment, that was a case of immigration services being provided for prospective labouring services. So the discussion took place, the labouring was  
20 undertaken, Mr Field provided the immigration services. Similarly in relation to count 2, and in that particular one perhaps I can illustrate that by reference to one part of the evidence. One of the Thai nationals, a painter who was referred to as Ded, I won't pronounce, or attempt to pronounce his surname, his evidence was, and the reference here is in case on appeal, volume 5 at pages 44 to 45, "[Mr Field] asked  
25 me how much I would charge. I said I did not want it because if he helped me to get work permit to be here I don't want to charge him anything. He asked me whether I'm sure to say that and I said yes. I did not want any of his money." Now the Crown's case in that particular case was that was an instance of a prospective arrangement. That the labouring services were to be provided and in the future  
30 Mr Field would be providing immigration services.

Perhaps the most clearest example of all of those, of that type of case, is in relation to count number 9, which was the first of the cases relating to Samoa where tiling services, in relation to a very large property in Samoa, where the tiling, there was  
35 over 400 square metres of tiling, was plainly provided in anticipation of Mr Field providing immigration services to the man known as Sunan Siriwan. Now there are

some where it's quite frankly difficult to determine whether it's prospective, retrospective or contemporaneous but there are –

**TIPPING J:**

5 Does it actually matter in law?

**SOLICITOR-GENERAL:**

I don't believe it does –

10 **TIPPING J:**

No.

**SOLICITOR-GENERAL:**

– in the slightest and my response to Ms Cull on this point is twofold. One, as a matter of law it is utterly irrelevant. And two, as a matter of fact, the Crown's case is as the learned trial Judge directed the jury, namely that immigration services were provided knowingly in the belief that it was to reward or influence him in respect of immigration services that he had provided or was to provide to a number of named persons.

20

Now, I'm very keen to go into the case law if Your Honours so wish me to but I detect that perhaps it might not be necessary in this particular –

**BLANCHARD J:**

25 You may be keener than we are.

**ELIAS CJ:**

Do you want to give us your best shot? Did you say you were keen to do it?

**SOLICITOR-GENERAL:**

30 I'm very keen to get into it but I'm conscious of the fact that the Court has been taken to the cases. I agree *Singh* is about as close as you're going to get in this particular instance to something that's very, very close to the mark. In relation to, can I just simply add a couple of points? Ms Cull places emphasis on *McDonald*, a Secret Commissions case requiring dishonesty and refers to that South Australian case of  
35 *Johnson*. I agree entirely. Secret Commission cases do require dishonesty. Not an issue. But in cases involving elected officials or appointed officials simply require a



breach in the form of accepting an additional benefit for doing one's duty in one's capacity as a Member of Parliament.

5 And that point is made very, very clear in *Parker* where the Court endorsed the directions of the trial Judge where emphasis was made between the link between payment and duty. And I think that was page 72 of the judgment that we were focusing on just before morning tea. And in *Andrews Weatherfoil* exactly the same propositions emerge.

10 **BLANCHARD J:**

Which case is that?

**SOLICITOR-GENERAL:**

15 *Andrews Weatherfoil*, which is tab 12 of volume 1 of the respondent's bundle of authorities and you'll find the relevant page at page 127, Your Honour.

**TIPPING J:**

I suppose analytically, although this won't make any difference to this case, there has to be both a link and knowledge of it?

20

**SOLICITOR-GENERAL:**

Indeed, and that's been the Crown's case.

**TIPPING J:**

Yes, one wants to present it with precise accuracy.

25

**SOLICITOR-GENERAL:**

30 Yes. Now I had been intending to deal with this part as part of part 3 but I don't think it's necessary to dissect the appellant's case in that way. The final chart, which is the third page of the document which I've handed up, sets out exactly what the High Court Judge said to the jury. It's not only in the fact and definition sheet but also in his directions. And I've compared that with what the Court of Appeal said. It's not necessary for me to advance this argument in this particular case.

**TIPPING J:**

35 Would it upset you if we were not to be very enthusiastic about the Court of Appeal's approach, Mr Solicitor?

**SOLICITOR-GENERAL:**

No, no, I had been minded to stand up and say that I encourage you to allow the appeal as you've expressed the leave question and sit down because that would have just simply meant that the Court of Appeal decision would be overturned and the High Court judgment would remain. But that might be just a little bit too bold.

**TIPPING J:**

Well, there's a bit more in the Court of Appeal decision than just this point that's on the right-hand side of your chart here.

10

**SOLICITOR-GENERAL:**

I think that's the essence of it, Sir.

**TIPPING J:**

15 That is the essence of it, I agree.

**SOLICITOR-GENERAL:**

Yes, and all I've tried to do is distil it right down to its bare essence.

20

**TIPPING J:**

But you accept the proposition, do you, that the, that "capacity" being the word used in the section is the appropriate word to use to encapsulate the scope, if you like, of the MP's activities.

25

**SOLICITOR-GENERAL:**

Yes.

**TIPPING J:**

30 Rather than duty.

**SOLICITOR-GENERAL:**

Yes. And when one looks at the way in which the Judge actually elaborated just slightly on the sheets that he made available to the jury in the form of the definition and issues sheets that he had for each count, one can see that he actually, in my respectful submission, did an extraordinarily good job of directing very, very fairly and accurately on the law. And there can be no doubt that he was focusing upon

35

knowledge of a causal relationship between the acceptance of the benefit and the performance of the immigration services.

Now, I've been briefer than I had intended to be but I don't want to sit down unless  
5 Your Honours are satisfied that it's unnecessary for me to take you step by step through the cases.

**ELIAS CJ:**

No, thank you. Yes, Ms Cull?

10

**MS CULL QC:**

If I could just answer my friend's submissions? Having given a great deal of consideration to the charge which my friend has referred you to but, in my respectful submission the reference to, "Just being in office,"  
15 in my respectful submission, still requires the importing of "improper". And *Singh*, for the reasons that we've gone back to those passages, still contains that element, that there was clearly an intent to bribe or to influence the persons in control, such as the prosecutor and then, of course, the magistrate. The position that the Crown has adopted in relation to the Secret Commissions Act, that does require dishonesty, I  
20 should just draw Your Honours' attention to the wording of that section, which talks about an agent being guilty of corruptly accepting or obtaining for himself or any other person, "Any gift or other consideration as an inducement or reward for doing or forbearing to do or having done or forborne to do any act in relation to principals' affairs or business." In my submission, quite simply, if "corruptly" there imports the  
25 ingredient – not ingredient, but the element of dishonesty – so too does "corruptly" in section 103, and particularly where the direction to the jury was that you knew or believed that the benefit was received to influence or reward. In my submission, the dishonesty element or improper element should still pertain.

30 In relation to Tipping J's reference to 103(2), there are a number of ways in which one can read that section, as I think Your Honour had already highlighted, that anyone who agrees to give a bribe with an intent to influence under (2) can equally be charged, as can the Member of Parliament who has accepted the bribe, namely, that the bribe was to influence, and reinforces, in my submission, the submissions  
35 where the appellant is saying that if you are going to put in "reward" it has to be clear. And it wasn't clear, either in the bribe definition or in the actual statutory section, but is definitely there of course in relation to the direction to the jury and in the leave

decision. And, in my submission, that does raise a serious question as to whether reward was contemplated – of course, I won't repeat what we say about that –

**TIPPING J:**

5 I don't think, with respect, Ms Cull, I don't want to prolong it, but I don't think you're actually on the point that was exercising my mind, but –

**MS CULL QC:**

Well –

10

**TIPPING J:**

– I don't think we need go through it again.

**MS CULL QC:**

15 Well, what I'm drawing Your Honour's attention to is that it is plain that the briber is the one that is intending to influence the Member of Parliament.

**TIPPING J:**

Of course, of course.

20

**MS CULL QC:**

And the Member of Parliament then accepts the bribe that was intended to influence. I simply draw that to Your Honour's attention.

25 The position of the appellant is clearly set out in the submissions. In relation to the cases, I have already addressed Your Honour about *Singh* in the same way that I addressed Your Honours about *Parker*. *Weatherfoil* also, I would like to take just one moment to answer my friend, because he's referred to it. That appears in volume 2 of the – sorry, volume 3 of – sorry, volume 1, I beg your pardon. Volume 1 of the  
30 respondent's bundle at tab 12, I beg your pardon. Again, very similar to *Parker* and, indeed, there's reference, another judgment, to the similarities. Here, W was chairman of the Housing Committee and, again, was the decision-maker. He was convicted on one count of corruptly offering emoluments or payments out of his employment by W Limited, but offering the chairman an inducement to a reward for  
35 favouring them. Now, here there was a question about whether the verdicts were consistent or inconsistent, and the question came before the Court as to whether the conviction for the chairman of the Housing Committee could remain. The points to

make about this case was that W was the chairman, he was the decision-maker. Two, there was evidence of an antecedent agreement, and I'd like to take you to the passages because it is important that this judgment is read fully because, clearly, not only the jury direction but also the Court of Appeal took particular note of the evidence of the antecedent agreement.

If I could take you to page 127, down the bottom at H, where it says, "This Court then is of the opinion that the statute covers receipt of money for a past favour without any antecedent agreement and it was open to the jury to convict both accused on this basis. However, the Judge in fact left the case to the jury on a more favourable basis, for taken as a whole his direction indicated that they should look for an agreement before April 1966. He specifically said, '...of course, if the £500 and any suggestion of any money was not given until after everything was over and there was no suggestion that he was to have an inducement or reward beforehand, that would not be good enough.' There was, in fact, ample evidence from which an antecedent agreement could be inferred and consequently this ground for leave to appeal fails." And it is important also, as in *Parker*, to look at the way in which the rewards were being given to the chairman, and it's set out –

**ELIAS CJ:**

I'm sorry, I'm not understanding the point you're making from this. It's my fault, I'm sure, but it's being said that the summing up was favourable to the accused, –

**MS CULL QC:**

Yes.

**ELIAS CJ:**

– put matters on a higher basis than was necessary.

**MS CULL QC:**

In fact, the agreement, the antecedent agreement, was actually in the evidence –

**ELIAS CJ:**

Yes.

**MS CULL QC:**

– and the jury were entitled to take account of that. And the jury direction actually was that if there was no evidence of antecedent agreement then that would not be good enough.

5 **ELIAS CJ:**

Yes.

**MS CULL QC:**

10 So, in actual fact, the jury direction was, if there isn't an agreement then you wouldn't necessarily be convicted. But, in the context of the case, not only was there evidence of an antecedent agreement, and if you look at the counts that the chairman kept being paid for his position as the chairman, being the decision-maker on these planning matters, it puts the case into the context of whether you receive it afterwards and, again, whether it has a factor in priming you for future decisions to be  
15 made in the capacity as a chairman becomes relevant. So, it's not just stating that you don't need an antecedent agreement necessarily for the reward to be caught, it is actually important to see in what way the Court was dealing with both the jury direction and the evidence and the way in which payments had been made to not only reward for the past favour but to also give rewards for the future. And, in my  
20 submission, it doesn't just rest on, "This is an authority to say you don't need any antecedent agreement," because clearly the Court was looking at what the evidence was.

**TIPPING J:**

25 I don't think that's the purpose for which Mr Solicitor referred to the case, Ms Cull.

**MS CULL QC:**

Well, Sir, I understood that –

**TIPPING J:**

30 He said it was in the same vein in relation to the question of the concept of corruptness as *Parker*.

**MS CULL QC:**

35 Yes, but again, with respect, Sir, the "corrupt" and "corruptly" definitions also deal with the question of whether there was improper conduct, which is where we come back to the appellant's position in relation to "corruptly". But I'm saying that the facts,

as well as the entire jury direction and how it was viewed, need to be taken into account. It's just not a stand-alone authority in that sense.

Unless there's anything else, those are my submissions.

5

**ELIAS CJ:**

Yes, thank you. Thank you, Ms Cull. We'll reserve our decision in this matter. Madam Registrar will adjourn. Thank you, counsel, for your assistance.

10 **COURT ADJOURNS:3.10 PM**