IN THE SUPREME COURT OF NEW ZEALAND

SC 3/2011
[2011] NZSC 129

TAITO PHILLIP HANS FIELD

v

THE QUEEN

Hearing: 21 June 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

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

Judgment: 27 October 2011

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by William Young J)

Introduction

The appeal

[1] At the conclusion of his trial before Rodney Hansen J and a jury, Taito Phillip Field was found guilty on 11 counts of corruptly accepting benefits in connection with acts carried out by him in his role as a Member of Parliament (laid under

s 103(1) of the Crimes Act 1961). He was also found guilty on 15 counts of attempting to pervert the course of justice (laid under s 117 of the Crimes Act). He was subsequently sentenced to a total of six years imprisonment.[1] He unsuccessfully challenged in the Court of Appeal both the convictions and the sentences imposed.[2] His appeal to this Court is confined to the convictions on the charges of corruptly accepting benefits.

The core facts

[2] The appellant was a Member of Parliament between 1993 and 2008. Although he also held Ministerial office (as Associate Minister of Pacific Island Affairs, Associate Minister of Social Development and Employment, and Associate Minister of Justice) between 2003 and 2005, the charges he faced related only to his activities as a Member of Parliament. It was in this role that he came into contact with a number of Thai nationals who faced immigration difficulties. The appellant was very knowledgeable about the way the immigration system operated and he advised them as to how they could best secure the immigration outcomes they wanted. He and his staff also wrote letters to the New Zealand Immigration Service and the Associate Minister of Immigration. As well, the appellant had a number of personal meetings with the Associate Minister. The Thai nationals he was helping were involved in the building industry and, in the representations he made on their behalf, the appellant often stressed their expertise as plasterers, painters and tilers. In terms of outcomes achieved, his assistance was very effective, indeed far more so than the paid assistance which they had previously obtained from immigration consultants and lawyers.

[3] The appellant started to provide this assistance in late 2002 and, on the Crown case, soon afterwards received plastering and painting services in respect of one of the houses he had an interest in. There were no charges in relation to this first round of assistance and receipt of benefits. Instead, the Crown relied on these events as the beginning of what soon became an established pattern involving the appellant providing immigration assistance and receiving, in return (as the Crown maintained

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1 *R v Field* HC Auckland CRI-2007-092-18132, 6 October 2009.
2 *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784.

and the jury must have found), plastering, painting and later tiling services. On the Crown case, this pattern of events became so settled that the appellant knew, from what had gone before, that if he provided immigration assistance the Thais he was helping would reciprocate; and this despite the absence of an express promise or bargain to that effect.

[4] The relevant charges which the appellant faced covered the period September 2003 to late 2005. On the Crown case the value of the plastering, painting and tiling services the appellant received was in excess of $50,000. While that figure was disputed at trial, it is clear that the services had a substantial value.

[5] The primary defence at trial was that the plastering, painting and tiling services were not provided, at least in the appellant's mind, in connection with, and as a reward for, the immigration assistance he provided. That defence was rejected by the jury. That rejection means that we must approach the case on the basis that when the appellant provided immigration assistance he received what he knew were rewards in the form of plastering, painting or tiling services. Given this, he must have recognised early in the piece that such assistance as he provided would, in due course, be rewarded.

The propriety of the actions of the appellant

[6] At trial the prosecutor criticised the propriety of some aspects of the immigration assistance provided by the appellant. These criticisms did not amount to much in the context of the case as a whole, were peripheral to the way the Crown case was advanced and irrelevant on the approach to the law taken by the Judge. And by way of preface to what we are about to say, we should also record that, in his sentencing remarks, the Judge in effect acquitted the appellant of having acted improperly in the particular ways in which he assisted the Thai nationals.[3]

[7] We therefore accept that the appellant did not act improperly in respect of the particular assistance he gave to the Thais. In saying this, however, we should make

[3] At [58] he said that the appellant "did not act improperly in response to opportunities for personal benefit" and concluded that the appellant had "acted as any conscientious Member of Parliament would ... ."

it clear that this acceptance leaves distinctly open a rather different question, which is whether in their totality – including receipt of benefits for assistance provided – the appellant's actions were improper.

The primary issue

[8] As we have just noted, the propriety or otherwise of the assistance given by the appellant to the Thais was irrelevant to the outcome of the case. This is because, on the legal approach adopted by the Judge in his summing up, all the Crown had to prove to establish that the appellant had acted "corruptly" was that he:

> [32] … must have known or believed that the work done on his property was done because he had provided or it was anticipated that he would provide immigration services.

The Judge thus left it open to the jury to find the appellant guilty if he received the services in question *after* providing immigration services and irrespective of whether there was any antecedent agreement (or offer) that the services would be provided or anything else (such as impropriety in the immigration services provided) that smacked of corruption. The central issue in the case is whether the Judge was right to do so.

[9] The primary argument of Ms Cull QC for the appellant was that liability under s 103(1) requires a corrupt bargain and does not apply to what she called a "gratuity", that is, a benefit provided after the relevant actions of the Member of Parliament and not pursuant to an antecedent offer or agreement. In the context of the case as a whole, this is perhaps a slightly artificial point because (a) some plastering, painting and tiling was carried out at the same time as, or before, the relevant immigration assistance was provided, and (b) the appellant must have soon realised that he would be rewarded for the assistance he provided despite the absence of offers or agreements to this effect. We will, however, address the argument in the terms in which it was advanced.

[10] The Judge's direction was given in relation to the acceptance of services of substantial value, meaning that de minimis considerations could not be, and were not, invoked by the appellant. Given this, we are satisfied that the direction was

correct; this in light of the relevant statutory language and context, the legislative history, the leading authorities on similar statutory provisions and the requirements of policy. We will elaborate on these reasons shortly, but before we do so we should refer briefly to the way in which the case was dealt with in the High Court and Court of Appeal and, in the course of doing so, discuss and dismiss subsidiary arguments advanced on behalf of the appellant.

The way the case was dealt with in the High Court and Court of Appeal

[11] A prosecution under s 103 may only be commenced with the leave of a High Court judge. The application for leave to prosecute the appellant was opposed on grounds which required the Judge (Randerson J) to address what the Crown would have to show to establish that the appellant had acted corruptly. In granting leave to prosecute, Randerson J held that the appellant would have acted corruptly if:[4]

> [47] … he deliberately accepted the [services provided] knowing or believing that [their provision] was intended to influence or reward him in respect of assistance given (or to be given) by him in his capacity as a member of Parliament.

Because the appellant's attempt to appeal against the judgment of Randerson J failed on jurisdictional grounds,[5] there was no pre-trial opportunity for the appellant to challenge the approach taken by Randerson J. And, as is apparent from what we have already said, the same test was adopted by Rodney Hansen J at trial.

[12] In the course of dismissing the appellant's conviction appeal, the Court of Appeal judgment asserted that the prosecution against the appellant was "really, from beginning to end, a 'reward' or gratuity case".[6] Ms Cull complained that this was not the way the case was advanced at trial. On this point we agree with Ms Cull. It was certainly part of the Crown case that some at least of the services provided to the appellant were by way of inducement in relation to immigration assistance which had not been completed. The same is apparent from the indictment which alleged that services had been corruptly accepted in respect of acts "done or to be done". It

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4 *Burgess v Field (No 2)* HC Auckland CIV-2007-404-3206, 5 October 2007.

5 See *Burgess v Field* [2007] NZCA 547 and [2007] NZSC 110, [2008] 1 NZLR 733.

6 At [99].

follows that the Court of Appeal's characterisation of the case was not correct. Building from this premise, Ms Cull maintained that there should have been separate and alternative counts in relation to inducement and reward (or perhaps in relation to "acts done" and "acts to be done").

[13] We are satisfied that there is nothing in this argument. The case at trial was presented on the basis of both inducement and reward.[7] When the indictment referred to acts "done or to be done" it was replicating the language of s 103(1) and was therefore in accordance with s 330(1) of the Crimes Act. Significantly, no application was made at trial for the allegations in the counts to be disaggregated.[8]

[14] In dismissing the appellant's appeal against conviction, the Court of Appeal indicated that for the purposes of s 103(1), the appellant acted corruptly, if, in accepting the services, he was "knowingly outside the recognised bounds of his or her duties".[9] Despite what at first sight may appear to be a difference between that formulation of the law and the approach of the trial Judge, the Court of Appeal also concluded that if the appellant had accepted the services in question as a reward for immigration services (which is what the jury must have concluded), he had been knowingly outside the recognised bounds of his duties.[10]

[15] Before us, Ms Cull challenged both the Court of Appeal's formulation of the test and also its application of this formulation to the way in which the Judge had summed up. Ms Cull's challenges to the Court of Appeal's reasoning were fairly responsive to the terms on which leave to appeal was granted,[11] but the associated arguments are nonetheless something of a distraction. The obvious problem with a strict approach to s 103 is that it might catch innocent transactions, for instance the gift of a rugby jersey to a Member of Parliament who opens a rugby club. It is this problem which the Court of Appeal was trying to address with its "knowingly outside the recognised bounds" test.[12] But since on the findings made by the jury the

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7 This was made clear in the opening of the prosecutor.
8 As provided for by the Crimes Act 1961, s 330(2).
9 At [64].
10 See [98]–[100].
11 Which focussed on the correctness of the Court of Appeal's approach. *Field v R* [2011] NZSC 21.
12 As will become apparent our solution to this problem is different, see [65].

appellant must have been knowingly outside those bounds – given the value of the services he received – this aspect of the Court of Appeal judgment was, at least in substance, by way of comment. And in any event, if the Judge was correct in the way in which he summed up to the jury, the appeal must fail; and this irrespective of any criticisms which might be made of the reasoning of the Court of Appeal. It follows that the only point of moment in the case is whether the Judge in his summing up accurately captured what has to be established to show that the appellant had acted "corruptly".

The relevant statutory language and context

The wording of ss 103 and 99

[16] Section 103 is in these terms:

> **103 Corruption and bribery of member of Parliament**
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> (1) *Every member of Parliament is liable to imprisonment for a term not exceeding 7 years who corruptly accepts* or obtains, or agrees or offers to accept or attempts to obtain, *any bribe for himself* or any other person *in respect of any act done or omitted, or to be done or omitted, by him in his capacity as a member of Parliament*.
>
> (2) Every one is liable to imprisonment for a term not exceeding 7 years who corruptly gives or offers or agrees to give any bribe to any person with intent to influence any member of Parliament in respect of any act or omission by him in his capacity as a member of Parliament.
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> (3) No one shall be prosecuted for an offence against this section without the leave of a Judge of the High Court. Notice of the intention to apply for such leave shall be given to the person whom it is intended to prosecute, and he shall have an opportunity of being heard against the application.
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> (emphasis added)

"Bribe" is defined by s 99 to mean: "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect".

[17] In terms of this statutory language, the Crown case was that the appellant corruptly accepted benefits (being the services provided by the Thais) in connection

with acts done or to be done by him in his capacity as a Member of Parliament, namely immigration assistance. It was accepted that the immigration assistance provided by the appellant involved acts "done ... by him in his capacity as a member of Parliament."

[18] The word "bribe" customarily denotes a payment (or other benefit) which is provided (or offered) in order to influence the behaviour of a public official or agent in a way that is contrary to recognised rules of probity. This sense of the word appears in the definitions in Black's Law Dictionary:[13] "A price, reward, gift or favour bestowed or promised with a view to pervert the judgment of or influence the action of a person in a position of trust"; and the Shorter Oxford English Dictionary:[14] "A sum of money or another reward offered or demanded in order to procure an (often illegal or dishonest) action or decision in favour of the giver." [15] A gratuity, as postulated by the appellant, is either not within, or is at worst (from the point of view of the appellant) on the margin of what would normally be regarded as a bribe and Ms Cull contended that a gratuity could not be regarded as a bribe at common law.[16]

[19] We see no need to engage with whether a gratuity could be a bribe at common law. This is because s 99 defines "bribe" in non-pejorative terms, focussing simply on the element of benefit rather than the context in which it is provided (or agreed to be provided). As will become apparent, it is clear that when enacting s 103 (and a number of related and similarly worded provisions), the legislature wished to avoid the need to repeat the words "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect". It did this by the common shorthand method of replacing them with a single word (in this case "bribe") which it then separately defined. This means that s 103(1) is to be construed as if it relevantly provided:

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13 Bryan A Garner (ed in chief) *Black's Law Dictionary* (9th ed, Thomson Reuters, Minnesota, 2009).

14 Angus Stevenson (ed) *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007).

15 The earlier sense of the word seems to have been limited to consideration extorted by the bribe's receiver and has since been applied to consideration voluntarily offered to the receiver – *Oxford English Dictionary* (2nd ed, Clarendon Press, Oxford, 1989).

16 Referring to *R v Glynn* (1994) 71 A Crim R 537 (NSWCCA); *R v Mills* (1978) 68 Cr App R 154 (CA) and *R v Allen* (1992) 62 A Crim R 251 (NSWCCA). The Court of Appeal, in the decision under appeal, discussed the "corrupt bargain" element at [65]–[67].

> ... corruptly accepts ... any … benefit, whether direct or indirect for himself ... in respect of any act done....

It follows that the receipt of a gratuity can be within s 103(1) providing it is accepted "corruptly". This approach to s 103 is consistent with the legislative history which we will discuss shortly.

[20] Under s 103(1), the word "corruptly" is applied to the actions of a Member of Parliament who accepts benefits in respect of both an "act … to be done" and an "act done". This suggests that the legislature saw the acceptance of benefits "in respect of" official acts as unacceptable irrespective of whether the acts have already occurred or still lie in the future. To put this another way, the legislature had in mind a single concept of "corruptly" that was equally applicable whether the official acts in question were "to be done" or had been "done". If the legislature had seen an antecedent bargain or promise as a prerequisite to a finding that a Member of Parliament had acted "corruptly", rather more elaborate drafting might have been expected.

[21] Although this point may seem a little subtle, its significance becomes more apparent when the language of s 103(1) is compared with that used in s 103(2). The narrower drafting of s 103(2) means that an offence is only committed in respect of the provision of benefits or the making of offers and agreements which are intended to influence, and thus must logically precede, the relevant official acts. If (as the appellant maintains) the offence of receiving a bribe can be committed only if the benefit was accepted either before the acts or omissions or pursuant to an antecedent offer or agreement, the Member of Parliament could be convicted only if the person providing the bribe was liable to conviction under s 103(2). If Parliament had intended this result, there was no point in defining the s 103(1) offence more broadly than the s 103(2) offence.

[22] To develop a little further what is essentially the same point, an "intent to influence" is an essential component of the s 103(2) offence. In this context, the absence of such a requirement in the language used in s 103(1) suggests very strongly that the legislature did not see liability as depending upon such an intention being present. As will become apparent when we discuss the relevant legislative

history, s 103(2) is expressed in distinctly more narrow terms than the corresponding subsection in the provision which provided the model for s 103.[17]

The statutory context

[23] Section 103 is one of a number of provisions addressed to official misconduct. Section 100 deals with judicial corruption; s 101 with bribery of a judicial officer; s 102 with corruption and bribery of a Minister of the Crown; s 104 with corruption and bribery of a law enforcement officer; and s 105 with corruption and bribery of an official. These sections generally follow the same model as s 103 in the sense that the definition of the offences committed by those in official positions is broad enough to encompass acceptance of gratuities, whereas offences committed by those who provide or offer bribes are defined in terms similar to those employed in s 103(2) and thus do not encompass gratuities. The whole context makes it understandable that the legislature used the shorthand drafting technique referred to above in [19] rather than repeat on many occasions the words "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect".

[24] Another point to be noted is that prosecution under these sections requires either the consent of the Attorney-General under s 106 (for offences alleged against judicial officers (s 100), law enforcement officers (s 104) and officials (s 105)) or of a High Court Judge (for offences involving Ministers and Members of Parliament under ss 102 and 103).

The legislative history

Introduction

[25] The statutory technique employed in s 103 and in a number of related provisions (of penalising the provision or receipt of after-the-event rewards providing it occurs "corruptly") has been employed in a number of related contexts

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[17] See [45] below.

for more than 150 years, going back at least as far as s 2 of the Corrupt Practices Prevention Act 1854 (UK).[18] This was the section which was under consideration in the leading case, *Cooper v Slade*[19] and it plainly provided a model for legislative provisions which were more directly copied by our legislature when it enacted s 103.

Cooper v Slade

[26] This case concerned the unsuccessful 1854 candidacy of the then Mr Frederick Slade QC[20] at a by-election for one of the two seats for Cambridge Borough.[21] Prior to polling day, the chairman of the committee supporting Mr Slade's campaign wrote to Mr Richard Carter, a voter who lived in Huntingdon, asking him to return to Cambridge for the poll and to vote for Mr Slade. The letter had this postscript:

> Your railway expenses will be paid.

The evidence at trial was to the effect that this postscript was added after Mr Slade, at a meeting of members of his election committee at the Lion Hotel in Cambridge, had pointed out that in light of observations made by Tindal CJ some years before,[22] such a payment would be lawful. There was room for debate whether, on the true construction of the letter, the offer of payment was conditional upon Mr Carter voting as requested. And if the letter was to be so construed, there was scope for argument whether Mr Slade had authorised such an offer, as opposed to having merely contemplated an after-the-event payment. In any event, Mr Carter, having

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[18] Corrupt Practices Prevention Act 1854 (UK) 17 & 18 Vict c 102.

[19] *Cooper v Slade* (1858) 6 HLC 746, 10 ER 1488 (HL).

[20] Later Sir Frederick Slade. He had an extensive practice in electoral cases involving alleged bribery.

[21] The by-election was necessary because the two successful candidates at the preceding general election had lost their seats for bribery: (1 March 1853) 124 GBPD HC 800–801. Electoral bribery was notoriously rife in a number of electorates of which the Cambridge Borough was one. As a result of the widespread bribery in Cambridge during the 1852 election a Commission was appointed to inquire into the existence of such corrupt practices. The report makes interesting reading, see Graham Willmore, George Boden and Thomas Tower *Report of the Commissioners Appointed under Her Majesty's Royal Sign Manual to inquire into the Existence of Corrupt Practices in the Borough of Cambridge* (17 August 1853). As well, the Borough was briefly disenfranchised, with its writ for election suspended from 3 March 1853 until 11 August 1854 (David Lidderdale (ed) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (19th ed, Butterworths, London, 1976) at 34, fn (r)). This was apparently in consequence of the Commission's appointment: see (2 February 1854) 130 GBPD HC 214–215.

[22] In *Bremridge v Campbell* (1831) 5 Car & P 186, 172 ER 933. This was in the context of a section which was a precursor to s 2 of the 1854 Act.

come to Cambridge and voted as requested, received reimbursement of eight shillings for his train fare.

[27] Section 2 of the Corrupt Practices Prevention Act 1854 made it a misdemeanour (for which the sanction was liability to a penalty of £100 payable to anyone who might sue for it) to offer "money or valuable consideration" to a voter in order to induce that voter to vote or refrain from voting and, as well, "corruptly" to provide money or valuable consideration "on account of any such voter having voted or refrained from voting at an election". There was a proviso exempting certain "legal expenses" incurred at or concerning any election, which is what Mr Slade had in mind when he said that Mr Carter could be reimbursed his travelling expenses.

[28] The plaintiff, Mr Charles Cooper,[23] sought to recover penalties in relation to both the letter promising payment and the payment itself (and as well in relation to another 77 alleged infractions on the part of Mr Slade).[24] The case was tried at the 1855 Cambridge summer assizes before Parke B. At his suggestion (perhaps rather forceful given what he was later to say about the case), Mr Cooper abandoned all counts other than those addressing the letter and the later payment.[25] Despite the evidential reforms of the 1840s and early 1850s,[26] the evidence led in relation to those counts was extremely limited (consisting primarily of the letter and what its author could recall of what Mr Slade had said at the meeting at the Lion Hotel). This meant that much was left to inference.

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[23] He was the town clerk of the Cambridge Borough. He was presumably suing on the instructions of the Borough Council and there is no suggestion that he was acting as a busy-body.

[24] Despite there being every reason for the Borough Council to take a strong line on bribery and corruption in Cambridge given the Borough's disenfranchisement following the 1852 election, the case still seems odd and perhaps a little mean-spirited. If, as is presumably the case, the two counts involving the letter and payment of the train fare represent the high water mark of the case against Mr Slade, there may not have been much to the other 77 counts. What was alleged against Mr Slade was well removed from the usual blatant bribery which characterised many mid-nineteenth century elections and had been rife in the Cambridge Borough, see the report mentioned in fn 21. As well, Mr Slade had been unsuccessful at the election meaning no harm had been done. The total liability Mr Slade was initially exposed to would likely to have been a very substantial sum.

[25] The procedural history is outlined in *Cooper v Slade* (1858) 6 HLC 746 at 747–748 and 751, 10 ER 1488 at 1489–1490 (HL).

[26] Evidence Act 1843 (UK) 6 & 7 Vict c 85 (known as Lord Denman's Act) and the Evidence Act 1851 (UK) 14 & 15 Vict c 99 (known as Lord Brougham's Act).

[29] Mr Cooper was successful on both counts which were left to the jury. This success was on the basis of a combination of:

(a) the views of the Judge as to the proper construction of the letter, what if any expenses could lawfully be offered and what had to be shown to establish that Mr Slade had acted corruptly; and

(b) the conclusions of the jury as to whether Mr Slade had authorised the letter and payment.[27]

[30] Judgment for £200 was subsequently entered in favour of the plaintiff in the Court of Queens Bench. From what later transpired in the House of Lords, this was based on a misunderstanding, as Parke B had regarded the two counts as alternatives, as we will explain shortly. This misunderstanding was not picked up in the Court of Exchequer Chamber, but that Court found in favour of Mr Slade on other grounds.[28] In essence it held that the payment of the expenses after-the-event, without antecedent promise or bargain, was not corrupt and that Mr Slade was not implicated (given that Court's construction of the letter and view of the evidence) in the making of an antecedent promise. The case then went to the House of Lords, where it was argued before Lord Cranworth LC and Lords Brougham and Wensleydale (as Parke B had just become). Also in attendance were eight judges, some of whom had sat on the case in the Court of Exchequer Chamber. At the conclusion of the argument, the House of Lords put three questions to the judges, the third of which was in these terms:

> Whether there was evidence that the Defendant corruptly paid money to Carter on account of his having voted at the election?

[31] On 15 February 1858 the eight judges each, individually, provided their advice and on 17 April the same year, Lords Cranworth and Wensleydale gave speeches. They both considered that Mr Cooper was entitled to judgment in respect of the letter but could not recover two penalties for what in substance was a single transaction. These views must have been earlier conveyed to Mr Cooper who had by

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27 It does not appear to have been disputed that Mr Slade had, by his remarks, authorised the payment but the issue of whether he had in fact done so was nonetheless left to the jury.

28 *Cooper v Slade* (1856) 6 El & Bl 447, 119 ER 932.

17 April communicated his willingness to abandon his claim in relation to the payment.[29] The upshot was that the verdict of £100 in his favour in respect of the letter was restored. Presumably because the case had been compromised (at least in substance),[30] Lord Brougham (who was then 79) neither spoke himself, nor signified assent to (or dissent from) the observations of Lords Cranworth and Wensleydale.

[32] In his speech, Lord Cranworth made it clear that but for the double recovery point he would have found against Mr Slade in relation to the payment, saying:[31]

> … I am clearly of opinion that the paying of the money was a corrupt payment within the meaning of the statute, because I cannot give the word "corruptly," as there used, referring to a payment after voting, any other meaning than a payment in violation of that which the statute was passed to prohibit.

Given what Lord Cranworth had to say on the double recovery point, it is clear that he considered that the payment was corrupt irrespective of whether there had been an antecedent bargain or promise. Lord Wensleydale had been of the same view at trial. It will be recalled that at trial he had seen the claims as alternatives. As he made clear in his speech, this meant that when deciding whether the count in relation to the payment should go to the jury, he had proceeded on the basis that there had been no antecedent agreement or promise to pay the expenses. He explained his reasoning in this way:[32]

> … it occurred to my mind that the reasonable construction to be put upon the Act was, that if a man gave money to a voter as a reward for having voted for him, that being the moving cause of the vote,[33] it must be a corrupt payment within the meaning of the Act of Parliament.

He then went on, however, to say:[34]

> But I confess, certainly, not to have been perfectly satisfied with the correctness of that opinion.

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[29] See *Cooper v Slade* (1858) 6 HLC 746 at 789 and 797, 10 ER 1488 at 1505 and 1508 (HL).

[30] Which is what the Court of Exchequer Chamber later concluded in relation to a dispute as to costs, see *Cooper v Slade* (1858) 1 El & El 336, 120 ER 935.

[31] At 788, 1504.

[32] At 790–791, 1505.

[33] This is what Lord Wensleydale is recorded as saying but it is clear that he meant "payment" and not "vote"; this given (a) the context and (b) how he summed up to the jury, see *Cooper v Slade* (1858) 6 HLC 746 at 750–751, 10 ER 1488 at 1490.

[34] At 791, 1505.

And towards the end of his judgment, he returned to the point saying that:[35]

> I have ... very great doubt whether I was right in my construction of the obscure terms of the Act, and holding that if a candidate after the election pays a voter money, the moving cause of his doing so being that the voter has given him his vote, the payment is "corrupt" ... .

This doubt he did not formally resolve in his speech given the abandonment by Mr Cooper of his claim in respect of the payment.

[33] There was considerable diversity in the responses of the judges to the third of the questions put to them. Bramwell B largely adhered to the conclusions of the Court of Exchequer Chamber,[36] finding no evidence that the letter was a prohibited antecedent promise or that Mr Slade had authorised it.[37] Four answered the third question in the affirmative on the basis of their construction of the letter (that it was a prohibited antecedent promise) and that Mr Slade had authorised it.[38] Accordingly, their discussions of the third question are relatively brief and all proceed either explicitly or by implication on the basis that there was an antecedent promise. The advice of the other three judges is more material in the present context.

[34] Of these three judges, two were supportive of Mr Slade and concluded that the letter, to the extent it contained a prohibited inducement, had not been authorised by him. As to the third question, Wightman J concluded that unless Mr Slade knew of a "precedent promise" in the postscript, the repayment of Mr Carter's travelling expenses was not corrupt.[39] Coleridge J was of broadly the same view, albeit that he was also influenced by what he regarded as the reasonableness of the opinion expressed by Mr Slade that payment of travelling expenses was lawful.[40] The third of the judges was Willes J and he was distinctly against Mr Slade:[41]

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35 At 797, 1508.
36 See above at [30].
37 At 767–768, 1496–1497.
38 Channell and Watson BB, and Crompton and Williams JJ.
39 At 781, 1502.
40 This was a rather odd consideration. As Coleridge J recognised at 785, 1503, a bona fide belief on the part of Mr Slade that the expenses could lawfully be paid was not in itself an answer to the allegation that he had acted "corruptly" and the strongest plank in the case against Mr Slade as to authorisation of the letter was the evidence of what he had said as to the lawfulness of the payment of expenses.
41 At 773, 1499.

> … I am of opinion that there was evidence that the defendant corruptly paid money to Carter on account of his having voted at the election. I think the word "corruptly" in this statute means not "dishonestly", but in purposely doing an act which the law 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". The word "corruptly" seems to be used as a designation of the act of rewarding a man for having voted in a particular way as being corrupt, rather than as part of the definition of the offence. *I agree with what was said by the learned Judge at the trial, that if the moving cause of giving the money is the voter having voted for the particular candidate, such gift is contrary to the statute, as being given by way of reward for the vote, and therefore corrupt.*
>
> (emphasis added)

[35] Treating the approach of Wightman and Coleridge JJ as implicitly supported by Bramwell B (who followed the view of the Court of Exchequer Chamber) and the four judges who answered the third question in the affirmative only because they were of the view that there had been an antecedent authorised promise, Willes J was, on this point, in a distinct minority of the judges who gave advice. And while Lord Cranworth was plainly of the same view as Willes J, Lord Wensleydale in the end left the issue open in his speech. Unsurprisingly given the diversity of judicial opinion we have discussed, *Cooper v Slade* was not initially seen as settling the question whether paying a voter as a reward for voting was corrupt in the absence of an antecedent promise.[42] The extent to which the judges supported Mr Slade's position is also perhaps not entirely surprising. *Cooper v Slade* was decided at a time when electoral bribery was extremely common. By contemporary standards, Mr Slade's fault was trivial and the case was seen at the time as a very hard one.[43] But, as it has turned out, it is the approach preferred by Lord Cranworth and Willes J which has proved to be durable.

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[42] In the *Northallerton Borough Case* (1869) 1 O'M & H 167 at 167–168, Willes J himself saw the issue as unresolved. In *Bewdley Election Petition* (1869) 19 LT 676 at 678 Blackburn J followed the approach of Willes J in *Cooper v Slade*. So too did Lush J in the *Harwich Borough Case* (1880) 3 O'M & H 61 at 70–71 but in the same case Manisty J at 67 considered that there needed to be something "*plus* the mere payment to make it a corrupt payment". Views similar to those of Manisty J are to be found in *Bradford Election Petition* (1869) 19 LT 723 at 727 per Martin B and *Caldicott v Corrupt Practice Commissioners* (1907) 21 Cox CC 404 at 409 per Bigham J. The judgments in the *Cheltenham Borough Case* (1911) 6 O'M & H 194 and the *Stroud Borough Case* (1874) 2 O'M & H 181 give mixed signals.

[43] See the comment made by Mellor J in the *Bolton Election Petition* (1874) 31 LT 194 at 196.

Later criminal statutes in the United Kingdom

[36] Section 1(1) of the Public Bodies Corrupt Practices Act 1889 (UK)[44] provided:

> Every person who shall by himself or by or in conjunction with any other person, corruptly solicit or receive, or agree to receive, for himself, or for any other person, any gift, loan, fee, reward, or advantage whatever as an inducement to, or reward for, or otherwise on account of any member, officer, or servant of a public body as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which the said public body is concerned, shall be guilty of a misdemeanour.[45]

This section has some similarities to the 1854 Act considered in *Cooper v Slade*, particularly in terms of the alternative ways in which the offence might be committed, that is in relation to inducements and rewards. Section 1(2) of the 1889 Act provided, in effectively mirror terms, for it to be an offence to provide benefits in the circumstances provided for in s 1(1). Section 1(1) of the Prevention of Corruption Act 1906 (UK),[46] which addressed offending involving agents, was in very similar terms. Because "agent" was defined as including anyone serving under the Crown or a number of specified public bodies, there was considerable scope for overlap between the two statutes. There was, however, a requirement for the leave of the Attorney-General to be obtained for any prosecution under the 1906 Act (s 2). Amendments, most significantly to penalty, to both Acts were made by the Prevention of Corruption Act 1916 (UK),[47] which provided for all three statutes to be cited together as the Prevention of Corruption Acts 1889 to 1916. These statutes have now been replaced by the Bribery Act 2010 (UK), the drafting style of which is so different from s 103 as to be of no particular relevance in the present context, although we will revert to it later in this judgment for other reasons.

New Zealand criminal statutes

[37] Sections 108 and 110 of our Criminal Code Act 1893 provided:

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[44] Public Bodies Corrupt Practices Act 1889 (UK) 52 & 53 Vict c 69.
[45] Later becoming an offence.
[46] Prevention of Corruption Act 1906 (UK) 6 Edw VII c 34.
[47] Prevention of Corruption Act 1916 (UK) 6 & 7 Geo V c 34.

108 **Judicial Corruption** —

Every one is liable to fourteen years' imprisonment with hard labour who, —

(1) Holding any judicial office, corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person, any bribe, that is to say, any money or valuable consideration, office, place, or employment whatever, on account of anything already done or omitted, or to be afterwards done or omitted, by him in his judicial capacity; or

(2) Corruptly gives or offers to any person holding any judicial office, or to any other person, any such bribe as aforesaid on account of any such act of omission.

110 **Selling offices** —

Every one is liable to seven years' imprisonment with hard labour who —

(1) Corruptly accepts or obtains, or agrees to accept or attempts to obtain, for himself or any other person, any money or valuable consideration whatever on account of his having appointed to, or having procured or attempted to procure for, or in consideration that he will appoint to, or procure or attempt to procure for, any person, any public office or employment; or

(2) Corruptly gives or offers to give to any person any money or valuable consideration whatever on any such account or consideration.

[38] These sections replicated ss 111 and 113 of the draft Criminal Code (UK) which formed part of the Stephen Commission Report of 1879.[48] That report, and the subsequent 1883 report of the New Zealand Statutes Revision Commission,[49] which copied ss 111 and 113 as ss 107 and 109 in its draft Criminal Code, do not elucidate the intended meaning of the two sections. Both sections, however, follow, at least broadly, the scheme of the 1854 Act discussed in *Cooper v Slade* in capturing before and after the event benefits. As well, the language used in s 111 of the 1879 draft Code (UK) and s 108 of the Criminal Code Act 1893 ("on account of anything already done or omitted, or to be afterwards done or omitted") left little scope for doubt as to its application to after-the-event benefits. In this respect, it is at least plausible to assume that the emphasis in s 111 of the 1879 draft Criminal Code (UK) on after-the-event benefits (signified by the words "anything already done or

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[48] Colin Blackburn, Charles Robert Barry, Robert Lush and James Fitzjames Stephen *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (1879) (UK).

[49] Alexander J Johnston and W S Reid *Report on the Criminal Code* (1883), tabled by the Joint Statutes Revision Committee on 7 August 1883.

omitted") reflected an intended adoption of the approach of Lord Cranworth and Willes J in *Cooper v Slade*.[50]

[39] Sections 126 and 128 of the Crimes Act 1908, being part of the 1908 consolidation, were in materially similar terms to ss 108 and 110 of the 1893 Act.

[40] The next development in New Zealand came in 1910 with the enactment of s 4(1) of the Secret Commissions Act 1910, which addressed corrupt acceptance of gifts by an agent. Specifically, it provided:

> **4. Acceptance of such gifts by agent an offence —**
>
> (1) Every agent is guilty of an offence who corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, or solicits from any person, for himself or for any other person, any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business (whether such act is within the scope of the agent's authority or the course of his employment as agent or not), or for showing or having shown favour or disfavour to any person in relation to the principal's affairs or business.

Under s 16(1)(c) people in the service of the Crown or acting for or on behalf of the Crown are deemed to be "agents" for the purposes of the Act. Prosecution under s 4 requires the prior consent of the Attorney-General (s 12). The statute is very similar in form to the Prevention of Corruption Act 1906 (UK).

[41] When the Secret Commissions Act was being debated in Parliament, the Attorney-General noted:[51]

> … as the Bill stands it is wide enough in scope to hit cases which may be innocent, but it is only by making it wide that you can get at cases which are distinctly dishonest. We have had illustrations of how impossible it is to draft an effective clause which will not hit some case that does not deserve to be punished. The safeguard resorted to is to throw on the shoulders of some officer – here the Attorney-General – the duty of seeing that the case in which he is proceeding is one which deserves to be punished.

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50 Lord Blackburn was one of the members of the Stephen Commission and had earlier adopted the approach of Willes J in *Cooper v Slade*, see fn 42 above.

51 (9 November 1910) 153 NZPD 452–453.

[42] In the explanatory note to the Crimes Bill 1959, which provided the basis for the Crimes Act 1961, the bribery and corruption provisions were described as follows:[52]

> *Bribery and corruption*: The present provisions, which are very limited in their application, have been revised and extended to include the bribery of public servants, members and officials of local authorities and public bodies, members of Parliament, or Ministers of the Crown.

And the explanatory note to the Crimes Bill 1961, which largely reproduced the text of the Bill introduced in 1959, contained this discussion of the relevant provisions:[53]

> *Clauses 102 and 103* replace section 128 of the 1908 Act, which makes it an offence to corruptly take a bribe in consideration of procuring or attempting to procure the appointment of any person to any public office or employment. These clauses, which are based on section 100 of the Canadian Criminal Code (1954), are wider in their effect. They make it an offence for a Minister of the Crown to corruptly take a bribe for any act done in his capacity as a Minister; for a member of Parliament to corruptly take a bribe for any act done in his capacity as a member; and for anyone to corruptly give such a bribe. No one is to be prosecuted under these clauses without the leave of a Judge of the Supreme Court.

Canadian legislative history

[43] The comment that the clauses were "based on section 100 of the Canadian Criminal Code (1954)" warrants some brief explanation and discussion.

[44] Section 100 was enacted in 1954[54] and provided:

> (1) Bribery of judicial officers, etc. — Every one who
>
> (a) being the holder of a judicial office, or being a member of the Parliament of Canada or of a legislature, corruptly
>
> (i) accepts or obtains,
>
> (ii) agrees to accept, or
>
> (iii) attempts to obtain,

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52 Crimes Bill 1959 (61-1) explanatory note at iii.

53 Crimes Bill 1961 (82-1) explanatory note at xvi.

54 Its current incarnation is s 119 of the Criminal Code RSC 1985 c C-46. The full legislative history of this and the other Canadian sections discussed is detailed in Gary P Rodrigues (ed) *Crankshaw's Criminal Code of Canada, RSC 1985* (online looseleaf ed).

> any money, valuable consideration, office, place or employment for himself or another person in respect of anything done or omitted or to be done or omitted by him in his official capacity; or
>
> (b) gives or offers corruptly to a person who holds a judicial office, or is a member of the Parliament of Canada or of a legislature, any money, valuable consideration, office, place or employment in respect of anything done or omitted or to be done or omitted by him in his official capacity for himself or another person,
>
> is guilty of an indictable offence and is liable to imprisonment for fourteen years.
>
> (2) Consent of Attorney General — No proceedings against a person who holds a judicial office shall be instituted under this section without the consent in writing of the Attorney General of Canada.

[45] It is clear that the wording of s 103 (and the other related provisions) of the Crimes Act owes much to the Canadian section, although there are some differences. By way of example, the offence of giving or offering a bribe in s 100(1)(b) was more widely defined than the corresponding offence in s 103(2) of the Crimes Act 1961. This means that the drafting of the narrower s 103(2) offence involved a conscious decision and perhaps adds weight to the point discussed above at [20]–[22].

[46] Section 100 of the Canadian Criminal Code, as enacted in 1954, was merely a re-formulation of statutory provisions which first appeared as s 131 of the Criminal Code 1892 c 29 and which was plainly based on s 111 of the 1879 draft Code (UK) (although wider in its application). Amongst other things it made it an offence for judicial officers and Members of Parliament or of a legislature to corruptly accept money etc:

> … on account of anything already done or omitted, or to be afterwards done or omitted [in an official capacity].

Application to s 103

[47] Section 103 thus:

(a) is closely reflective of the drafting of s 100 of the Canadian Criminal Code as enacted in 1954;

(b) in its application to Members of Parliament, based on s 100 of the Canadian Criminal Code as enacted in 1954 and s 131 of the Canadian Criminal Code of 1892; and

(c) can be traced back to the language used in s 111 of the 1879 draft Criminal Code (UK) which was carried through into s 108 of New Zealand's Criminal Code Act 1893, s 126 of our Crimes Act 1908 and s 131 of the Canadian Criminal Code of 1892.

Given the use of the extended language "on account of anything already done or omitted, or to be afterwards done or omitted", s 131 of the 1892 Canadian Criminal Code and s 108 of the New Zealand Criminal Code Act 1893 seem to have been intended to capture after-the-event benefits. Since s 100(1) as enacted in Canada in 1954 and the current s 103 in New Zealand used language which was simply a slightly compressed version of that used in their precursors, the same must be true of them as well. For this reason and also the reason advanced in [45], this history might be thought to advance the Crown case.

[48] Ms Cull, however, sought to rely on the borrowing from Canada as supporting her argument. This was on the basis that from the outset the Canadian Criminal Code has had separate provisions which have addressed the provision of benefits by way of commission or reward to government employees by those who have dealings with the government.

[49] Ms Cull's argument was that given that the Canadian Criminal Code has always provided for offences relating to illegal gratuities, the offence of bribing a Member of Parliament could not have been intended to encompass gratuities. On this basis, she argued that s 103 of our Crimes Act should likewise be taken to not encompass gratuities. In the course of argument she suggested that the Canadian authorities supported her contention that an antecedent bargain is required to establish that benefits were received "corruptly". As will become apparent, we do not accept that this is so.[55]

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55 The Canadian cases are discussed below at [54].

[50] More generally, we see a number of flaws in the argument. In its original form (as s 131 of the Criminal Code 1892), the bribery offence was expressed in language which was plainly capable of capturing gratuities and in this form it sat alongside the sections addressing illegal gratuities for more than 60 years before s 100 was enacted in 1954. As well, the s 100 offence was addressed to potential defendants who were not the same as those addressed by the illegal gratuities offences. In any event, in this area of the criminal law, some overlap in the potential scope of offences is to be expected.[56] And finally, the argument does not recognise the respects in which this aspect of the legislative history supports the Crown argument.

The leading authorities on similar statutory provisions

[51] For present purposes, we regard similar statutory provisions as those which are based, at least loosely, on the Corrupt Practices Prevention Act 1854 (UK) and which are addressed to prohibitions on either the giving and acceptance of benefits causally linked to official actions, or the giving and acceptance of secret commissions.[57] As will be apparent from what we have said, this legislation has involved the use of three different drafting techniques:

(a) one technique – used in the Prevention of Corruption Acts 1889 to 1916 (UK), the Secret Commissions Act 1910, in New Zealand, and the corresponding secret commissions offences in Canada – addresses the receipt of benefits provided "as an inducement to, or reward for" the actions of the recipient;

(b) a second technique – adopted in s 111 of the United Kingdom's 1879 draft Criminal Code, s 131 of the Canadian Criminal Code 1892 and s 108 of New Zealand's Criminal Code Act 1893 – addresses the

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[56] We note in passing at this point that the Canadian Parliament enacted a Secret Commissions Act in 1909 which, like our identically named Act of 1910, was based on the Prevention of Corruption Act 1906 (UK). The offences provided for under the 1909 Act were later carried over to the Canadian Criminal Code. This provides further scope for overlapping offences.

[57] This means we do not need to discuss cases where the meaning of "corruptly" or related words has fallen to be determined in other contexts, as for example in *Broom v Police* [1994] 1 NZLR 680 (HC).

receipt of benefits "on account of anything already done or omitted, or to be afterwards done or omitted"; and

(c) the third technique – to be found in s 100 of the Canadian Criminal Code as enacted in 1954 and s 103(1) of the Crimes Act 1961 – addresses benefits provided "in respect of any act done or omitted, or to be done or omitted".

As is apparent, we see the third technique as simply a compressed version of the second. More generally it is difficult to discern any intended difference in effect between the three formulations.

[52] The authorities in relation to such provisions can be best divided into two relevant categories: first, those dealing generally with what must be established to show that a defendant has acted corruptly and, secondly, those dealing specifically with what is in issue in the present case, that is, whether the receipt of an after-the-event reward is corrupt in the absence of an antecedent bargain or promise.

[53] There are some cases in the first of the categories just discussed where the courts have read more into the word "corruptly" than Lord Cranworth and Willes J. In these cases, the judges have looked for something which could be regarded as dishonest or dishonourable, or perhaps some obviously improper action on the part of the official concerned.[58] Predominantly, however, the approach of Lord Cranworth and Willes J has been adopted. Amongst the relevant cases is *R v Smith*,[59] where the appellant's defence to a charge of corruptly offering a bribe was that he had done so simply for the purpose of exposing corruption. In dismissing his appeal, the Court referred to the conflict of opinion in *Cooper v Slade* between Willes and Coleridge JJ and preferred the approach taken by Willes J.[60] Another similar case is

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58 See for instance *R v Lindley* [1957] Crim LR 321 and *R v Calland* [1967] Crim LR 236. These cases treated "corruptly" as requiring some element of dishonesty. To a broadly similar effect is the judgment of Williamson J in *R v McDonald* [1993] 3 NZLR 354. Of course where the recipient of a benefit has acted improperly, it is very easy to conclude that there was corruption, see for instance *R v Leolahi* [2001] 1 NZLR 562 (CA).

59 *R v Smith* [1960] 2 QB 423 (CA).

60 Although the Court indicated that in a simple reward case a different approach might be necessary, see 429. As will become apparent, however, in the reward cases the same approach has been taken, see below from [54].

R v Wellburn,[61] which involved a prosecution under s 1 of the Prevention of Corruption Act 1906 (UK). The recipient of the alleged bribes was an army officer and the other defendants worked for a radio equipment supplier which wished to supply equipment to the Iranian government. A possible view of the evidence was that the recipient had acted as an intermediary between the supplier and people on the Iranian side of the transaction in circumstances where a contract could not be secured without the payment of bribes to the relevant Iranian officials. The Recorder of London, taking his guidance from *Smith* (and through *Smith* from Willes J), rejected the argument that the Crown had to show that the other defendants had dishonestly intended to weaken the recipient's loyalty to the Crown[62] and, instead, summed up in this way:[63]

> "Corruptly" is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt.

In upholding the convictions, the Court of Appeal disapproved of the more open-textured approaches taken in other cases[64] and followed *Smith*, again adopting the remarks of Willes J.[65] To the same broad effect is *R v Godden-Wood*.[66] Finally, there is the judgment of the Privy Council in *Singh v State of Trinidad and Tobago*[67] in which the Privy Council expressly endorsed[68] the approach taken by Willes J in *Cooper v Slade* including his assertion that word "corruptly" encompasses:

> [15]... purposely doing an act which the law 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.

Also endorsed by the Privy Council was the conclusion of Willes J that in the circumstances just postulated:

> Both the giver and the receiver in such a case may be said to act "corruptly".

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[61] *R v Wellburn* (1979) 69 Cr App R 254 (CA).
[62] At 265.
[63] At 264.
[64] The cases referred to above in fn 58.
[65] See 264–265.
[66] *R v Godden-Wood* [2001] EWCA Crim 1586 at [55]–[58].
[67] *Singh v State of Trinidad and Tobago* [2005] UKPC 35, [2006] 1 WLR 146.
[68] At [15]–[17].

[54] The Canadian cases have taken broadly the same approach as that adopted in the cases discussed in the preceding paragraph. In particular, the Canadian courts have generally adopted the view of Lord Cranworth and Willes J in *Cooper v Slade*,[69] albeit that in secret commission cases the concept of corruption which is invoked necessarily includes non-disclosure by the agent to the principal.[70] There is thus no requirement to show anything akin to a corrupt bargain.[71]

[55] The only cases cited to us which address directly the issue raised by the present appeal are *R v Andrews-Weatherfoil Ltd*[72] and *R v Parker*.[73] They involved prosecutions under s 1(1) of the Public Bodies Corrupt Practices Act 1889 (UK). It will be recalled that this section made it an offence for officers of a local authority to "corruptly ... agree to receive ... any … reward ... whatever as an inducement to, or reward for" the performance of public functions. In both cases the Court rejected the contention that the section did not encompass gratuities. The conclusion of the Court in *Andrews-Weatherfoil* was succinctly expressed:[74]

> This court ... is of the opinion that the statute covers receipt of money for a past favour without any antecedent agreement ... .

Policy

[56] In its report *Legislating the Criminal Code: Corruption*,[75] the English Law Commission, postulated four situations (which it later called "cases") in which corruption might be present:

> 5.104 …
>
> (1) A leads B to believe that, if B acts in a particular way, A will reward B for doing so. B therefore acts in that way, and A does reward B.

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69 On this point the leading judgment is that of Laidlaw JA in *R v Brown* (1956) 116 CCC 287 (ONCA). See also Edward L Greenspan, Marc Rosenberg and Marie Henein *Martin's Annual Criminal Code 2011* (Canada Law Book, Ontario, 2011) at 244.

70 See *R v Kelly* [1992] 2 SCR 170.

71 As held in *Kelly* at 192–193.

72 *R v Andrews-Weatherfoil Ltd* [1972] 1 WLR 118 (CA).

73 *R v Parker* (1985) 82 Cr App R 69 (CA).

74 At 127.

75 The Law Commission *Legislating the Criminal Code: Corruption* (LC248, 1998).

> (2) Without any encouragement from A, B nevertheless believes that, if B acts in a particular way, A will reward B for doing so – for example, because B believes that A has rewarded other agents for acting in that way. B therefore acts in that way, and A does reward B.
>
> (3) B acts in a particular way, not as a result of a corrupt inducement and not (or not primarily) with a view to reward. A rewards B for acting in that way, hoping that the reward will influence B to act in a similar way in the future.
>
> (4) B acts in a particular way, not as a result of a corrupt inducement and not (or not primarily) with a view to reward. A rewards B for acting in that way, with no thought of influencing B to act in a similar way in the future.

It will be observed that case (4) captures the concept of gratuity which Ms Cull urged on us.

[57] The Law Commission was of the view that the first three cases involved corruption (although in respect of case (2) only if the hope of reward was B's primary purpose in acting in that way) but not case (4):

> 5.106 Case (4) is not, in our view, corrupt at all. The act rewarded is not a corrupt act, because it is not illegitimately influenced by inducements or the hope of reward. The reward for it is therefore not a corrupt award ...
>
> 5.107 It is perhaps arguable that, even if case (4) is not in principle corrupt, it cannot safely be exempted because it is too hard to distinguish from cases (1) and (2). If B has given A a valuable contract, and A has rewarded B handsomely for doing so, the defence may assert that B did not expect to be rewarded and that A was motivated by unalloyed gratitude; and, it may be said, such a defence would be impossible to rebut. We believe that this reasoning overstates the difficulty. If the reward is more substantial than a genuine token of gratitude would normally be, and no explanation is offered for that fact, the fact-finders will draw such inferences as appear proper – for example, that B had been promised a reward if A got the contract. And a similar inference is likely to be drawn if an innocent explanation is offered but not believed.
>
> (citations omitted)

With its focus on the impropriety of the actions of the recipient of the bribe and, as well, the causal significance of the bribe in relation to the actions of the recipient, the Law Commission was seeking to exclude usual "courtesies of life" gifts (such as corporate hospitality) from the reach of the criminal law. In this respect, it was not

prepared to accept that the expression "corruptly" was sufficiently flexible to exclude liability for the giving and receipt of such benefits.

[58] The Law Commission developed its proposals in a later report, *Reforming Bribery*.[76] The Law Commission remained concerned about the possibility of legislative over-reach in relation to advantages of minor value but considered that the risk of this could be dealt with by a more intense focus on the wrongfulness of the actions of the intended recipient. And, at the same time, it adopted a broad approach to when such actions might be wrongful. Under this approach, which was distinctly broader than that proposed in the earlier report, the receipt of a benefit may be all that is required to render the actions of the official wrongful. By way of illustration, the Commission postulated a case – not very far removed from the present – of a government official issuing a visa to someone and then accepting from that person a gift of £1,000 as an expression of gratitude.[77] The Commission considered that the payment and receipt of the money in those circumstances should be subject to the criminal law. The revised recommendations of the Law Commission were eventually enacted as the Bribery Act 2010 (UK) with the example just discussed provided for, perhaps slightly awkwardly, by ss 1(3)(b) and 2(3)(b)).

[59] The subsequent report of the Law Commission and the form in which the Bribery Act 2010 were enacted cast something of a shadow over the comments set out in [57]. Indeed, we are of the view that these comments do not reflect the reality that it is simply wrong for an official to accept money or like benefits in return for what has been done in an official capacity.

[60] There are two overlapping reasons why this is so.

[61] The first reason is that the offering and acceptance of substantial benefits in relation to official acts is corrupt because it has the tendency to promote corruption – a tendency which is not dependent upon an antecedent bargain or promise. This tendency arises because the giving and acceptance of such benefits creates an environment in which:

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76 The Law Commission *Reforming Bribery* (LC313, 2008).
77 See [3.73]–[3.76].

(a) an official who receives such benefits will come to expect similar benefits in the future and is likely to act accordingly; and

(b) members of the public who know about, or suspect, what has happened will come to believe that unless they too provide such benefits, they will not receive dispassionate consideration and, if prepared to provide such benefits, will receive corresponding advantages.

By way of illustration, the immigration official postulated in the example referred to in [58] could be expected in the future to look with favour on the person who handed over £1,000 and indeed anyone likely to be similarly generous. And by way of further illustration, the pattern of events in the present case[78] meant that the appellant must have soon realised that any assistance he provided would be rewarded.

[62] The second and associated reason why the provision of gratuities to officials is corrupt is that there is a fundamental inconsistency between the performance of official functions and the acceptance of private rewards for doing so. In large measure this is a corollary of the first reason in the paragraph above. But associated with this are related expectations about the way in which those in official positions, including Members of Parliament, can be expected to act. This consideration is also illustrated by the facts of the present case.

[63] The appellant was not a decision-maker in respect of the Thai nationals' immigration issues – which is why his case is not on all fours with the example discussed in [58]. But he was part of an official process in which those he was helping obtained the immigration outcomes they were seeking. In his representations to the Immigration Service and the Associate Minister, he was vouching for them. Given the favourable outcomes achieved, his willingness to do so must have been an influential consideration in the decisions which were ultimately made. The people who actually made the immigration decisions, including the appellant's colleague, the Associate Minister of Immigration, did not know that the appellant was receiving benefits from those for whom he was

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78 See [2]–[5].

vouching. Had they known this, his representations should have been completely discounted. There was thus a fundamental conflict between the representations he was making and the fact that he was receiving quid pro quo benefits for doing so. So his receipt of quid pro quo benefits had the tendency to devalue the ordinary currency of New Zealand political life.

[64] We accept that too broad an approach to s 103 and like sections carries the risk of criminalising activity involving unexceptionable token gifts or other benefits. This risk is substantially mitigated by the requirements for consent before a prosecution can be commenced. It is certainly possible that the legislature deliberately defined the relevant offences widely on the basis that the requirements for consent would ensure that oppressive and unfair prosecutions were not brought.[79] But while we accept that the sanction requirements provide a safeguard, we do not see them as a complete and principled answer to the risk of over-criminalisation.

[65] This particular problem cannot be solved by simply treating an antecedent promise as a touchstone for criminality. In the example given of the Member of Parliament who accepts a rugby jersey when opening a rugby club,[80] the Member would still not be corrupt even if he or she knew in advance of the opening that there would be a gift (perhaps because of a question as to what size rugby jersey would be suitable). So if there is an exception, it must address the extent of the gift and the particular context in which it occurs. We consider, therefore, that there must be a de minimis defence in relation to gifts of token value which are just part of the usual courtesies of life.

Conclusion

[66] While we are satisfied that the acceptance of gifts which are de minimis (as just explained) should not be considered corrupt under s 103(1), the acceptance of other benefits in connection with official actions is rightly regarded as corrupt irrespective of whether there was an antecedent promise or bargain. We do not

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79 Such an approach is consistent with the parliamentary history of the Secret Commissions Act 1910, see [41] above.

80 See [15].

accept that this approach means that the word "corruptly" in s 103(1) is deprived of effect. In part it captures the requirement for a defendant to have acted knowingly. In the present case, this requirement required the Crown to establish that the appellant knew that the services he received were provided in connection with the immigration assistance he gave, meaning that he knowingly engaged in conduct which the legislature regards as corrupt. As well, it is the presence in s 103(1) (and like provisions) of the word "corruptly" which permits the de minimis exception to liability which we accept exists.

[67] Because the services in this case – worth around $50,000 – were not de minimis, we are satisfied that the directions given by Rodney Hansen J to the jury were correct. They are consistent with the approach taken by Lord Cranworth and Willes J in *Cooper v Slade* and the subsequent leading authorities. As well – and most importantly – they are also consistent with the language of s 103, the particular statutory context in which it appears and the legislative history.

Disposition

[68] For those reasons the appeal should be dismissed.

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