IN THE COURT OF APPEAL OF NEW ZEALAND

CA133/2017
[2017] NZCA 514

BETWEEN	STEPHEN JAMES BORLASE Appellant
AND	THE QUEEN Respondent

CA205/2017

BETWEEN	MURRAY JOHN NOONE Appellant
AND	THE QUEEN Respondent

Hearing:	17 October 2017
Court:	Kós P, Harrison and Gilbert JJ
Counsel:	R M Mansfield for Appellant (CA133/2017) S J Lance for Appellant (CA205/2017) B H Dickey and M S Gatland for Respondent
Judgment:	14 November 2017 at 11 am

JUDGMENT OF THE COURT

A The appeal against conviction (CA133/2017) is dismissed.

B The appeals against sentence (CA133/2017 and CA205/2017) are dismissed.

REASONS OF THE COURT

(Given by Harrison J)

Introduction

[1] One appellant, Stephen Borlase, was the principal of Projenz Ltd. The other appellant, Murray Noone, was a senior engineer employed first by Rodney District Council and later by its statutory successor, Auckland Transport. Projenz provided engineering consultancy services specialising in roading. The company successfully tendered for contracts with the Council and later Auckland Transport. Over a seven-year period Mr Borlase on Projenz's behalf gave Mr Noone undisclosed cash and other benefits totalling about $1.15 million. He also gave Barrie George, another senior employee of both local authorities, benefits of about $100,000.

[2] The Crown charged all three men with giving and taking bribes under s 105 of the Crimes Act 1961. Mr George pleaded guilty to two charges. Messrs Borlase and Noone pleaded not guilty. Following a lengthy trial in the High Court, Fitzgerald J sitting without a jury found Mr Borlase guilty of six charges of bribing Mr Noone and of two charges of bribing Mr George.[1] She found Mr Noone guilty of the six mirror charges of receiving bribes.

[3] The Judge convicted and sentenced Messrs Borlase and Noone to terms of imprisonment of five years and six months and five years respectively.[2] Lang J had earlier sentenced Mr George to 10 months' home detention.[3] Mr Borlase appeals against both his conviction and sentence. Mr Noone appeals against sentence alone.

[4] The four agreed elements of the charges against Mr Borlase were that he (a) corruptly (b) gave a bribe (c) to Mr Noone (d) with intent to influence him in respect of any act or omission by him in his official capacity. Mr Mansfield accepts that Mr Borlase cannot challenge the Judge's findings of proof of the first three elements. Mr Borlase's appeal against conviction is advanced solely on the ground that the Judge erred in finding the fourth element proved. Mr Mansfield says the

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1 *R v Borlase* [2016] NZHC 2970 [Reasons].
2 *R v Borlase* [2017] NZHC 236 [Sentencing notes].
3 *R v George* [2016] NZHC 2067. See also Lang J's sentencing indication: *R v George* [2016] NZHC 1730.

Crown failed to establish that the payments were made with the intention that Mr Noone act improperly to Mr Borlase's advantage. Our factual narrative must be read in that context.

Facts

[5] The trial occupied six sitting weeks. The Judge's unchallenged findings allow us to recite the facts with relative brevity.

[6] Mr Borlase established Projenz in around 1997. The company developed a commercial relationship with Rodney District Council soon after its formation. Mr Borlase met Mr George when the latter was the company's primary client contact with the Council.

[7] Mr Noone started providing sub-consultancy services to Projenz in 2000, originally on an exclusive basis in the areas of business development and traffic-safety engineering. From 2002 to 2006 he provided his services to Projenz on a part-time basis while contracting to other entities including the Council. In early 2006 the Council employed Mr Noone as its Director of Transport and later as Director of Infrastructure. At the time Mr Noone disclosed that he was providing consultancy services for another council but he said nothing about Projenz.

[8] Between early 2006 and 2010, when Auckland Transport was created and assumed the Council's statutory functions, Mr Noone tendered monthly invoices to Projenz averaging between $8,000 and $10,000. He purported to charge for consulting services performed at an average of 90 to 110 hours monthly. Projenz paid Mr Noone a total of $660,000 in this four-year period. The company also provided him with other benefits totalling $27,983 for international airfares and accommodation; and provided Mr George with similar benefits to a value of $55,659.

[9] Messrs Borlase and Noone's primary defence at trial was that Projenz's payments and associated benefits were in settlement of consulting services performed by Mr Noone pursuant to a genuine contractual relationship. The Judge rejected this defence. She found there was no such contractual arrangement and no

such services were provided. She was satisfied that in terms of s 105(2) the payments were "in respect of any act done or omitted, or to be done or omitted, by [Mr Noone] in his official capacity", namely his management of Projenz's work for the Council and Auckland Transport and (b) "corruptly" paid and received knowingly in connection with Mr Noone's official duties.[4] Those findings are not challenged on appeal.

[10] In 2008 the Council had conducted a substantial tendering process for what are known as the "Infrastructure One" contracts. Projenz was a successful tenderer. Mr Noone was neither on the evaluation panel nor involved in selection. There was no evidence that either Mr Noone or Mr George provided any actual assistance to Projenz during the tender process or during a subsequent tender process at Auckland Transport; or that Projenz would not have been successful without the significant benefits which it provided to both men. The company was a very proficient operator.[5] But Mr Noone was the Council's client lead on the project. He did not disclose to his employer any of the benefits he was receiving from Projenz: Fitzgerald J found that if Mr Noone had done so, those receipts would have reflected on his probity and would have been "an extremely serious issue which would have needed to be raised at the highest levels".[6]

[11] In June 2010 Projenz agreed to pay Mr Noone $200,000 plus $30,000 in disbursements, purportedly for additional consulting services. Again, the Judge found these services were never performed. The arrangement was a sham. The payments were additional to the benefits already being received.

[12] This same pattern of payments continued after Auckland Transport was formed as the Council's successor in 2010. Mr Noone was employed by the new entity as Manager, Road Corridor Maintenance, a senior fulltime position. When interviewed by his superiors, Mr Noone referred to performing outside consulting services for a few days annually for the New Zealand Transport Agency. Again, he said nothing about Projenz. His monthly submissions of invoices to Projenz continued at about $9,000 to $10,000. Over this period Projenz paid added benefits

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4 Reasons, above n 1, at [608]–[615].
5 Sentencing notes, above n 2, at [19].
6 At [18].

to Mr Noone of $28,821 and to Mr George of $44,571. Again, the Judge found the contractual arrangements, pursuant to which the payments were made and benefits provided, were not genuine.

[13] Projenz was successful during this period in obtaining significant contracts in a tender round conducted by Auckland Transport for technical support services. This was known as the TSS tender. Neither Mr Noone nor Mr George disclosed his benefits at the time but the Judge found they did not conduct themselves improperly during the tender process. Another one-off sham arrangement agreement was entered into between Mr Noone and Projenz. A further $40,000 plus disbursements was paid over a four-month period, additional to the monthly amounts that continued to be paid.

[14] Projenz paid Mr Noone a total of $1,103,002 and provided him and Mr George with additional benefits of $56,864 and $100,231 respectively.

Conviction appeal

[15] Mr Borlase was charged and convicted of offending against s 105(2) of the Crimes Act which materially provides:

> **105 Corruption and bribery of official**
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> (1) Every official is liable to imprisonment for a term not exceeding 7 years who, whether within New Zealand or elsewhere, corruptly accepts or obtains, or agrees or offers to accept or attempts to obtain, any bribe for himself or herself or any other person in respect of any act done or omitted, or to be done or omitted, by him or her in his or her official capacity.
>
> (2) Everyone 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 official in respect of any act or omission by him or her in his or her official capacity.*
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> (Our emphasis.)

[16] As noted, Mr Mansfield advances Mr Borlase's appeal against conviction on one ground only. He accepts that Mr Borlase corruptly gave bribes in the form of financial benefits to Messrs Noone and George. But, he says, the Crown failed to prove Mr Borlase intended to influence Mr Noone to act improperly to Projenz's

advantage. He says that to read s 105(2) in any other way defeats its very purpose of preventing officials from actually abusing their positions of power. Mr Mansfield says there was no evidence of any express or implied request by Mr Borlase to influence Mr Noone to act differently or other than as he was required to act in accordance with his official duties.

[17] There is a short and decisive answer to Mr Mansfield's submission: it is contrary to the plain words of s 105(2). Its acceptance would require us to read a significant gloss on the meaning unequivocally conveyed by the statutory text. The purpose of s 105(2) is to proscribe conduct which is intended to influence the acts or omissions of public officials performed in their official capacity; it does not require proof of the additional element of an intention to influence the official to act in a certain way, whether proper or improper. As Fitzgerald J observed, the culpable intention is limited to bringing about a certain state of affairs.[7] The underlying legislative policy does not mandate an inquiry into motives or consequential events. The nature of the influence is relevant only to sentence.

[18] Mr Mansfield's argument also has an element of unreality when considered within its statutory context. He accepts that Mr Borlase corruptly gave bribes to both officials. The concepts of corruption and bribery have perjorative connotations, suggesting impropriety. However, in its statutory context, as Mr Dickey observes, the word "bribe" is value-neutral: it is defined by s 99 as meaning "any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect".

[19] It is the word "corruptly" which introduces the specific element of impropriety. Corruption is established by evidence of the payment of a financial benefit knowing that its receipt is fundamentally inconsistent with the public official's duties. It does not require proof of dishonesty but of a conscious recognition by both the payer and recipient that the benefits are being provided in connection with the official's duties.[8] Fitzgerald J found this element was made out against Messrs Borlase and Noone. The payments were made in circumstances

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7 Reasons, above n 1, at [123] (emphasis removed).

8 *Field v R* [2011] NZSC 129, [2012] 3 NZLR 1 at [66].

where both parties knew the remuneration package provided by the public authority, comprising the employee's salary and related benefits, was to constitute the official's sole source of financial recompense for performing his duties. The element of corruption existed in this case in the additional payments made by a third party according to bogus contractual arrangements designed to disguise their true nature. Payment by this mechanism demonstrates that both knew receipt of the financial benefits was fundamentally inconsistent with Mr Noone's duties. That fact is conclusive evidence that both parties acted corruptly.

[20] Proof of the element of corruption becomes decisive in establishing the offence. When viewed in conceptual terms, the actus reus of the offence is the corrupt payment and receipt of the financial benefits, and the mens rea is the intent to influence the recipient in performing his or her official duties. As with many criminal offences, proof of the first requirement will provide a sound if not decisive evidential foundation for proof of the second. The offence is complete on proof of the corrupt payment and receipt with the requisite intent to influence. It is implicit in the arrangement that the payer's intention is to influence the recipient to act improperly. Otherwise, it might be rhetorically asked, what would be the purpose of the payments? A businessman acting rationally does not pay a public official to act properly where there is no suggestion he is acting otherwise. And, as we have stated, our law does not require proof of any additional element. All it requires is proof of an intent to influence. Both men knew the financial benefits were provided in connection with Mr Noone's official duties. The Judge's finding to that effect is decisive.[9]

[21] Mr Mansfield does not suggest the Crown is required to go further and prove the existence of a causal link between the bribery and a tangible benefit to Projenz. It is thus unnecessary for us to indulge in hypothetical or "but for" reasoning.

[22] Mr Mansfield seeks support from the provisions of the Bribery Act 2010 (UK). The English legislation does not require proof of corruption but does require proof of an improper purpose and improper act by the particular official.

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9 Reasons, above n 1, at [611] and [614].

The differently worded English statutory provisions are of no assistance with construing s 105.[10]

[23] Mr Mansfield also relies upon *R v Hutt.*[11] The defendant applied to be discharged before trial on the ground that the allegedly corrupt agreement postdated an official's recommendation that a lease be awarded. Mallon J was satisfied there was an evidential basis for the charge because the financial benefit — payment of $160,000 — was provided on the understanding that the official would award a lease to the payer no matter what occurred. The Judge made a passing reference to a causal connection between payment and performance of the official acts.[12] We do not read the judgment in *Hutt*, given in a very different context, as of assistance here.

[24] It follows that Mr Borlase's challenge to his convictions must fail.

Sentence

High Court

[25] Conviction for an offence against s 105 carries a maximum penalty of seven years' imprisonment. Offending of this nature and scale in New Zealand is rare. There was little by way of sentencing precedent for Fitzgerald J to follow. Mr George's sentence provided the most immediate guidance.[13] Lang J adopted a starting point of three years and nine months' imprisonment. After allowing for a number of mitigating factors, the Judge sentenced Mr George to 10 months' home detention.

[26] Some assistance was also available from the sentence imposed in *Field v R* where a Member of Parliament received $50,000 worth of free tiling services in connection with an official role.[14] This Court approved a starting point of five years was adopted. Sentences imposed in what might be called "outright" bribery cases, where the provision of financial benefits and improper acts are directly connected,

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10 *Field v R*, above n 8, at [36].
11 *R v Hutt* [2012] NZHC 593.
12 At [48].
13 *R v George*, above n 3.
14 *R v Field* HC Auckland CRI-2007-092-18132, 6 October 2009; aff'd [2010] NZCA 556, [2011] 1 NZLR 784.

were also considered by Fitzgerald J but they were of limited assistance.[15] Finally, there was *R v Palmer*, an insider-trading case where an official acquired a one-off personal benefit of $215,000 due to information obtained through his role.[16] This Court endorsed a starting point of three to four years' imprisonment for the comparable offence of corrupt use of official information under s 105A.

[27] In fixing the starting points for both men, Fitzgerald J identified these five aggravating factors: (a) the significant harm to the Council and Auckland Transport as well as the broader community in tarnishing New Zealand's international reputation as a country where public corruption is virtually non-existent; (b) the seven-year duration of the offending; (c) the nature and scale of the amounts paid; (d) the breach of trust inherent in the parties taking advantage of a close and lengthy relationship between Projenz and the local authorities; and (e) the element of deception.[17]

[28] The Judge was satisfied that the culpability of both men was serious. Taking into account all the relevant aggravating factors, she adopted a starting point of five years for Mr Borlase for his bribery of Mr Noone, uplifted by nine months to take into account his bribery of Mr George. A modest discount of three months was allowed for Mr Borlase's previous good character and personal circumstances. The end sentence was five years and six months' imprisonment.[18]

[29] The Judge was satisfied that Mr Noone's culpability was greater than that of Mr Borlase.[19] She was influenced by Mr Noone's gross breaches of trust and his constant failures to disclose his very significant benefit received from Mr Borlase during the Infrastructure One and TSS tender processes. She fixed a starting point of five years and six months, then allowed six months for good character, remorse and insight. The end sentence was five years' imprisonment.[20]

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15 *R v Nua* [2001] 3 NZLR 483 (CA); and *R v Hutt* HC Wellington CRI-2011-085-4011, 15 June 2012.
16 *R v Palmer* CA332/03, 31 March 2004.
17 Sentencing notes, above n 2, at [34]–[54].
18 At [84].
19 At [86]–[89].
20 At [95].

Starting points

[30] Both appellants focus their primary challenges on the starting points. Two main grounds emerged. The first was advanced by Mr Lance for Mr Noone, supported by Mr Mansfield. He submits the sentences were wrong in principle. He says the circumstances did not warrant imposition of terms of imprisonment at the upper end of the sentencing scale, near the maximum of seven years. Sentences in that order are reserved for offending of the worst type. This offending falls well short of that characterisation.

[31] Mr Lance's argument may have had traction if each man had committed a single offence. But a different picture emerges where multiple offences were committed over a prolonged period. Mr Borlase was convicted on eight separate charges relating to provision of payments and benefits of two different public officials; Mr Noone was convicted of six. While each offence may not be among the most serious of its type, the cumulative pattern demonstrates criminality on a serious scale. This argument must fail.

[32] Mr Mansfield advances the second major challenge. He says the appropriate starting point was four years' imprisonment, to be fixed by inquiring into what Mr Borlase intended to receive from the payments, not by what he actually paid. His culpability must be driven by what he was seeking — to improve client relationships. He paid significant amounts but there is no evidence of any direct benefit received in return. Projenz won tenders on its merits, and was a very proficient contractor.

[33] Mr Mansfield's argument mischaracterises the evil towards which s 105 is directed. We repeat that its apparent purpose is to proscribe unlawful payments to public officials with the requisite intent to influence regardless of the asserted purpose or evidence of a corresponding financial gain. As noted, knowing payment and receipt of benefits in connection with acts done in an official capacity are fundamentally inconsistent with performance of those functions. Such practices have a tendency to promote a culture of officials working under the expectation of

similar benefits in the future, and among the public of not receiving assistance without provision of them. This is what constitutes corruption.

[34] Mr Mansfield postulates a hierarchy of corruption. He places Mr Borlase's offending at the lowest level of culpability, referring to his aspirational desire to influence Messrs Noone and George with no requirement of quid pro quo. He characterises the payments as considerably less serious than outright bribes because there was a bona fide contractual relationship and the lines between legitimate marketing and illegal gratuities simply became blurred. He seeks support from sentences imposed in the United Kingdom, Australia and Canada for offending under their equivalent corruption provisions.

[35] We cannot accept that submission, which flies in the face of the factual findings made by Fitzgerald J. Mr Borlase's offending went much further than the mere provision of goods and services as part of a relationship management or marketing exercise. As the Judge found, this was generic and systemic corruption with a tendency to undermine confidence in the administration of public affairs.[21] The repetitive payment of money and other benefits manifested a sustained pattern of dishonesty, masked by sham consultancy arrangements. If Parliament's purpose was to punish for the separate element of outright bribery — that is, where there is evidence of a direct relationship between a specific payment and a corresponding financial advantage to the payer — it might have provided for a different offence with a higher range of penalties. That, however, assumes outright bribery will always be a greater evil than long-term investment in the corruption of the public service to one's commercial advantage. There is no reason to suppose that is so.

[36] In any event, the appropriate inquiry is into what benefit Mr Borlase believed he was deriving from these corrupt arrangements. Our earlier comments apply. It is trite that an astute businessman would not provide financial benefits on this scale unless he believed he was enjoying an appropriate return. Messrs Noone and George might not have participated in or exercised any direct influence over the tender evaluation process. But their unstated objective while serving on Projenz's payroll must have been to foster and maintain an environment of goodwill with all staff,

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21 At [72].

creating a particularly favourable climate within the local authority for consideration of the company's tenders. This advantage was inestimable. Both men were also in a position to provide Mr Borlase with confidential information. Whether that was provided is not the issue. Our point is that Mr Borlase obviously saw real value in these corrupt arrangements.

[37] Mr Dickey also makes the point that Projenz's business would have been ruined if the arrangements had been disclosed to the Council or Auckland Transport or any other local authority. He produced an abbreviated summary of the company's financial statements disclosing an increase in annual gross income from these projects from $1.168 million in 2006 to $8.196 million in 2012. Over that same period its annual profit margins rose from 3 per cent to 46 per cent, from $36,271 to $3.783 million. These benefits were real and substantial.

[38] Something was made of the Judge's rejection of the Crown's submission that Mr Borlase was more culpable than Mr Noone. The ultimate difference of six months in Mr Borlase's favour is marginal. In our judgment there was little to distinguish between them. But ultimately we are not satisfied that the Judge erred. She had the unique benefit of hearing and evaluating all the relevant evidence over a lengthy trial. The starting points adopted were well within range.

Mitigation

[39] Both Messrs Mansfield and Lance assert an error by the Judge in failing to make greater allowances for personal mitigating factors. Mr Borlase was allowed a discount of three months for his previous good character. Mr Mansfield submits Mr Borlase's loss of professional standing in the community and previous good character warranted further reductions. He also refers to Mr Borlase's election not to put the prosecutor to proof relating to payment of many invoices, thereby reducing the cost and time of trial and warranting a discount.[22] We reject these submissions. Mr Borlase was fortunate to obtain any allowance for good character where his

[22] Sentencing Act 2002, s 9(2)(fa).

offending was prolonged and premeditated, which often dispels any concession to be gained by reason of a previously unblemished record.[23]

[40] The Judge allowed Mr Noone a six-month discount for good character, remorse and insight into offending. In Mr Lance's submission a nine-month allowance would have better reflected the relevant mitigating factors. We disagree. Mr Noone may have been fortunate indeed to secure a discrete discount for remorse.

[41] We are not satisfied that either sentence reflected an error or was manifestly excessive.

Result

[42] Mr Borlase's appeal against conviction is dismissed.

[43] Both appeals against sentence are dismissed.

Solicitors:
Crown Solicitor, Auckland for Respondent

[23] *R v Zhang* (2004) 20 CRNZ 915 (CA) at [26]. See also *King v R* [2015] NZCA 475 at [29]–[32] where persistent sexual offending over an 11-year period disqualified the appellant from a discount for previous good character.