CA NO. 2/16

IN THE COURT OF APPEAL OF THE COOK ISLANDS
HELD AT RAROTONGA

BETWEEN TEINAKORE BISHOP of Aitutaki Cook Islands

Appellant

AND: THE CROWN

Respondent

Court:	Barker JA (presiding) Fisher JA Paterson JA
Hearing:	15, 16 and 17 November 2016
Counsel:	R E Harrison QC and B Mason for the appellant Solicitor-General (D James) and SJ Mount for the respondent
Judgment:	6 December 2016

JUDGMENT OF THE COURT

Solicitors:
Appellant: Mason PC, Parekura Place, Avarua, Rarotonga
Respondent: Crown Law Office, PO Box 494, Rarotonga

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Introduction

[1] On 20 July 2016 the appellant was found guilty in the High Court by a jury on a charge of corruptly accepting or obtaining a bribe as a Minister of the Crown. On 25 August 2016 he was sentenced to imprisonment for two years and four months. He appeals to this Court against conviction and sentence.

The facts

[2] The appellant was the Minister of Marine Resources in the Cook Islands Government. In that capacity he issued foreign fishing licences to offshore fishing companies. His powers were derived from s 35(1) of the Marine Resources Act 2005.

[3] A Chinese group of companies collectively referred to here as "Luen Thai" has fishing and seafood subsidiaries operating throughout the Asia-Pacific region. One of its subsidiaries, referred to here as "Huanan", operated in the territorial waters of the Cook Islands. In his role as Minister the appellant issued 18 foreign fishing vessel licences to Huanan. In the process the appellant came to know Luen Thai's Chief Operating Officer, Mr San Chou.

[4] The appellant and his family ("the Bishops") wished to combine with a friend, Mr Thomas Koteka, to purchase Samade Resort on the island of Aitutaki for NZ$1 million. Mr Tony Manarangi was the solicitor for the joint venture and each of its participants. They later incorporated a company, Aitutaki Villages Limited, to effect the purchase.

[5] The appellant and Mr Koteka faced two challenges. The first was that a New Zealand couple, Mr and Mrs Worden, had already agreed to buy the resort. That couple's purchase was subject to approval by the Business, Tourism and Investment Board ("BTIB"). The BTIB would give preference to a Cook Islands purchaser if one could be found. The appellant and Mr Worden made representations to the BTIB. The BTIB's decision of 22 March 2013 was as follows:

> 1. Teina Bishop is given 30 days from Monday 25 March 2013 to proceed and finalise sale and purchase of the property.
> 2. The Board will review the matter at its next meeting on 25 April 2013.

3. If the purchase by Teina Bishop cannot happen by the 25th of April then the Worden's will have the opportunity to settle the purchase.

[6] The appellant and Mr Koteka therefore had until 25 April (later extended to 26 April due to a public holiday) to finalise the purchase. If they could not meet that deadline the opportunity to buy would revert to Mr and Mrs Worden.

[7] The second challenge was to find the money. The plan was to borrow most of the funds from one of the major banks. The Bishops could offer their home and other assets as security. This would cover the principal finance. But a bank could not be expected to fund the whole purchase. There had to be a cash contribution from the proprietors. The appellant could raise only NZ$50,000 in cash and Mr Koteka none at all. The rest would have to come from secondary finance from someone prepared lend to either or both of the shareholders.

[8] For the secondary finance, the appellant approached various sources without success. He also asked Mr Chou of Luen Thai. Luen Thai agreed to advance the money in principle.

[9] For the principal finance, the appellant and Mr Manarangi initially approached ANZ bank. Mr Manarangi explained to the ANZ representative, Mr Dennis, that the secondary finance was likely to come from Luen Thai and would take the form of a loan to Mr Koteka. Mr Dennis saw two difficulties. One was that ANZ would require a more substantial cash equity from the proprietors. The other was that the bank had a policy that it would not to lend where the customer might have a conflict of interest. In his evidence Mr Manarangi conceded that he took this to be a reference to a conflict between the appellant's role as a Minister granting licences to Luen Thai and his interest in purchasing the resort using Luen Thai funds.

[10] Walking back from the ANZ bank, the appellant asked Mr Manarangi whether Mr Manarangi thought that he was breaking the law. Mr Manarangi replied that given that the loan would be to Mr Koteka, and would have to be on commercial terms, he did not see anything illegal about it.

[11] After the unpromising response from ANZ, the appellant and Mr Manarangi approached Westpac. Westpac was more accommodating. On 22 April 2013 it agreed to provide the principal finance at 11%, the loan being secured over the Bishop family home and their other assets.

[12] The appellant and Mr Koteka were still short of the funds required to complete the purchase. Other possible sources were exhausted. The appellant went back to Mr Chou of Luen Thai. While Luen Thai had supported the loan in principle, it needed time to discuss the details and obtain a commitment from the relevant board of directors. On 24 April 2013, two days before the BTIB deadline was due to expire, the appellant signed renewals for three of the HuaNan fishing licences.

[13] By 25 April 2013 the appellant was concerned that time was running out. He called Mr Chou by Skype. The exchange included the following:

> Mr Chou: "I still have a conference call meeting with my board and our lawyer. They are very worry [sic] about opposition can cause this incident to attack you and HuaNan in the future. I'll try my best to convince them and will advise the outcome later."
>
> Mr Bishop: "That is why the loan is for Thomas [Thomas Koteka] even though it is the strength of our business that will secure and pay for it. It is also why we only want now $300,000 instead of half a million. We have already spread the word that the bank is giving us 60 per cent of the funding and Ann and I through our saving is putting up $100,000 cash and Thomas is to put in $100,000…"

[14] On the day of the deadline, 26 April 2016, Mr Chou emailed the appellant to confirm the loan, stating:

> After long discussion finally able to receive board's approval. But legal advisor do suggest NOT use HuaNan's name to loan the money to you.

[15] As those exchanges noted, neither the appellant nor HuaNan were to be named as parties to the advance. In the transaction that followed, Luen Thai used another of its subsidiaries, Century Finance Ltd, as the lender and the borrower was shown as Mr Koteka. We accept that the appellant always intended that the borrower would be Mr Koteka alone.

[16] Although Luen Thai was prepared to advance US$300,000, only US$256,000 was called for and advanced. Century Finance made the payment to Mr Manarangi on 10 May 2013. Mr Manarangi credited it to his trust account in the name of Mr Koteka. It is common ground that that was the date of the loan advance. At that date there was still no loan agreement or security in existence.

[17] The purchase of the Samade Resort was settled on 10 July 2013. The final sources of the NZ$1 million purchase price were NZ$700,000 from Westpac, NZ$250,000 from Century Finance and NZ$50,000 from the Bishops. The excess in the Century Finance advance was later repaid to Century Finance.

[18] On 7 August 2013 the police executed a search warrant at the Ministry of Marine Resources. On 28 August 2013 the police asked Mr Manarangi to provide documents to assist in the investigation. At that stage there was still no loan agreement for the Century Finance advance.

[19] On 14 November 2013 a lawyer acting for Century Finance sent Mr Manarangi a draft loan agreement for execution. It showed Mr Koteka and the appellant as borrowers. Mr Manarangi asked that the appellant's name be deleted in the various places where it appeared in the draft. This was agreed to and all references to the appellant were deleted. Mr Koteka signed the final loan agreement on 23 November 2013. It provided for interest at 7.56% and security by way of first mortgage over what was thought to be Mr Koteka's leasehold property on the island of Atui. In the event it turned out that Mr Koteka did not have the required leasehold interest and no security was ever provided.

High Court Proceedings

[20] The Crown charged the appellant with corruptly accepting or obtaining a bribe, namely US$256,745, from Century Finance Co Ltd, a subsidiary of the Luen Thai Group of companies, contrary to s 113(1) of the Crimes Act 1969. The prosecution case was that the appellant had corruptly accepted or obtained a bribe in the form of a benefit for himself or Mr Koteka in respect of acts previously done by him in his capacity as Minister, namely the issue of 18 foreign fishing vessel licences to the Luen Thai Group.

[21] A jury trial followed from 4 to 20 July 2016. The Crown led evidence from various witnesses and documents to support the facts outlined above. Against the objections of the defence, the Crown was also permitted to lead evidence from a New Zealand Serious Fraud Office forensic accountant, Ms Pettifer, who took the jury through the sequence of events by reference to the documentary exhibits. Also against defence objections the Crown was permitted to lead evidence suggesting that the appellant's conduct contravened the Cabinet Manual and Standing Orders of Parliament and that the appellant had failed to comply with the Civil List Act requirement that he declare his financial interests.

[22] The defence led evidence from the appellant's solicitor, Mr Manarangi, and from Mr Koteka. Their evidence was consistent with the material facts outlined above. The appellant did not give evidence.

[23] At the conclusion of the trial the Judge provided the jury with a document described as a "Question Trail". As this formed the framework for both his summing up and the issues argued in this Court we set it out in full:

> Elements of the Charge
>
> The prosecution has to prove the elements (ingredients) of the charge which are, that at the relevant time:
>
> 1. The defendant was a Minister of the Crown;
> 2. He accepted or obtained a bribe for himself or someone else;
> 3. Accepting the bribe was in respect of an act done by him in his capacity as a Minister; and
> 4. When he accepted the bribe he did so corruptly i.e. deliberately, knowing or believing it was in connection with assistance given by him in his capacity as a Minister.
>
> Applied to this case
>
> That means that for this case, the prosecution must prove beyond reasonable doubt each of these things:
>
> 1. The defendant was the Minister of Marine Resources between 14 October 2011 and 10 July 2013;
> 2. Between those dates the defendant issued the fishing licences set out in the schedule to the information;
> 3. On 10 May 2013 Century Finance Ltd advanced USD$256,745.00 to enable the purchase of Samade Resort by Aitutaki Village Limited to proceed;
> 4. On 10 May 2013 the defendant was a shareholder and director of Aitutaki Village Limited;
> 5. The Defendant knew the loan was advanced;
> 6. The loan advance resulted in a direct or indirect benefit to the defendant; and
> 7. The defendant knew or believed that he was getting that benefit because he had granted the fishing licences.
>
> Not in dispute:
>
> 1. The defendant was the Minister of Marine Resources between 14 October 2011 and 10 July 2013.
> 2. The defendant issued the licences on the dates set out in the information.
> 3. The defendant was a shareholder and director of Aitutaki Resort Limited on 10 May 2013.
> 4. A loan of USD$256,745.00 was made by Century Finance Limited on 10 May 2013.

5. Century Finance Limited was a subsidiary company of the Luen Thai Group of companies.
6. The defendant knew the loan was made.

Questions to be answered to reach a verdict

Note: On all questions, the burden of proof beyond reasonable doubt lies on the Prosecution.

1. Are you sure Mr Bishop was the Minister of Marine resources between 14 October 2011 and 10 July 2013? [not in dispute]

   If no find the defendant not guilty and go no further

   If yes go to question 2

2. Are you sure that between14 October 2011 and 10 July 2013 the defendant issued the fishing licences set out in the schedule to the information? [not in dispute]

   If no find the defendant not guilty and go no further

   If yes go to question 3

3. Are you sure on 10 May 2103 Century Finance Ltd advanced USD$256,745.00? [not in dispute]

   If no find the defendant not guilty and go no further

   If yes go to question 4

4. Are you sure on 10 May 2013 the Defendant was a shareholder and director of Aitutaki Village Limited? [not in dispute]

   If no find the defendant not guilty and go no further

   If yes go to question 5

5. Are you sure the deft knew the loan was advanced? [not in dispute]

   If no find the defendant not guilty and go no further

   If yes go to question 6

6. Are you sure the loan advance resulted in either a direct or indirect benefit to the defendant?

   If no find the defendant not guilty and go no further

   If yes go to question 7

7. Are you sure the defendant knew or believed that he was getting that benefit, because he had granted the foreign fishing licences to Luen Thai?

   If no find the defendant not guilty

   If yes find the defendant guilty

[24] In addition to more general directions which are not challenged in this Court, the Judge's summing up was essentially an explanation of the Question Trail.

[25] After a retirement of a little over four hours, the jury returned with a guilty verdict. The appellant was convicted. On 25 August 2016 he was sentenced to imprisonment for two years and four months.

THE APPEAL AGAINST CONVICTION

[26] In this Court the appellant advanced multiple grounds for his appeal against conviction. It will be convenient to traverse them under the following headings:

1. Actual or apparent bias of jury foreman.
2. Misdirection as to "corruptly".
3. Misdirection as to "bribe".
4. Misdirection as to necessary connection.
5. Misdirection as to timing of knowledge.
6. Admissibility of prosecution summary evidence.
7. Misdirection and admissibility with respect to ethical conduct evidence.
8. Substantial miscarriage of justice?

(1) Actual or apparent bias of jury foreman

[27] This ground of appeal alleges bias or apparent bias on the part of the foreman of the jury. The ground is based on an allegation that by his utterances to various people after the trial had begun and shortly after the jury gave its verdict. The appellant claimed that the chosen foreman was motivated by ill-will and bias against the appellant sufficient to vitiate the verdict of the jury on the grounds of actual bias (or alternatively, apparent bias) and/or to breach the appellant's Constitutional rights to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal and/or to a fair hearing in accordance with the principles of fundamental justice.

[28] There are three separate occasions on which the foreman is said to have made statements which indicate that he was biased against the appellant, namely:

(a) Statements made by the foreman to a co-employee after the end of the first day of the hearing on 4 July 2016;

(b) Statements made while at Trader Jack's Bar during the evening of 6 July 2016. Although the trial began on 4 July 2016, the Judge's opening comments to the jury were not made until 6 July and by the end of the Court day on 6 July, the trial had proceeded as far as the Crown counsel having completed his opening address; and

(c) Statements made at the Fishing Club during the evening of 20 July 2016, the jury having delivered its verdict at about 4pm on that day.

[29] This Court gave the appellant leave to adduce evidence before it in support of these allegations. As a result, eight witnesses for the appellant and seven for the Crown swore affidavits and most were cross-examined. Before considering and analysing the evidence, it is appropriate to state the law that is applicable to allegations of misconduct against a juror. It appears as though this issue has not previously been considered by an Appellate Court in the Cook Islands as neither counsel cited Cook Island judgments on the issue. Under Part XXIV of the Cook Islands Act 1915, English common law applies. Counsel do not differ in their submissions on the applicable law.

[30] An accused has an absolute and fundamental right to be tried before an impartial tribunal. This right is enshrined in the Cook Islands Constitution in Article 65(1)(e) which recognises that a right or freedom which cannot be abrogated, abridged or infringed by statute is the right a person has to:

> ... be presumed innocent until he is proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[31] The appellant in this case alleges both actual bias and apparent bias. It is only necessary to prove apparent bias by a juror to establish a miscarriage of justice. If the appellant was deprived of one unbiased mind, a miscarriage of justice occurs: see *R v Tinkler* [1985] 1 NZLR 330 (CA).

[32] In a case such as the present where there is a conflict in the evidence given by witnesses called by the Crown who included the foreman and the witnesses supporting the appellant, it is necessary for the Court to determine objectively whether the particular allegations against the foreman are established and if so, whether that conduct gives rise to a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the foreman did not perform his task impartially. The apprehension or suspicion referred to must be based on reasonable grounds. These propositions are well grounded in case law and were not disputed by either counsel. Cases which recognise this principle include *R v Bates* [1985] 1 NZLR 326 (CA); *Muir v Commissioner of Inland Revenue* [2007] 3 NZLR 495 and *R v Tainui* [2008] NZCA 119.

[33] Counsel also cited the House of Lords case of *R v Mirza* [2004] UKHL 2. Lord Steyn noted at paragraph 32 that there is a strong presumption that a jury is impartial and also noted that if there are substantial reasons to doubt the impartiality of the jury or a member of it, the matter must be examined in order to determine whether there has been a breach of this fundamental guarantee.

[34] The first incident occurred on 4 July 2016 after the end of the first day of the hearing. On that day the jury was chosen, sworn in and elected its foreman. The jury was then discharged for the day so that legal issues could be determined by the Judge. Later in the day the foreman went to his workplace and had a discussion with the manager there. The manager's evidence was that the foreman told him that he did not like the appellant. The manager could not recall the exact words but it was not something as formal as "I don't like him", it was something along the lines of "that bastard" or a similar type of word. When cross-examined at the hearing, the manager could not recall the exact words used.

[35] The manager's evidence was that he "must have told the owner of the business about the foreman's uncomplimentary remarks about the appellant" as he had seen an email from the owner of the business to the appellant's solicitor dated 9 August 2016 reporting on what the foreman had said to the manager. This email was not produced in evidence but presumably did not refer to specific comments. The affidavit sworn by the manager and filed in the Court was prepared by the private investigator acting for the appellant (the investigator).

[36] The investigator took notes of his interview with this manager but these notes had not been available to the Crown at the time the manager gave evidence so counsel did not have an opportunity to cross-examine the manager on them. The notes confirm in substance what was said in evidence but did not precisely state the date of the discussion between the foreman and the manager other than noting it was early in the trial.

[37] The foreman admitted that he spoke to the manager on 4 July 2016 as well as on an earlier date when he received his jury summons. He denied making the statements which the manager alleges he made and said he never uses the word "bastard".

[38] This Court accepts that there was a discussion after the foreman had been elected foreman and that the foreman made uncomplimentary remarks about the appellant, although he cannot now, and could not about a month after the conversation, recall the actual words spoken. We do not see that this in itself satisfies the test that the comments give a reasonable apprehension or suspicion that the foreman was not impartial. The appellant was a prominent politician in a relatively small community which has been politically active in the last few years. Many of its residents will have used words either favourable or unfavourable about the leading politicians no matter what party they may represent. It does not follow that a person with such views when properly directed on the jury's responsibilities and duties, as this jury was, cannot apply impartially his or her mind to consideration of the verdict even if he disagrees with that person's political views.

[39] The second occasion on which it is alleged the foreman showed that he was not impartial towards the appellant occurred at Trader Jack's after the Court had concluded for the day on 6 July 2016 by which time counsel for the Crown had given his opening address. Counsel for the appellant did not give his opening address on that day.

[40] Evidence of what was allegedly said was given by two witnesses. One was a former executive member of the CIP and closely related to a leading member of that party. His evidence was that he was drinking at Traders Jack with friends when the foreman arrived there. He asked the foreman how the trial was going and the reply was "he's going down". When asked "why", the foreman replied, "Ah he's guilty".

[41] The second witness said he heard the first witness and the foreman's conversation although he was not part of it. He heard the foreman say "he's guilty" but did not hear the other alleged comments. The foreman denied that he made the statements alleged. This

Court does not place weight on the evidence given by these two witnesses for two reasons. First, the first witness obviously has had a close political relationship with the appellant and did not given his evidence in a convincing manner. Secondly, the second witness, who appeared to the Court to be a more credible witness, gave his initial statement in early September after he was approached by the investigator and after he had discussed the matter with the first witness at a rugby match. By his own admission, he was not part of the conversation and only heard part of it. We do not find the evidence of this alleged incident persuasive.

[42] The substantive evidence called to support this ground of appeal was given by the investigator who was employed by the appellant. It was suggested by the Crown that this investigator's conduct was inappropriate and that he should not have approached the foreman and spoken to him as he did. This suggestion will be referred to below.

[43] The investigator's evidence was that on the evening of the verdict, he initially went to Traders Jack but then went to the Fishing Club where he is a social member. He said he went to an outside table and sat down next to a lady he knew and took the only empty chair at the table which was next to her. It was only after he sat down that he realised he was also sitting next to the foreman. He spoke to the foreman but not about the trial. After a while the foreman made a comment which shocked the investigator. It was "Well I've fixed that Teina didn't I? And now I am going to be the next MP for Aitutaki". The investigator said that the foreman thrust his chest out and pointed back to himself to indicate his point. The foreman then said, "And a good job too he needed fixing because I don't like him. He is a rich man on the island and he is the one that gets all the attention, I know because my brother works for him."

[44] When the investigator asked the foreman which party he supported, the foreman replied, "I am a CIP and proud of it. That Teina was CIP but he jumped ship so that's why I don't like him and that's why I am going to be the next CIP for Aitutaki." It was the investigator's evidence that the foreman became more intoxicated and became louder and more belligerent. He told the investigator that he knew the appellant was guilty right from the start and he had to make the jury understand that. The following morning, the investigator went to the appellant's solicitor's office to report the incident. A file note dated 8.20am on 21 July 2016 noted that he briefed the solicitor on the foreman's statements to him and others at the Fishing Club. It includes:

Boasting, doesn't like Teina. CIP – stand in bi-election in Aitutaki.

[45] There is no mention in the file note of the other statements which he says the foreman made and which he included in his evidence. His evidence was that he was not instructed by the appellant to investigate the foreman until after this incident.

[46] The foreman swore an affidavit and was cross-examined on it. He acknowledged talking briefly about the trial to a friend at the club that night and that friend in separate evidence confirmed the conversation. The friend said he asked if all went well at the trial and the foreman's response was that the trial was hard but at the end the verdict was unanimous and that the jury had been helped by the advice and guidelines given by the judge when considering the evidence. The foreman denied discussing the trial with any other person that night.

[47] None of the other witnesses called on behalf of the appellant gave evidence of hearing the comments that were allegedly made by the foreman. One witness was the Chief Electoral Officer in the office of the leader of the Opposition. He referred to a night during the trial when the foreman and he were both at the Fishing Club. However, he did not hear what the foreman said. He said that he asked another patron of the club in English what the foreman was saying. That man replied in Maori "that idiot – he is boasting about the trial and that Teina is guilty". He did not know the name of that patron and the patron was obviously not called to give evidence. Little weight can be given this statement.

[48] Another witness swore an affidavit for both the Crown and the appellant. She noted that the investigator and the foreman were talking and that the investigator was questioning the foreman. She acknowledged warning the foreman not to say anything because the investigator had told her that he was the appellant's private investigator. The bar manager on duty on the evening of 20 July also gave evidence. He was able to advise when the foreman had been at the club during and after the trial as he had been asked for that information by the investigator. In his affidavit he said that as he was at the bar on the night in question he could not hear what was being said at the table at which the foreman and investigator were sitting. .

[49] The investigator had reasonably extensive notes of his interview with the bar manager. These notes confirmed that on the night of the verdict, he could not hear what was being said. The notes contained the following:

> The foreman came to me – he beckoned me. He said he was very upset about Teina's trial. He said the night before the verdict he was ready for a not guilty verdict but when he heard the judge talk about the prosecution that's when he had to follow what the judge said and he couldn't get away from that. He said that none of the jury could get away.
>
> He told me his wife was not happy with him. He also said his brother in Aitutaki would not be happy because his brother worked for Teina.

The investigator prepared the affidavit of the bar manager but did not include this statement in it.

[50] The evidence called on behalf of the foreman included the evidence from his friend noted in paragraph 46 above. This was to the effect that during the trial he had asked the foreman how the trial was going and the foreman had told him that he had been instructed by the judge not to discuss the case while the trial was on. He also spoke to the foreman during the evening after the verdict had been given when he made the statement noted in paragraph 46 above. This witness was subsequently approached by the investigator who was seeking information of his discussion with the foreman on the night of the verdict. The witness said he gave the same information which he included in his Court affidavits and the investigator indicated he would get him to sign an affidavit but did not do so. These statements as recorded in the investigator's notebook did not suggest the foreman made statements which suggested he was not impartial. Another witness who was at the same table as the foreman and the investigator on the night of the verdict gave evidence that he talked with the foreman about politics in their village. At one stage during the conversation the foreman asked this friend to stand as the CIP candidate for Tupapa. This friend said the foreman did not say that he wished to stand either for Tupapa or Aitutaki or for any other Constituency. He said they did not talk about the appellant's case nor did the foreman mention anything about the case to him. They were talking in Maori. The foreman's wife also gave evidence. She confirmed that her husband had talked politics with reference to Tupapa but she did not hear her husband say anything about going to be the MP for Aitutaki. She told her husband to shut up because he was loud. There was also evidence that the foreman was never in contention for nor did he offer himself as a candidate for the Aitutaki electorate.

[51] The Crown suggested that the investigator had gone to the Fishing Club on the night of the verdict in an endeavour to trap the foreman into making statements which would assist the appellant on an appeal. It was suggested he was not a regular member of the club, did not attend regularly in the evenings, and had only recently renewed his subscription after having let it lapse several months earlier. He approached the barman to find out when the foreman had been in the club during the trial period. Because of these factors his evidence should not be given weight.

[52] This Court is prepared to give the investigator the benefit of the doubt in respect of some matters. One such matter is whether the investigator was endeavouring wrongly to intrude upon the privacy of a juror after trial. There were several fortuitous circumstances which led to the foreman seating himself alongside the investigator on the night after the verdict was given. However, it is unnecessary to reach a conclusion on whether this was improper conduct. However, there are several matters which are relevant in considering the investigator's evidence.

[53] First, the investigator was extensively involved in the appellant's defence at the trial. His notebook indicates that he spent approximately 200 hours on assisting the appellant in conducting interviews with potential witnesses, preparing witness statements, reviewing exhibits and discussing relevant matters with the appellant's solicitor. He was intimately involved in the conduct of the trial and in its preparation and cannot be said to be an independent witness.

[54] Secondly, he prepared the affidavits in support of this ground of appeal. In doing so he withheld important relevant evidence. One of those affidavits was from the bar manager. This evidence not only gave details of the foreman's visit to the club but also was designed to suggest the foreman was on the evening after the verdict being told by a friend to be careful of what was said. The intent of this evidence was presumably to suggest that the foreman was talking out of turn. The investigator had interviewed that friend who gave the evidence referred to in paragraph 46 above. He said that the investigator had come to see him after the trial and he thought he had told the investigator what he said in his affidavit to this Court. In fact, he did make those statements to the investigator as this is confirmed in the investigator's notebook which was produced at the hearing. This omission is surprising. Further, the bar manager who gave this evidence presumably to undermine what the friend may say also told the investigator of the foreman's comments to him noted in paragraph 49 above. The failure

of the investigator to include these comments in an affidavit aimed to undermine the foreman's position raises doubts as to the objectivity of the investigator and the evidence he sought to adduce.

[55] Thirdly, the evidence was that much of the discussion during the evening of 20 July 2016 was in Maori, a language not understood by the investigator. For this reason it may be that the political discussion about candidates that night which conflicts with other evidence as to what was said about the political scene that night was misunderstood by the investigator.

[56] Finally, both of the key participants in the conversation at the Fishing Club had consumed substantial amounts of alcohol (the foreman twelve "stubbies" and the investigator four bottles) and this reduces both the significance of anything which was said and the capacity of the participants to subsequently remember with accuracy what was said.

[57] We have concluded that for the reasons stated in the previous paragraph we cannot rely upon the evidence of the investigator to objectively establish that the foreman made statements which indicated actual or apparent bias. The appellant has not discharged the onus on him as the evidence does not displace the strong presumption of jury impartiality. As the alleged facts have not been established objectively it is not necessary to consider whether there is a reasonable apprehension or suspicion that the foreman did not act impartially.

[58] This ground of appeal fails.

(2) Misdirection as to "corruptly"

[59] Section 113(1) of the Crimes Act 1969 provides:

> 113. Corruption and bribery of Minister of the Crown – (1) Every Minister of the Crown or member of the Executive Council is liable to imprisonment for a term not exceeding fourteen 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 Minister or member of the Executive Council.

[60] A key element in the offence created by s 113(1) is the word "bribe". In that regard s 110 relevantly provides:

> 110. Interpretation - In this Part of this Act, unless the context otherwise requires,-
> "Bribe" means any money, valuable consideration, office, or employment, or any benefit, whether direct or indirect;

[57] We agree with Mr Harrison that the key elements of the offence as charged can be regarded as:

a. Acceptance (or obtaining) by the appellant of a "bribe" in the form of a "benefit", whether "for himself or another person" ("the benefit element");
b. The acceptance (or obtaining) of the alleged bribe being "in respect of an act done" by him in his capacity as Minister of Marine Resources, namely the issuing of foreign fishing licences as particularised ("the necessary connection element"); and
c. So acting, "corruptly" ("the 'corruptly' element")

[58] Of the three, Mr Harrison mounted his principal challenge to the way in which the Judge had approached what Mr Harrison described as the "corruptly" element. The relevant ground of appeal was expressed as follows:

> In misdirecting the jury or in the alternative failing adequately to direct the jury as to the mental element required to be proved on the part of the appellant in relation to the charge of bribery which he faced, and in particular in directing the jury that the element of corruptly accepting or obtaining a bribe was sufficiently established if the Prosecution proved that the appellant knew or believed that he was getting the alleged bribe because he had previously granted foreign fishing licences to the Luen Thai Group.

[59] Mr Harrison submitted that to satisfy this element of the offence it would not be enough to establish the appellant's knowledge or belief that he was receiving a benefit due to the previous grant of foreign fishing licences to the Luen Thai; the Crown was required to also establish corruption in the sense of dishonesty or moral turpitude.

[60] For this submission Mr Harrison relied on several sources. One was the Shorter Oxford English Dictionary definition of "corrupt", the synonyms for which include "debased in character", "depraved" and "perverted". Another was the New Zealand High Court decision, *Broom v Police*,[1] in which Tipping J applied a similar meaning to the offence of "corruptly" bargaining for reward under s 262 of the Crimes Act 1961. Further examples

[1] [1994] 1 NZLR 680.

were some of the earlier New Zealand bribery cases traversed in *Field v The Queen.*[2] Mr Harrison accepted that Doherty J's summing up on this point reflected the approach taken by the New Zealand Supreme Court in *Field*[3] but submitted that we should decline to follow that decision.

[61] We accept Mr Mount's response that for the purpose of interpreting equivalent provisions dealing with the bribery of officials, Mr Harrison's submission is contrary to settled Commonwealth authority. The authority includes not only the New Zealand Supreme Court's decision in *Field* but also decisions in England and Canada.[4] In this context the predominant approach is not to require the fact-finder to "look for something which could be regarded as dishonest or dishonourable, or perhaps some obviously improper action on the part of the official concerned."[5] Rather, an accused will have acted "corruptly" by acting in the way described by Parliament in the relevant offence provision – whether it be to provide money to a voter on account of that voter having voted in an election, or to accept a benefit knowing it was offered because of acts done in an official capacity.

[62] The word "corruptly" is used in many different legal contexts. Each calls for its own interpretation. In this case the word "corruptly" appears in a provision aimed at corruption in public life. Most people would have little difficulty with the notion that for a Minister of the Crown to deliberately accept a personal benefit in the knowledge that it is a reward for his own prior act as a Minister is inherently corrupt. Nothing more is required to satisfy normal expectations as to the meaning of the adverb "corruptly". The need to focus on context is the reason for distinguishing the many decisions made in radically different contexts such as property offending.[6] The context here is the bribing of public officials.

[63] We conclude that the approach to this type of offence taken by the New Zealand Supreme Court in *Field* is equally applicable in the Cook Islands. The summing up of Doherty J on this point was not a misdirection. This ground of appeal fails.

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[2] [2011] 1 NZLR 748 (CA); [2012] 3 NZLR 1 (SC).
[3] *Ibid.*
[4] For which see the authorities cited in *Field v R* [2012] 3 NZLR 1 (SC) at [51] to [55].
[5] *Ibid* at [53].
[6] Hence the view taken by both courts in *Field v R* [2011] 1 NZLR 785 (CA), at [60]; [2012] 3 NZLR 1 (SC), at [51] and fn 57 that decisions such as *Broom v Police* [1994] 1 NZLR 680 are distinguishable.

(3) Misdirection as to "bribe"

[64] Doherty J directed the jury that for the purpose of establishing the "bribe" element of the offence it would be sufficient to show that the Century Finance loan advance resulted in a direct or indirect benefit to the appellant. He also explained that for this purpose benefit meant "an advantage that is more than minimal or of more than token value".

[65] Mr Harrison criticised that direction to the jury for three reasons. The first was the submission that the benefit to an accused needed to be substantial; it was not sufficient that it be merely more than minimal or of more than token value.

[66] Doherty J's exclusion of de minimis benefits reflected the New Zealand Supreme Courts' conclusion in *Field* 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" in order to avoid "criminalising activity involving unexceptional token gifts or other benefits".[7] We can find no basis for elevating the de minimus threshold to substantiality. It would entail reading into s 113 an additional requirement which is not there.

[67] Secondly, Mr Harrison submitted that the Judge's direction that the jury ignore the debit or dis-benefit side of the loan transaction was plainly wrong. His arguments in that respect focused on the commerciality of the terms of the loan to Mr Koteka.

[68] The commerciality of the terms of the loan might have been relevant if the Judge had left the jury with the possibility that the relevant benefit was to "another", namely Mr Koteka. But the way in which the Judge summed up confined the issue to direct or indirect benefit to the appellant himself, not Mr Koteka. In that context the sole question was whether the appellant received a benefit. There is no suggestion that the terms of the loan impacted adversely on the appellant. The benefit to the appellant was clearly the acquisition of the Samade resort. Without the Luen Thai loan the acquisition could not have proceeded.

[69] Thirdly, Mr Harrison submitted that a distinct mens rea requirement was required for the "bribe" element; that it was for the prosecution to show that the accused knew that he was receiving a benefit; and that if it were merely a transaction in which there was a fair exchange of values, or at least so the accused had assumed, the necessary mens rea would be lacking.

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[7] *Field v R* [2012] 3 NZLR 1 (SC), at [64]-[65].

[70] We agree that the appellant had to know that he was receiving a benefit. We have already discussed this in connection with the "corruptly" requirement. The Crown had to show that the appellant knew or believed that he was being offered a benefit because of his prior acts as a Minister. This necessarily entails knowledge on the appellant's part that he was receiving a benefit. If he had not been aware that he was receiving a benefit he could not have thought that its receipt was due to the grant of foreign fishing licences.

[71] However Mr Harrison went further in his submission that "the Prosecution had to establish intention or knowledge on the part of Mr Bishop that what was being offered and in turn accepted or obtained was intended as a bribe by Century Finance as the alleged briber". Here one would be examining the mental state of the appellant as to the mental state of a third party. We can see no justification for introducing a complication of that kind. It is not supported by either the authorities or the statute. All aspects of the requisite mens rea have already been traversed when discussing the "corruptly" ingredient of the offence. This ground of appeal fails.

(4) Misdirection as to necessary connection

[72] One of the requirements in s 113(1) is that the acceptance of the bribe must be "in respect of" the official act as Minister. We accept Mr Harrison's submission that this imports an objectively viewed connection between the bribe and the benefit (the connection actus reus) as well as the accused's knowledge or belief in that connection (the connection mens rea). We also accept that the connection actus reus involves a causal connection between the official act and the benefit. The prosecution must show that but for the official act there would have been no offer of a benefit.

[73] We have already addressed all the mens rea requirements of the offence in our discussion of the "corruptly" element. The actus reus involved in the words "in respect of" requires further discussion.

[74] The introductory portion of the Question Trail identified four elements of the charge. The third was that "the bribe was in respect of an act done by him in his capacity as a Minister". This requirement was distinguished from the fourth element which focused on the appellant's knowledge or belief in that connection. By distinguishing between the third and fourth elements, the Question Trail made it clear that when it came to the connection between

the official act and the bribe, the connection actus reus need to be proved as well as the mens rea one.

[75] Mr Harrison rightly drew attention to the fact that when the Question Trail returned to this point in posing specific questions, it failed to ask any question directed to the connection actus reus. Question 7 was "Are you sure that the defendant knew or believed that he was getting that benefit, because he had granted the foreign fishing licences to Luen Thai". At least in its express terms, the question was confined to knowledge or belief on the appellant's part; it did not require the jury to be satisfied that there was such a connection in fact.

[76] In an ideal world Question 7 would have been preceded by the question "Are you sure that the defendant was getting that benefit because he had granted the foreign fishing licences to Luen Thai?" This omission engages s 69 of the Judicature Act 1980-81. The proviso to s 69(1) provides that this Court may, notwithstanding that it is of the opinion that a point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. So the question is whether the lack of a question directed specifically to the connection actus reus could have caused a substantial miscarriage of justice.

[77] Three considerations are relevant to that possibility. First, the required connection between the official act and benefit was included at the outset of the Question Trail, albeit not repeated later.

[78] Secondly the need for an actual causal connection was at least implicit in the Judge's oral summing up. For example he said this:

> ... the prosecution is not suggesting that the defendant received a benefit for doing something he shouldn't have done, like issue the licenses. The prosecution acknowledge that this was part of his job to issue the fishing licenses but what it does say is that it is not part of his job to be rewarded over and above his salary as a Minister for granting those licenses.

[79] Thirdly, Question 7 required the prosecution to prove that the appellant knew or believed that he was getting the benefit because he had granted the foreign fishing licences. If the jury had answered that question in the affirmative, it is difficult to see how it could have entertained the possibility that the appellant was wrong, and that in fact Luen Thai had some unrelated reason for making the loan. The possibility that there could have been some other

reason was never raised in either the trial or in this Court. To have done so would have been fanciful.

[80] We are satisfied that the lack of any question directed specifically to a causal connection between the licences and the benefit could not have materially prejudiced the appellant. This ground of appeal fails.

(5) Misdirection as to timing of knowledge

[81] In his notice of appeal the appellant summarised this ground of appeal as the trial Judge's failure to:

> ... direct the jury as to the precise temporal stage in the overall sequence of events (being when the loan was actually advanced by Century Finance) when it had to be proved that the appellant possessed the requisite knowledge or other mental element of the offence charged; and/or in misdirecting or failing adequately to direct the jury as to the relevance of subsequent events to that issue and the avoidance of judging with hindsight.

[82] As to the facts, Mr Harrison submitted:

> The evidence established that the Century Finance loan was deposited into Mr Manarangi's trust account on 10 May 2013. By that time, Mr Manarangi acting for Mr Koteka had drafted a loan and security agreement (initially between Luen Thai Group company Huanan Fishery and Mr Koteka), and lawyers were engaged on both sides. The security which Mr Koteka was to provide was a mortgage over a lease of land on the Island of Atiu, which Mr Koteka then (wrongly) believed was approved and registered in his name.41 The final version of the loan agreement between Century Finance and Mr Koteka had not been executed by 10 May 2013 when the loan was advanced, nor indeed was the proposed security in place or available. The loan agreement was executed by Mr Koteka and effectively agreed and in place on 23 November 2013.
>
> Later still, unexpectedly and certainly outside of the knowledge or control of Mr Bishop, the security which it was proposed Mr Koteka would provide turned out not to be available and thus was never provided.

[83] Mr Harrison also drew attention to the fact that the Prosecution had contended that the loan should be regarded as a "soft loan" given the absence of completed loan documentation and of the agreed security.

[84] In response Mr Mount pointed out that by reference to the summing up and Question Trail:

(a) Element 3, which was not in dispute, was that on "10 May 2013 Century Finance Ltd advanced a loan to enable the purchase of Samade Resort by Aitutaki Village Ltd to proceed.

(b) Element 4, which was not in dispute, was that on 10 May 2013 the appellant was a shareholder and director of Aitutaki Village Ltd.

(c) Element 5, which was not in dispute, was that "the defendant knew the loan was advanced."

(d) Elements 6 was that "the loan advance resulted in a direct or indirect benefit to the defendant."

(e) Element 7 was that "the defendant knew or believed that he was getting that benefit because he had granted the fishing licenses (emphasis added).

The Judge further underlined to the jury in the same Question Trail document that the prosecution had to prove that "when [the appellant] accepted the [loan], he did so…knowing or believing it was in connection with assistance given by him in his capacity as Minister.

[85] In our view the Judge's repeated references to the loan advance and its date adequately identified the time at which the Crown had to prove the required mental elements of the alleged offence. We agree that subsequent delays in completing the loan documentation, and in discovering that Mr Koteka had no security to offer, were irrelevant. But it is not disputed that no loan agreement had been agreed upon or signed when the advance was made. Nor had any security been given at that date. So it was legitimate for the prosecution to describe the loan as a "soft" one in that sense as at 10 May 2013. This ground of appeal fails.

(6) Admissibility of prosecution summary evidence

[86] The appellant objected to the evidence of Ms Pettifer, a forensic accountant from the New Zealand Serious Fraud Office. Ms Pettifer took the jury through the sequence of events, and their financial implications, by reference to the voluminous documentary exhibits.

[87] Mr Harrison submits that as these documents were produced as exhibits they could speak for themselves and that there was no need for a witness to go through and explain them. He went on to make the point that at least some of Ms Pettifer's summarising evidence fell outside her expertise as an accountant.

[88] Although Mr Harrison's comments are largely correct, we would not discourage evidence of the kind given by Ms Pettifer, particularly in a jury trial. She did not misrepresent a document or stray beyond the bounds of her expertise on any issues of significance. The modern approach to expert evidence is to allow it where it is likely to be helpful to the tribunal of fact. Given the volume and complexity of the exhibits in this case, we expect that her overview would have been helpful to the jury. The evidence was therefore properly admitted. This ground of appeal fails.

(7) Admissibility and misdirection in relation to other standards evidence

[89] Over objections from the defence, the Crown was permitted to adduce oral and documentary evidence as to standards of conduct imposed by sources other than s 113 of the Crimes Act. The other standards were said to apply to the appellant's conduct in this instance, albeit for other purposes ("the other standards evidence"). The three sources were:

a. The Cabinet Manual in so far as it applied to the roles and responsibilities of Ministers of the Crown;

b. The Standing Orders of Parliament, including the Code of Conduct applicable to Ministers and Members of Parliament; and

c. The Civil List Act 2005 which required Ministers and Members of Parliament to provide annual declarations of interest.

[90] In addition the Crown led evidence to the effect that the appellant had failed to file the annual declarations required by the Civil List Act. Section s 18 of that Act requires every Member of Parliament to make an annual declaration by 31 January disclosing any financial or other interest held by him in any company, partnership or unincorporated body as at 31 December of the preceding year. Evidence was led that the appellant had failed to make any such declaration for the years 2012 and 2013, those being the years in which the Samade Resort venture was launched.

[91] In his summing up, Doherty J referred to the other standards evidence in the following terms:

> I must also say that it's not part of your job to consider whether the defendant breached any obligation under the standing orders of Parliament or the Cabinet manual, or the Civil List Act. Those are not matters for the court, they are matters for Parliament. But if you accept the defendant knew of the contents of those documents, their relevance to you is to put his actions in context of the obligations of a Minister and to help you decide whether, if you find he did receive a benefit, he was corrupt in receiving it because he knew that in doing so he was acting outside the bounds of his duty as the Minister of Marine Resources.

[92] In adducing and permitting the other standards evidence, Counsel for the Crown and Doherty J appear to have been misled by an aspect of the Court of Appeal decision in *Field*

that has since been abandoned. In defining the "corruptly" element of the offence the Court of Appeal had said this: [8]

> In our view therefore, as a matter of general principle, the sounder basis on which to put the offence relating to a member of Parliament is to recognise that it catches the corrupt acceptance of a "bribe" in connection with the performance of that member's duties as a parliamentarian. A bribe is corruptly accepted if in accepting the bribe the particular member is *knowingly outside the recognised bounds of his or her duties* (emphasis added).

[93] It is important to note that on higher appeal the Supreme Court rejected that approach. It pointed out that despite purporting to add this overlay, the Court of Appeal was content to accept 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".[9] Once the Court of Appeal equated "accepted the services in question as a reward for immigration services" with "knowingly outside the recognised bounds of his duties", the latter added nothing to the former. The Supreme Court went on to point out that in its "knowingly outside the recognised bounds" test the Court of Appeal was trying to find a formula to deal with benefits which were of only minimal value.[10] The Supreme Court preferred to address that issue more simply as an application of the well-known de minimis rule.[11] It relegated the "knowingly outside the recognised bounds" concept to mere "comment" by the Court of Appeal[12] and went on to expressly approve the trial judge's directions which included no such requirement.[13] We respectfully agree with that approach.

[94] It follows that when considering the mental elements required in the present case, the sole issues were whether the appellant knew or believed that he was offered the Luan Thai benefit because he had previously granted them fishing licences and, in that knowledge or belief, accepted the benefit. What the appellant knew or believed at that time was a question of fact. We cannot accept Mr Mount's submission that the existence of codes of conduct applicable to other settings, and the appellant's knowledge of those other codes, was relevant to the issues facing the jury. They had no bearing upon what the appellant knew or believed about the connection, if any, between his grant of fishing licences and the offer of the loan.

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[8] *Field v R* [2011] 1 NZLR 785 (CA) at [64].
[9] *Field v R* [2012] 3 NZLR 1 (SC) at [14]
[10] *Ibid* at [15].
[11] *Ibid* at [10] and [65] - [67].
[12] *Ibid* at [15].
[13] *Ibid* at [8] and [67].

[95] As the evidence based on other standards of conduct was not relevant to any issue before the jury, it should not have been admitted. The next question is what effect the admission of that evidence might have had on the verdict.

(8) Substantial miscarriage of justice?

[96] The other standards evidence was at least a distraction and at worst risked unfair prejudice to the appellant. This too engages s 69 of the Judicature Act 1980-81. Whether there was a substantial miscarriage of justice turns on the presence and extent of unfair prejudice to the appellant. The question is whether there a serious possibility that the other standards evidence, in combination with Doherty J's comment on it, could have tipped the scales against the appellant in the minds of the jury.

[97] The effect of Doherty J's jury direction on this point was that the other standards evidence would help the jury to decide whether the appellant was corrupt in receiving the benefit in the knowledge that he was acting outside the bounds of his duty as a Minister. This must have puzzled the jury given that the questions actually posed in the Question Trail, and explained in the oral summing up, rightly included no such requirement. To the extent that the jury took anything at all from the Judge's comment, it could only have been that in addition to the mental elements explained elsewhere, the Crown had to show that the appellant was knowingly acting outside the bounds of his duty as a Minister. To impose this additional burden on the Crown could only have been helpful to the appellant. As Mr Mount put it, to the extent the Judge's comment could have influenced the jury, it could only have raised the bar for conviction. We are therefore satisfied that Doherty J's reference to the irrelevant standards evidence could not have led to a miscarriage of justice.

[98] That leaves the possibility that, regardless of Doherty J's comment on it, the other standards evidence unfairly prejudiced the appellant. Of particular concern was the Crown evidence that the appellant had failed to provide a declaration of interest under the Civil List Act 2005. The risk posed by evidence of that nature is that the jury will falsely reason that if the appellant had contravened his obligations in another setting that made him the kind of man who would be more likely to contravene s 113 of the Crimes Act. The question is whether false reasoning of that kind could have affected the result in this case.

[99] In other cases the evidence could well have had that effect. However a feature of this case was the overwhelming strength of the Crown case. By the time the jury retired, all the significant elements of the charge were undisputed but for (i) benefit to the appellant and (ii)

knowledge or belief that he was receiving the benefit because of the fishing licences. We were unable to accept the appellant's arguments as to the legal requirements for those two elements. The result of rejecting those arguments is that the Crown case became virtually unanswerable. The benefit to the appellant was clearly the acquisition of the resort – without the Luen Thai loan the acquisition could not have proceeded. And it seems inconceivable that the appellant might not have noticed the connection between his prior grant of fishing licences to Luen Thai, on the one hand, and their agreement to make the vital loan, on the other.

[100] In assessing the possible impact of the other standards evidence it is important to remember that the question is what the jury might have decided, not what this Court would have done in their place. Even on that approach, however, we are satisfied that the irrelevant standards evidence could not have made any difference to the outcome. Although the evidence should not have been adduced, it did not result in a substantial miscarriage of justice. This ground of appeal fails.

[101] All grounds for the appeal against conviction having failed, we conclude that the appeal against conviction must be dismissed.

APPEAL AGAINST SENTENCE

Judge's Sentencing Remarks

[102] Doherty, J commenced his comprehensive sentencing remarks by summarising the Appellant's offending as he saw it. He was entitled to express his view of the evidence so long as that view was not inconsistent with the evidence *R v Heti* [1992], 8 CRNZ 554 and *Drollett v Police* [2004] CKCA 10 at 72-73.

[103] The Court agrees with his summation, particularly when he stated that the loan from Century Finance was really one to the Appellant and not to Mr Koteka and that there was a benefit to the Appellant in the granting of the loan, which benefit was clearly a substantial benefit to the Appellant, but it did not need to be quantified with exactitude.

[104] The Judge did not accept unreservedly that the purchase of the Samade Resort was undertaken purely to benefit the inhabitants of Aitutaki. Although that may have been a consequence, the indicators rather pointed towards the self-interest of the Appellant.

[105] He disagreed with the Probation Officer over whether the Appellant had expressed remorse, and rejected the recommendation for a sentence of supervision. He considered that deterrence and condemnation were the primary purposes of sentencing in cases of this kind. In support, the Judge cited numerous authorities from New Zealand and elsewhere, especially *R v Field*. He mentioned the Parliamentary Standing Orders and the Manual of Cabinet Procedures. He noted that the maximum penalty for this offending was 14 years' imprisonment and summarized the effect of the authorities with the statement that: "*the Court should unremittingly adopt a firm no-nonsense approach*".

[106] The Judge acknowledged that the Appellant's fall from grace was significant – particularly, the loss of his seat in Parliament and his inability to stand for election for five years.

[107] He discussed the Appellant's health and his diagnosis of bipolarism, noting that the Appellant had been stabilised with medication, aware of early warning symptoms and had been able to cope with his illness despite the stresses of public office. He categorised the view of a consulting psychiatrist that imprisonment "*will likely precipitate a relapse requiring medical intervention*" as "*predictive but speculative and as an opinion given without any evidence that I can take any note of*".

[108] The Judge referred to the effects that imprisonment would have on the Appellant's business and on his family. He considered that the Appellant's wife and daughters, plus Mr Koteka, plus the support network of his business acquaintances who had provided references would see the business through any difficulties.

[109] He concluded that the legal advice tendered informally to the Appellant by Mr Manarangi did not excuse the Appellant's conduct because Mr Manarangi had not been told of the extent of the close relationship between the Appellant and Mr Chou, as expressed in numerous Skype conversations.

[110] The Judge referred to previous Cook Island cases not involving the same offence but which concerned offences of public corruption in the monetary sense. These indicated that courts in this jurisdiction would ordinarily impose imprisonment for corruption type offending.

[111] As to the numerous references supporting the Appellant, the judge said:

"[61] The Court has received something approaching seventy references from various people all in support of you. They come from Ariki. They come from Aitutaki community members, religious leaders, political associates, political opposition, civil service colleagues, business colleagues and friends. And I have read them all, probably four times, and I kept thinking as I read there are some common denominators here, and words like this were used, decent, caring, helpful, a listener, a sharer, an orator, generous, tenacious, accomplished musician and singer, leader, compassionate, entrepreneur, humble, loyal, religious, charismatic, role model, honest, strong values, hard worker, respected, diligent, trustworthy, perfectionist, capable, reliable, unselfish. And without exception they laud your attributes as a politician, a businessman, a leader of people and a supporter of your family and constituents.

[62] To many you appear to be viewed as a saint in all things. That is how strongly they support you. One of them said that you are one of the finest leaders that this country has ever produced. Perhaps surprisingly, given the verdict of the jury, most described you as a man of integrity and honesty and most do not believe that you are guilty of any crime and that is their opinion and Mr Harris on your behalf made very proper and careful suggestions that you are not promoting that and I do not take it that you are.

[63] In the face of that I cannot ignore that until now you have done much for your community and for those who are in it."

[112] He then proceeded to impose sentence in the following terms:

"[67] I tend to characterize your offending in a similar manner as one of your referees when he wrote that you were "trapped by enormous temptation to do what you did".

[68] One of the principals of the tasks of any sentencing Court is that the highest sentence is reserved for the worst cases. And so I must assess your offending within that principle and much of the argument that I have heard from counsel relates to this.

[69] I do not accept your counsel's submission that yours is a unique case. It is just another case that has to be placed somewhere on the continuum of seriousness of offending of this nature. Nor do I accept, if I am asked to believe it, that your circumstances place you in some unique position. Unfortunately many intelligent high achieving people have fallen from grace in the past. But this is not the worst case or anything like a worst case. As the Crown acknowledged that this is not a case of your granting commercial fishing licenses or like favours for millions of dollars over a long period. This is a case on my assessment where you as a talented individual, a leader of people, succumbed to the temptation to get something for yourself that meant you acted corruptly. Contrary to the rightful expectations of the Cook Islands people when you served as their Minister of Marine Resources.

[70] Succumbing to such a temptation is still regarded though as serious. Firstly, parliament has seen fit to set one of the highest finite terms of imprisonment in the criminal law as a maximum sentence - that is in this country. It still strikes at the heart of public confidence in parliament as an institution and I agree that breach of public confidence cases deserve the denunciation of the court on behalf of the community to such an extent that sentences should carry with it, not just accountability for those who are guilty but also to act as a deterrent to others who might be tempted to transgress.

[71] Your actions were deliberate. The value of the benefits that you received were neither, in my view, insignificant nor insubstantial.

[72] Your culpability when applied to the role of the court in these circumstances to denounce your conduct and show you are being held responsible and accountable and deter others is in my view such as to warrant a sentence of imprisonment.

[73] The Crown submits that a starting point should be towards the midpoint of the range available and it points relying on cases such as *Field, Nua* and *Palmer* at somewhere up to 6 years imprisonment. That is too high. For the reasons I have traversed I think your culpability places you within the lower range of the continuum and I assess that at 3½ years imprisonment. From that you are entitled to a credit for your contributions to your community, as a politician who has perhaps gone beyond the normal call of that job but also as a businessman, a philanthropist and a humanitarian in these lands. I think a reduction of one-third of the starting point, that is 14 months reduction as a generous refraction of that.

[74] Your sentence is 2 years, 4 months imprisonment.

[75] I also order that Dr Agnews medical reports provided to the Community Probation Service be forwarded to the Superintendent of Arorangi Prison."

Appellant's Submissions on Sentence

[113] Consent for the Appellant submitted, generally, that the sentencing Judge had downplayed or failed to take into account the many positive and mitigating factors which were special to the Appellant's situation. In particular, the Judge's premise that imprisonment was the only sentencing option available.

[114] Counsel stressed that the Judge's characterisation of the Appellant and not Mr Koteka as the real purchaser of the resort and the real recipient of the loan from the Chinese fishing interests was wrong in fact and against the weight of evidence. Counsel repealed the argument that the *Field* approach to the law taken by the Judge in his summing-up had been wrong.

[115] Four features of the Appellant's conduct were emphasized by counsel:

a. The 'benefit' obtained by the Appellant was not money, property or free services. Rather, it was a loan "*on onerous terms*" the benefit of which had never been quantified by the prosecution.

b. The Appellant had sought and had acted on legal advice. The Judge's criticism that the lawyer had given the advice without knowing all relevant facts was unwarranted. The lack of detailed knowledge of the extent of the

Appellant's dealings with Mr Chou was irrelevant since the lawyer knew enough of the transaction to opine on its legality.

c. There was no tangible financial benefit to the Appellant and no identifiable detriment to public or private interests. No favouritism to the Chinese fishing interests has been shown nor did those interests suffer any financial disadvantage.

d. The Appellant's motive for his actions was less for personal gain and more for supporting the Aitutaki economy and the citizens of that Island. Mr Koteka's and Mr Manarangi's evidence supported this view as did the numerous references.

[116] Counsel criticised sentencing based on the "mechanistic" approach in the New Zealand Sentencing Act 2002. He emphasized following New Zealand precedent (*Hogan v Ministry of Social Development* [2005] 23CRNZ 500 para 25) that "*The sentencing exercise is a matter of judgment and weighing many factors and not a mathematical exercise*". He argued following *Fleming v Commissioner of Transport* [1958] NZLR 101, 103 that "*only the minimum penalty which will operate as a deterrent is justified and that any excess is, if not cruel, then certainly unjustified.*" Allegedly analogous cases were unhelpful because this case, unlike those cited, produced no financial gain nor any free services (as in *Field's* case). Previous Cook Island cases, such as *Drollett* involved misappropriation of public funds.

[117] The effect on the Appellant's Aitutaki business and his medical condition were emphasised as mitigating factors as were the worthy features of the Appellant as detailed in the numerous references. Community service with possibly a fine added was advocated as the appropriate sentence.

Crown Submissions on Sentence

[118] Counsel for the Crown stressed that the integrity of the Ministers of the Crown was of vital importance for a small island nation. The Judge correctly identified all the pejorative aspects of the Appellant's conduct and referred to the evidence that showed the Appellant was the *de facto* applicant for and recipient/beneficiary of the loan. Lack of specific pecuniary loss denoted merely the lack of an aggravating factor and was not a mitigating factor.

[119] The legal advice was not a mitigating factor since it had been given informally and without full knowledge on the part of the lawyer. The Appellant had taken steps to conceal the loan. His assertions of altruism are suspect because he did all in his power to secure the necessary regulatory approval when there were other purchasers wanting to buy the resort.

[120] Counsel submitted that the Judge was right to place deterrence in the forefront, given the maximum penalty of 14 years' imprisonment, the Appellant's situation as a Minister of the Crown and the authority of precedents such as *Field's* case. The Cook Islands cases are distinguishable. The judge was right to consider that the business would not fail in the absence of the Appellant and that the view of the psychiatrist was "speculative".

Discussion

[121] Because many of those providing references seemed puzzled that the Appellant had been found guilty of a serious crime and faced the prospect of imprisonment, the Court feels it necessary to affirm the principle that a Cabinet Minister is under a heavy responsibility to discharge his duties without fear or favour to anyone. Those who take Cabinet rank with its privileges, honour and responsibilities should not abuse this position for personal gain. The public is entitled to have trust and confidence in those in positions of power.

[122] The court mentions these important principles because it may be thought that the term "corruption" implies some payment in cash or in loans to a Minister in exchange for some benefit to the briber.

[123] That indeed is a form of bribery which is not present here but the law goes on to prohibit a Minister receiving any tangible benefit as a result of carrying out official duties such as granting fishing licenses to overseas corporations. Society cannot stand by and allow Ministers to receive personal benefits from persons to whom they have granted discretionary licences and other benefits on behalf of the public. There are two reasons for this. One is that if one Minister is seen to profit in this way, others will be encouraged to think that if they direct favours to the right people they will receive personal benefits in return too. Corruption is an invidious disease which, once it gains a foothold, is liable to spread.

[124] The other reason is that the Minister concerned is bound to feel beholden to the recipient and will be more likely to extend similar favours to that recipient in the future. This problem is particularly serious where licences need to be renewed or replaced every year. At

the time when the appellant accepted this benefit it was inevitable that Luen Thai would be returning with applications for licences and renewals in the future. In his future dealings with Luen Thai the appellant would be required to exercise his discretion impartially on behalf of the public. By accepting the benefit he made that impossible. He was already beholden to Luen Thai for making the loan in the first place. His business would continue to be indirectly beholden to Luen Thai until the loan was repaid.

[125] The Appellant failed in his duties by asking for a loan to help finance the purchase of the Resort which he and Mr Koteka had wished to buy but could not fully finance the purchase. The Appellant had achieved a personal friendship with a key man in the Chinese fishing company to which the Appellant was issuing fishing licenses.

[126] Consequently, the Court must impose a sentence – albeit on an otherwise good-living individual – which both condemns the misuse of Ministerial office and deters others from following his example.

[127] The Court has struggled to decide what the appropriate sentence should be in this case. Imprisonment will satisfy the need to punish the Appellant for his breach of the standards that the public must expect from a Cabinet Minister. It would also send a message of deterrence to others tempted to succumb to similar conduct – particularly in a small jurisdiction where absolute integrity is vital for the economic credibility of a small country whose bona-fide trading partner nations require transparency and a lack of corruption to be shown in all official dealings.

[128] The range of sentencing options in the Cook Islands is not great. Had there been jurisdiction to impose a sentence of home detention or even a suspended prison sentence, then those options might have merited consideration here.

[129] The Court does not consider that a sentence of community service, as advocated by counsel for the Appellant as the most appropriate sentence does not sufficiently reflect the gravity of the offending, nor does it act as a sufficient deterrent.

[130] The Court was told that this sentencing option is available only in Rarotonga but that should not be a prohibition on imposing it on a resident of another island. Appropriate sentencing should not depend on a person's place of abode. Someone from, say Aitutaki,

should not go to prison when a similar offender from Rarotonga would avoid prison just because he lived in Rarotonga.

[131] Probation, which is basically designed to assist in rehabilitation, would do nothing for this Appellant. A heavy fine could give rise to a claim that a person of means can buy his or her way out of imprisonment.

[132] Prison in this case will have a serious effect on this Appellant. His health and business will be affected. His wife and family will face a heavy burden. But the Court has come to the conclusion that imprisonment must follow this offending for the reasons set forth in part above. Because any period of imprisonment – however short - is going to impact dramatically and traumatically on a person with the Appellant's track-record in politics, business, church and general community good works, the Court imposes as short a term as possible consistent with the requirements of punishing his conduct and providing a deterrent to others.

[133] The Court considers that Doherty J placed too much emphasis on the deterrence and condemnation criteria and failed to acknowledge that any term of imprisonment will have a crushing effect on this individual in his particular circumstances.

[134] True, the psychiatrist's opinion is just that. But there has been one well-documented unfortunate incident arising out of the Appellant's bipolar state. There is also the problem of treating this man in the difficult environment of a small prison with no medical staff or facility on site. The Court finds too that Mr Manarangi's advice was a factor in the offending. Even although Mr Manarangi did not know the extent of the Appellant's relationship with Mr Chou, he did not ask for further information. Nor would that information have produced necessarily a different answer. Mr Manarangi seemed unconcerned and may not have known of the subtleties of the law as enunciated in *Field's* case.

[135] The Court regards this as a special case because of the Appellant's background of service, his medical condition and the desirability of ensuring the continued success of the Aitutaki business – not for the Appellant's personal gain but for the good of Aitutaki in particular and Cook Islands tourism in general. The Court has not approached the fixing the term of imprisonment by following any mechanistic formula. Rather, it imposes a fixed term

that is long enough to reflect society's denunciation of his conduct whilst at the same time acknowledging his special circumstances.

[136] Above all, there is a factor which makes this case a very unusual one. In accepting the benefit (the loan to Mr Kotuku which made the Samade purchase possible) the appellant was acting on legal advice. We accept Mr Harrison's submission that the appellant had not withheld from Mr Manarangi any facts that were material to the legality of the transaction. Whether he had previously spoken to a Luen Thai representative once or many times matters little. Mr Manarangi knew perfectly well that in his role as Minister the appellant had granted fishing licences to Luen Thai, that by one means or another the appellant had obtained Luen Thai's agreement to advance a loan which would make the Samade purchase possible; and that the appellant stood to benefit if the purchase proceeded. With that knowledge Mr Manarangi told the appellant that, given that the loan would be to Mr Koteka, and would have to be on commercial terms, he did not see anything illegal about it. We find it surprising that that advice was given. However the fact is that the appellant received it and acted accordingly.

[137] But for that special factor it would have been necessary to impose a much more substantial prison sentence. However the fact that the appellant was acting on legal advice, in combination with the other mitigating factors we have referred to, allows the Court to reduce the prison sentence to one of six months. It will be apparent that for that reason this case will have little value as a sentencing precedent.

[138] The Court substitutes a term of six months' imprisonment instead of the term of two years four months imposed in the High Court. The Court directs that the medical reports that were before the Court be sent to the Superintendent of the Prison with the request that he confer with the Appellant's wife and medical advisors about the management of the Appellant's medical condition. In this regard, the Court notes the difficulties facing the prison service in dealing with inmates with mental conditions.

[139] Mindful of the effect on the Appellant's business and in particular his position as a major employer in Aitutaki, the Court requests that the Minister and Secretary for Justice give consideration to any request for temporary release of the Appellant under s.18 and/or 19 of the Prison Act 1969.

RESULT

[140] The appeal against conviction is dismissed.

[141] The appeal against sentence is allowed. The sentence imposed in the Supreme Court is quashed and in its place we substitute a sentence of six months' imprisonment.

Barker JA

Fisher JA

Paterson JA