

Legal update on regulatory and investigations - December 2016

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Tesco directors charged with fraud after overstating profits by £326 million

Three former Tesco directors have been charged in the UK as part of an ongoing Serious Fraud Office (SFO) investigation into the grocery giant's accounting irregularities. The SFO began investigating the British supermarket giant in October 2014 after Tesco admitted it had artificially overstated its first-half profits by £263 million. After Tesco included previous accounts, that figure was revised to £326 million.

Auditors discovered that the inflated profit was the result of Tesco recording payments from suppliers, before the company was due the money. Tesco also admitted to charging its suppliers twice for sums owed in order to improve its own financial position. The SFO further accused the executives of dishonestly falsifying Tesco's digital accounting records and its draft interim accounts by the "inputting of and/or reliance upon commercial income figures which gave a false account of the financial position of Tesco".

This month, former Tesco directors Christopher Bush (managing director), Carl Rogberg (finance director) and John Scouler (food director), appeared at Westminster magistrates court and plead not guilty to each charge of fraud by abuse of position and false accounting. The three men may face up to 10 years in jail if found guilty of fraud by abuse and seven years for false accounting.

The executives charged were three of the 'Cheshunt Eight' who were suspended from Tesco in late November 2014 following the revelations. The fate of the remainder of the 'Cheshunt Eight' is not yet known, although the SFO investigation is still ongoing and it is possible that further charges may be laid.

Tesco dominates the British grocery industry, holding the largest market share of over 25%, operating 3,500 stores with over 310,000 employees. However, the accounting scandal has significantly damaged Tesco's business. Within only hours of the Supermarket chain admitting it had overstated income from suppliers, the company's share price had plummeted by a staggering £1.6 billion. As a result, the company faces a huge damages claim from investors, who allege they have lost tens of millions of pounds as a result of the accounting scandal.

Rumours are still afoot as to whether Tesco itself will be charged. The SFO was believed to be pushing for a deferred prosecution agreement that would let Tesco avoid a criminal prosecution. If Tesco co-operated, this would require High Court approval, possible undertakings and a fine, which analysts have warned could reach £500 million. In addition, Tesco is also being investigated by the UK's Financial Reporting Council.

All in all, the headache is far from over for Tesco. In the interim, it has released the following statement: "We note the decision of the SFO to bring a prosecution against former colleagues in relation to historic issues and acknowledge the investigation into the company is ongoing. Tesco continues to cooperate with the SFO's investigation. The last two years have seen an extensive programme of change at Tesco, but given this is an ongoing legal matter, we are unable to provide any further comment at this time".

See relevant articles [here](#), [here](#), [here](#), [here](#), [here](#) and [here](#).

Company held liable for executives' A\$147m fraud: ASIC v King [2016] QSC 109

One of the major regulatory trends to have emerged from the global financial crisis has been a worldwide focus on corporate liability for the actions of rogue employees. It is now critical that companies understand the circumstances in which they will, or will not, be held liable for what an employee might do.

Earlier this year, the Supreme Court of Queensland in *ASIC v King*, found five former executives of MFS Investment Management Limited (MFS) liable for breaching their directors' and officers' duties. Importantly in this case, the actions of those executives were also attributed to MFS.

In 2008, the MFS group of companies collapsed, owing A\$2.5 billion. In 2009, the Australian Securities and Investment Commission (ASIC) brought a civil claim against the senior executives for A\$147.5 million, which the ASIC alleged the senior executives to have misappropriated from a Premium Income Fund (PIF) to satisfy other debts of the MFS Group.

The defendant executives were Michael King (CEO of the entire MFS Group until 21 January 2008), Craig White (CEO of the MFS Group after Mr King's resignation), David Anderson (CFO of the MFS Group), Guy Hutchings (CEO of MFS), and Marilyn Watts (Fund Manager of PIF).

Among other things, the senior executives were found to have known that the misappropriated money belonged to investors in the PIF scheme and that it should have been used for the purposes of the investors rather than the repayment of debts within the MFS Group. The Judge found that there was a perception amongst the senior executives that the PIF scheme was a "slush fund" run in the group's interests rather than the interests of its investors". The senior executives also falsified a number of documents that were "prepared in haste in a transparent attempt to hide the previous misappropriations" from the auditors and the Royal Bank of Scotland.

More significantly, however, the Judge attributed the actions of Messrs White, King, Anderson and Hutchings and Ms Watts to MFS. He did so by applying the well-known test set down by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* - that is, by asking "whose act (or knowledge, or statement of mind) was for this purpose to count as the act etc. of the company?"

The court had no difficulty holding the executives' actions should count as acts of the company. The Judge agreed with ASIC's submission that the executives' actions were not "totally in fraud" of MFS because MFS benefitted financially from the actions. In particular, the misappropriation of the PIF funds was used to satisfy other debts of the MFS Group.

See the Court's decision [here](#).

Youi Insurance pleads guilty to 15 Fair Trading charges brought by Commerce Commission

South African-owned insurer, Youi Insurance, entered guilty pleas to 15 charges laid by the Commerce Commission in early August. The charges, brought under the Fair Trading Act, are in response to a number of illicit practices carried out by Youi sales staff.

The questionable sales tactics were initially uncovered by journalist Diana Clement, who rang Youi for a quote in respect of a separate insurance story she was working on. Clement then gathered further information from a large number of Youi customers and ex-employees. The most serious allegations include:

- When generating quotes, sales staff would routinely manipulate the data they entered into the system by asking the customer strategic questions in order to generate a lower premium. For example, getting the customer to say their car was "charcoal" coloured, rather than "black", as this would generate a lower premium. Sometimes this would be done without the knowledge of the customer. For example, a car would be recorded as being garaged despite the customer having told the sales staff that they have no garage. Lower premiums meant the customer was more likely to accept the policy. However, often when the customer tried to claim on these policies, they would be considered void due to the customer's misrepresentation. Manipulation of data was so common there was in-house jargon for the practice: staff called it "maniping".
- Forcing customers to give payment information when only a quote was requested. Despite the customer being promised they would not be charged, and without signing any documentation, routinely they would nonetheless be charged
- Staff failed to cancel policies when requested, including repeatedly hanging up on customers ringing to try and cancel a policy. The same tactics would be used when customers would try to query why they had been charged for a policy when only a quote had been requested (and expressly, not accepted)
- Youi's standard contents insurance policies do not include cover for accidental damage or away from home coverage, despite these being standard in the industry. Customers were not made aware that these came at additional costs, and many did not discover these were not included in their policies until they tried to make claims.

Youi initially denied the allegations, claiming at first that the customers had mis-represented what happened in their calls. Later, it said that the transgressions were caused by "rogue employees".

However, Clement's investigation was thorough and revealed the problem to be systematic. In particular, it seemed Youi's number was up when ex-Youi staff revealed that Youi's performance-based bonus structure meant that sales staff were rewarded for the number of sales they made, regardless of the legitimacy of the policies. Managers were also rewarded for the number of sales their team made. As a result, managers would not only pressure their staff to engage in data manipulation, but would teach them how to effectively manipulate data.

The quantum of the penalty the Commerce Commission will seek is still unknown. Meanwhile, the Insurance Council of New

Zealand (ICNZ) has imposed the maximum fine possible on Youi, \$100,000. However, ICNZ stopped short of imposing the harshest penalty possible, which is membership termination. ICNZ president, Chris Black, said that this option was seriously considered by the regulator.

Youi has accepted the fine, commenting: "Unfortunately, we haven't got everything 100 per cent right and we found flaws in our customer service procedures. This includes charging a small percentage of customers for insurance policies when they only asked for quotes."

See relevant articles [here](#), [here](#), [here](#) and [here](#).

Supreme Court of Canada rejects investigative agencies' rights to privileged documents

In two recent decisions, the Supreme Court of Canada soundly rejected the power of Government agencies to compel the production of documents over which a person or company maintains legal professional privilege.

The first case, *Alberta (Information and Privacy Commissioner) v University of Calgary* [2016] SCC 53, concerned an order of the Information and Privacy Commissioner of Alberta for the production of records over which the University of Calgary had claimed solicitor-client privilege. The Commissioner was dissatisfied with the University's claim to privilege. The Commissioner therefore issued a Notice to Produce Records under s 56(3) of the Freedom of Information and Protection of Privacy Act. Under that section, a public body must produce required records to the Commissioner "despite . . . any privilege of the law of evidence".

Similarly, in the second case, *Lizotte v Aviva Insurance Company of Canada* [2016] SCC 52, the assistant syndic of the Chambre de l'assurance de dommages asked Aviva Insurance Company of Canada to send her a complete copy of its claim file with respect to one of its insured. Aviva refused to do so on the basis that some of the requested documents were protected by litigation privilege. In response to that refusal, the syndic filed a motion for a declaratory judgment, arguing that the relevant statutory provision created an obligation to produce "any . . . document" concerning the activities of a representative whose professional conduct is being investigated by the Chamber, and that this was sufficient to lift the privilege.

Both agencies therefore relied on a general power to produce documents as sufficient to stultify legal professional privilege.

The Supreme Court of Canada rejected those arguments. In both decisions it emphasised that legal professional privilege is a fundamental principle of the common law that cannot be set aside by inference but only by legislative language that is clear, explicit and unequivocal.

In the University case, the apparent abrogation of the privilege by reference to "any privilege of the law of evidence" was equivocal. As in New Zealand, it is well established in Canada that legal professional privilege is not merely a rule of evidence but a substantive right on which the administration of the legal system as a whole depends. The section did not embrace, and therefore stultify the substantive right to legal professional privilege.

In the Aviva case, the empowerment for the syndic to request the production of "any document" was simply a general production provision that did not specifically indicate that the production must include records for which privilege is claimed.

These principles are all well-established in New Zealand, which was amongst the first in the Commonwealth to recognise that the Executive has no power under statute except by express words or necessary implication to request the production of privileged documents outside of legal proceedings (*Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 (CA)).

Even so, unlawful requests for privileged documents are routinely made by regulatory agencies in New Zealand. The Supreme Court of Canada's rejection of the Executive's power to do so adds grist to the mill for a company or individual that intends to protect its rights to legal professional privilege.

Judicial review of UK SFO's decision to investigate fails

In *R (on the application of Soma Gas & Oil Ltd) v Director of SFO* [2016] EWHC 2471 (Admin), the Claimants (Soma) judicially reviewed the UK SFO, arguing that the SFO's failure to conclude its investigation into Soma was unlawful on the grounds that it was irrational. Soma, ambitiously, sought a mandatory declaration to the effect that the SFO would terminate the investigation, or that the SFO would take a decision whether to prosecute Soma and disclose the nature of inquiries being pursued by the SFO.

On 25 June 2015, the SFO commenced its investigation into whether or not Soma committed bribery and corruption offences in connection with oil exploration activities it conducted in Somali territory from June 2013 to date. The initial investigation focused on Soma's involvement in making capacity building payments to Somali public officials that gave rise to potential criminal offences under ss 6 and 7 of the Bribery Act 2010 (UK). A leaked report authored by the United Nations Somalia and Eritrea Monitoring Group dated 28 July 2015 characterised the capacity building payments as "a likely part of a quid pro quo arrangement" whereby,

in exchange for payments to public officials, Soma had obtained preferential treatment and commercial advantages. Soma denies any wrongdoing.

By May 2016, Soma perceived the investigation to be dragging on and expressed such concerns in correspondence with the SFO. Soma was seeking further finance in August 2016 and it was concerned the continued investigation would cast a shadow over Soma's business and give rise to a risk of insolvency. The SFO conceded that Soma had been cooperating fully during the investigations. However, in a letter dated 17 May 2016 the SFO told Soma that although the capacity building payments aspect of the investigation was almost complete, "the investigation [...] revealed certain other matters which we have a duty to investigate..."

Soma commenced proceedings for judicial review against the SFO in August 2016. Between then and the judgment, the SFO, against its usual policy, gave Soma an update regarding the investigations. The letter made clear that if Soma wished to communicate the contents to its potential investors, such consent would be approved by the SFO, provided the investors gave a written undertaking that it would not communicate the contents without SFO prior approval. The letter also invited Soma to withdraw the judicial review.

The Court held that Soma faced a very high hurdle in asking the Court to review the discretionary decision of the SFO to commence the investigation, and in seeking mandatory orders terminating such an investigation. The Court confirmed that challenges to the decisions of prosecutors can only be advanced on very narrow grounds and, even then, will succeed only in very rare cases. This is due to the wide discretion entrusted to the Director of the SFO under s 1(3) of the Criminal Justice Act 1987 which says "the director may investigate..."

Whilst the decisions of the Director to commence an investigation are not immune from review of the courts, the courts will be slow to interfere. However, the SFO had not yet reached any decision, and the update on the investigation sent to Soma illustrated the SFO approached the matter proportionately, with regard for Soma's concerns.

Soma was unsuccessful in all its claims and was ordered to pay 80% of the SFO costs. In relation to disclosure of other matters, given the national security risks, the Court held the SFO could not disclose those to Soma until the investigation was concluded.

See the Court's decision [here](#).

Balancing the receivers' receipt

In *Financial Markets Authority v PTT Limited* (in receivership) [2016] NZHC 692 the Financial Markets Authority (FMA) suspected that Mr Steven Robertson was operating a Ponzi scheme by receiving funds for investment which were ultimately not invested. Accordingly, in August 2015, the FMA obtained orders under the Financial Markets Conduct Act 2013 (FMCA) preserving assets and appointing receivers over various companies owned by Mr Robertson. The FMA also sought that the costs of the receivers be met from the assets of the respondents.

Mr Robertson and the other respondents opposed the receivers' costs being taken from the estate, claiming that the Court had no jurisdiction to make such an order.

Palmer J held that the Court does have jurisdiction to make such an order as long as doing so is for a purpose within the contemplation of the FMCA. He noted that the public and regulatory function of receivers appointed under the FMCA distinguishes them from ordinary receivers. Accordingly, such receivers ultimately have a public function to act in the interests of potentially aggrieved persons in order to fulfil the wider public functions of the FMCA.

In setting out the criteria that should be applied by a Court in considering where the costs of the receivers should fall in a particular case, Palmer J found that the Court should only make such orders if it is satisfied, after hearing from all relevant parties, that:

- The receivership is clearly justified in the interests of the potentially aggrieved persons
- The effect of doing so will not impact on the returns to potentially aggrieved persons of their funds disproportionately to their benefits.

Applying these criteria, the judge considered the receivership was clearly justified but that there was not enough information to decide whether the second limb of the above test had been met. At the time of this hearing, the known claim pool comprised approximately \$2 million, while the known asset pool was only \$50,000. The receivers' costs had also increased to \$172,603.10.

However, it was possible that the FMA could have further claims against additional respondents. Accordingly, Palmer J considered that the FMA could apply to the Court again once there was greater clarity about the relationship between the total pool of claims by potentially aggrieved persons and the total available assets.

The Court stated that if the receivership is clearly justified but the effect of the receivership is disproportionate, then the Court may face a difficult decision as to how to allocate the costs, and the FMA may need to bear the portion of the costs that are not proportionate to the benefits.

See the Court's decision [here](#).

International battle against corruption: What does this mean for business in China?

New Zealand has strengthened its commitment to combat bribery following the London Anti-Corruption Summit.

In May 2016, Police Minister, Hon Judith Collins, addressed the London Anti-Corruption Summit, outlining New Zealand's 'no tolerance' approach to corruption. In the statement, New Zealand committed to exposing corruption domestically and off-shore, punish the corrupt, support disadvantaged creditors and drive out the culture of corruption where it exists. One of New Zealand's key commitments was to nominate a representative to the International Anti-Corruption Coordination Centre. New Zealand also committed to assisting international efforts to prevent illegal money flow across multiple countries caused by high level corruption and to undertake effective enforcement action against those involved.

It is intended that the commitments outlined by the Police Minister will build on the work New Zealand has done in recent years and will help to maintain its reputation as one of the least corrupt countries in the world.

What does this mean for New Zealand's 'high risk' export markets, such as China?

With annual growth at a little over NZ\$900 billion, China's economy is relatively well placed. However, it is a far cry from the high growth rates experienced in the 1990s and 2000s. Many, like former policy maker at the People's Bank of China, Dr David Li, consider that the government's anti-corruption drives are to blame.

In 2012, China launched a high-profile campaign dubbed the Anti-Graft drive which targeted government, military and state-owned company officials suspected of corruption. The campaign led to the investigation and prosecution of hundreds of officials across the country.

Historically, Chinese business has been sustained by 'guanxi'. Guanxi refers to close, clandestine business relationships that can even override law and as one Chinese businessman noted "in China, relationships are the law". Inevitably, guanxi can lead to nepotism and corruption and as a result, the Anti-Graft drive has started to displace it.

Given that guanxi has long been considered to be the bedrock of the Chinese economy, the effect that the crackdown on corruption will have on the Chinese economy is self-evident. As Dr Li candidly observed, "corruption was helping the economy grow, to be very honest."

Nonetheless, even Dr Li had to concede that the Chinese had grown wary of the crooked, cloak and dagger nature of the guanxi system. In addition, the shady nature of business was hampering the entry into the Chinese market by foreign businesses, which feared being caught up in corruption and facing prosecution under their local, more stringently enforced, anti-corruption legislation.

What could this mean for New Zealanders doing business in high risk countries such as China?

Business in China is a double-edged sword. While the crackdowns on corruption mean that the legal risk of doing business in China has reduced, the economic risks have increased as a result of the unstable economy. Dubious Chinese government growth forecasts, sharp drops in the stock market, erratic currency movements and unpredictable and unreliable economic policy responses from Beijing are presently considered to be some of the biggest global economic risks facing the world's economic policy-makers.

Undeniably, however, China remains an exceptionally profitable market for New Zealand businesses. The appetite of the Chinese consumer for quality western products is growing. As a result, New Zealand's opportunities in China - including tourism and education, exports of premium food and beverage products, dairy, meat - continue to develop.

But one thing is clear, New Zealand and China are focussed on the fight against corruption. Even if it may temporarily act as a road block to China's economic growth, long term, a safer trading environment can only be good for New Zealand businesses.

See relevant article [here](#) and the New Zealand's full statement from the Anti-Corruption Summit 2016 [here](#).

No such thing as privacy? UK's Investigatory Powers Bill receives royal assent

The Investigatory Powers Act 2016 (Act) has passed into law, having been through three independent reviews and extensive amendments in the House of Commons. The Act will give the UK government unprecedented surveillance powers and is regarded by Edward Snowden as "the most extreme surveillance in the history of western democracy".

The Act allows the UK government to keep a record of every website accessed, phone app used, and the metadata of all

telephone calls made by every citizen for up to a year. This type of information is known as internet connection records (ICRs). The ICRs will include when a citizen visited a certain webpage, how long they stayed, their IP address, and information about their electronic device. The Act also forces internet providers and mobile carriers in the UK to store ICRs and gives police officers the power to access and retrieve such information through a process known as the 'request filter'. It is still unclear how the process works and how much information the police may retrieve. The lack of judicial oversight for such a power is worrying. Access to such ICRs will be solely at the discretion of the police.

The Act also extends the UK government's power to collect metadata around the world. Referring to hacking as "equipment interference", the Act permits the Government to engage in targeted hacking of individuals' computers, including by means of phone bugging and reading texts. Unlike the ICRs, 'equipment interference' would require a warrant from both the Secretary of State and a panel of judges. This power extends to 'bulk equipment interference' meaning that it is capable of hacking large groups of people outside of the UK.

The Act is part of an international trend that endows governments with wide-ranging powers of surveillance and intrusion subject to limited oversight, which pose a significant threat to the privacy of individuals and corporations.

Hefty fines imposed for Euribor tampering

After five years of investigation, the European Commission has hit three banks with €485.5 million of fines for participating in a scheme to rig the Euribor benchmark. J.P. Morgan was issued the largest slice of €337.2 million.

Seven banks were originally accused of breaching EU anti-trust rules by colluding to alter benchmark rates to suit their own positions. The group were referred to as an "anti-competitive cartel", using chatrooms and videos to share sensitive information amongst themselves, allowing them to effect tiny movements in the key pricing components of interest rate derivatives.

The fines issued were calculated in consideration of the amount of time spent partaking in the scheme, and the value of the products concerned.

In 2013, The Royal Bank of Scotland, Deutsche Bank and Société Générale were awarded a 10% discount on their fines for settling the Euribor case. Barclays avoided the fine altogether by bringing the conspiracy to the attention of the EU. The total settlement amount amassed €820 million.

Spokespeople for the three banks opting not to settle indicated that they would continue to bring possible appeals, maintaining that no laws were infringed.

Greasing the wheel: High Court rejects that bribes were "consistent with industry standards"

On Friday 9 December Mr Murray Noone and Mr Stephen Borlase were found guilty of multiple charges of 'corruption and bribery' concerning \$1.2 million in payments and other benefits between 2005 and 2013. This case confirms the New Zealand position that there is no requirement for an official to act improperly to satisfy the test for bribery and corruption under s 105 of the Crimes Act.

Mr Borlase was a Director of Projenz (2005) Limited, a supplier to Auckland Transport and Rodney District Council. Mr Noone was in senior management roles at Auckland Transport and Rodney District Council, both of which were recipients of fraudulent payments by Mr Borlase.

The charges concerned a number of payments by Mr Borlase to Mr Noone between 2005 and 2013. The case also considered payments made to a Mr George, who pleaded guilty at an earlier date and was sentenced to 10 months' home detention. Such payments encompassed unjustified consultancy fees, corporate hospitality, and extensive personal travel costs. Mr Borlase was also accused of knowingly "inflating invoices".

The defence argued that the receipt of such monies was justified as it was "consistent with industry standards".

The Court examined the legal principles underpinning the "corruption and bribery of an official" under s 105 of the Crimes Act with reference to the Supreme Court decision of *Field v R* [2010] NZSC 556, which concerned the conviction of a Member of Parliament under s 103 of the Crimes Act. There, the Supreme Court confirmed that there is no requirement for an element of impropriety for an act of an official to be corrupt. It stated that, subject to a de minimus exception, "it is simply wrong for an official to accept money or like benefits in return for what has been done in an official capacity". The UK position safeguards against legislative over-reach by requiring an improper act to satisfy the test for corruption. However, Fitzgerald J held that the New Zealand position differed from the UK, and therefore rejected Mr Borlase's argument that because there was allegedly no impropriety in Mr Borlase's actions s 105(2) was not satisfied.

The High Court also held, in reliance on *Field v R*, that "bribery" as defined in the Crimes Act departs from its ordinary meaning in that it encompasses "value neutral" consideration. Fitzgerald J also considered that bribery payments could be made "through or via a corporate entity", emphasising that it would be unjust to enable key players in such activities to hide behind a corporate shield.

Mr Noone was found guilty on six charges of receiving bribery payments from Mr Borlase under s 105(1) of the Crimes Act. Although noting that if the civil burden of proof had been in question, the outcome would likely have differed, Mr Borlase was found not guilty of four charges relating to the "inflation" of certain invoices. He was, however, found guilty on eight charges of offering bribes to officials pursuant to s 105(2) of the Crimes Act.

Sentencing is to take place on 22 February 2017.

See the Court's decision [here](#).

Ex-Barclays investment banker sues for unfair dismissal

Ex-Barclays investment banker Richard Boath has indicated that he is bringing a claim for unfair dismissal in a preliminary tribunal hearing. Boath's lawyer, Jonathan Cohen, proposes that the dismissal was directly related to information given to Barclays by the UK Serious Fraud Office (SFO).

The SFO disclosed to Barclays a 900-page transcript of an interview conducted in 2014 as part of the ongoing investigation into the 2008 Global Financial Crisis emergency capital call. The interview was originally kept private, but put forward earlier this year to support an application for a warrant to search the bank. Cohen suggests that Barclays dismissed Boath unfairly on the grounds that they were merely unhappy with what was disclosed by him in that interview.

It appears that the unfair dismissal claim will be brought under whistle-blower protection laws. Under such laws, there is no cap for a potential monetary award.

The SFO is currently seeking to have the case heard in private, alleging that a public hearing would jeopardise their ongoing investigation. Several media outlets, including the Guardian, will challenge this.

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