Public interest and corruption

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Corporate Crime analysis: What is the relevance of public interest to corruption offences? Alison Geary and Sahil Sinha of international law firm, WilmerHale discuss the implications of the decision in R v Chapman.

Original News

R v Chapman, Gaffney & Panton [2015] EWCA Crim 539, [2015] All ER (D) 313 (Mar)

The proceedings concerned two cases in which journalists had been convicted under the 700-year-old common law of misconduct in public office. The journalists were found to have paid public officers for information. The Court of Appeal held that at the original trial the jury had been misdirected on how serious the abuse of public office had to be in order to amount to criminal conduct.

What issues does this decision raise?

Commentary and press coverage of the recent quashing of the conviction of former News of the World journalist, Lucy Panton may have left the impression that a dramatic change had taken place in the law and that there is now a public interest defence to allegations of corruption. Although such an impression is false, the case may well have implications for offences both under the Bribery Act 2010 (BA 2010) and the prior regime.

What were the details of the decision?

The necessary elements of the misconduct in public office offence were most recently stated in *A-G's Reference (No 3 of 2004)* [2004] EWCA Crim 868, [2005] 4 All ER 303 and are:

- a public officer acting as such
- willfully neglects to perform his duty and/or willfully misconducts himself
- to such a degree as to amount to an abuse of public's trust in the office holder
- without reasonable excuse or justification

The offence raises questions as to why poor conduct in the course of employment should be a criminal matter, rather than simply an employment matter. It is the third element of the offence that addresses this issue, and the Court of Appeal sought to give guidance to assist juries with it.

The Court of Appeal held that the jury must be directed that misconduct at the level of breach of duty, neglect of duty or breach of trust was insufficient to satisfy the third element of the offence. Further, a jury must be given direction as to the level of seriousness required. This may be done in two ways:

- the jury can be directed that the threshold is a high one
- the jury can be directed to consider objectively whether the provision of the information by the office holder in deliberate breach of his duty had the effect of harming the public interest--the public interest could be sufficiently harmed if either:
  - the information disclosed itself damages the public interest, eg a leak of budget information, or
  - the manner in which the information is provided or obtained damages the public interest, eg if the public office holder is paid to provide information in breach of duty

In the context of a media case, the Court of Appeal stated that the second option was 'the major determinant in establishing whether the conduct can amount to an abuse of the public's trust and thus a criminal offence'.

What can we take from this decision?

The judgment invites defence arguments that the overall effect of the misconduct did not harm the public interest. In particular, this could be used in whistleblowing situations. Stories that are clearly in the public interest could be balanced against the harm of a public officer leaking information in order to argue that the misconduct did not have the effect of harming the public interest.

Putting this into context, a journalist may pay a social worker for a story. This undoubtedly would be interpreted as damaging the public interest. But that story may reveal serious wrongdoing by the local authority--information that is significantly in the public interest to disclose. Overall, the misconduct would be beneficial to the public interest and, following the judgment in *Chapman*, arguably not serious misconduct. If the misconduct is not sufficiently serious, then the payment of the social worker is not criminal.

What is the relevance for cases today?

Payments by journalists to public officers today would be considered within the framework of BA 2010 or the Criminal Justice and Courts Act 2015 (CJCA 2015). The relevant offences in these acts do not contain any reference to the misconduct needing to be sufficiently serious. However, some comparisons can be drawn.

Both BA 2010 and CJCA 2015 are concerned with the expectations of a reasonable member of the public when deciding if the conduct is improper. It is arguable that a reasonable person expects public officers to act in the public interest. Building from the arguments suggested above, it could be argued that the actions of the officer are only improper if the public good fails to outweigh the damage of an officer being paid for information or an officer leaking information.

However, this argument comes with a serious health warning--it is untested and by no means an obvious comparison to draw. Perhaps the greater relevance of the *Chapman* judgment to cases under the new legislation is the effect that it has had on the CPS.

New CPS guidelines

On 17 April 2015, the CPS announced the completion of their re-review of Operation Elveden, the Metropolitan Police Service's investigation into payments to public officers made by journalists in exchange for information. Alongside this announcement, the CPS published additional guidance for such cases. The CPS has applied its understanding of *Chapman* to the public interest stage of the full code test and concluded:

> 'The harm to the public interest in the corrupt payments and the lack of harm caused by any resulting stories may be finely balanced and the prosecution of journalists in these circumstances may not always be in the public interest.'

The CPS considers the position of the public officer and the journalist to be very different. The CPS appears to be reluctant to charge journalists with a misconduct in public office offence. With regard to journalists, the CPS highlights three broad categories:

- cases in which it is manifestly in the public interest to publish the information--in these cases, it is unlikely that there will be a reasonable prospect of conviction and it will not be in the public interest to prosecute
- cases in which the information will manifestly harm the public interest--in these cases, the public interest will usually require a prosecution
- cases that fall in between these extremes (which will be the majority)--in these cases, the balance needs to be carefully weighed, and in cases where the competing considerations are finely balanced, it is unlikely to be in the public interest to prosecute

In addition to providing this guidance, the CPS announced it will now be taking no further action in relation to nine journalists. Under the post-*Chapman* re-review, only one journalist did not have action against him halted.

The guidance and re-review were conducted in relation to misconduct in public office only, but the CPS also announced an intention to publish guidance for BA 2010 and CJCA 2015 offences. Should this guidance follow a similar approach, a public interest defence for journalists may be rendered unnecessary as investigations may not proceed beyond the early stages.

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