



Pacific Judicial
Integrity Program

Judicial Officers' Fraud and Corruption Online Course

Via Zoom - 18, 25 & 31 May, 8 & 15 June 2023



**FEDERAL COURT
OF AUSTRALIA**



Papua New Guinea
Centre for Judicial Excellence



Session 2: Fraud and Related Offences

Thursday 25 May, 2023

Justice Teresa Berrigan

National and Supreme Courts of Papua New Guinea

Session 2: Fraud & Related Offences Agenda



1. Welcome & Introduction (5 minutes)
2. Justice Berrigan's Presentation (30 minutes)
3. Summary of Case Scenario and breakout room discussions (20 minutes)
4. Plenary discussion (20 minutes)
5. Discussion Questions on Case Scenario (20 minutes)
6. Introduction to next week's topic & scenario (5 minutes)
7. Session Wrap-Up (5 minutes)

Fraud and Corruption Offences



Two broad categories

- **Fraud related offences**
 - Offences against property or involving dishonesty
- **Corruption offences**
 - Official corruption, bribery or abuse of office

There may be, and often is, significant cross-over between the offences within these categories



Fraud Related Offences



- Generally regarded as one of the most complex areas of criminal law
- Complex and broad



This is a result of:



- The complex nature of property itself:
 - The various forms it takes
 - The rules governing ownership at civil law
- The response by the criminal law to address those issues and recognise other forms of interest in property
- The sophisticated way in which fraud is conducted in the modern world, often involving multiple actors and complex schemes



Determining Guilt



In determining whether or not the prosecution has established the guilt of the accused beyond reasonable doubt, it is necessary to ask:

- What are the **elements** of the offence?
- What is the **evidence** in support of each of those elements?
- Does the evidence **establish or prove** each of the elements beyond reasonable doubt?



Analysing a Charge



Identify the elements of the offence on the face of the provision that creates the offence



Analysing a Charge

Identify what is required to prove those elements or the principles applying by reference to:

- Any **specifically enacted provisions** for that purpose within the legislation
- The **general interpretation section** within the legislation
- **Binding authority** in your own jurisdiction
- **Persuasive authority** in your own jurisdiction
- **Overseas authority** which whilst not binding might be regarded as persuasive



Analysing a Charge



The paramount consideration will be the elements of the offence as prescribed in the relevant legislation and the requirements of those elements in **your jurisdiction**



Elements of an offence

Every offence is made up of elements

Physical element(s)

- The act(s) or omission(s) by the accused & the circumstances in which those acts or omissions took place

Mental element(s) (or “fault” element)

- The intention(s) of the accused at the time they did the acts or made the omissions alleged, e.g. intention, knowledge, wilfulness, negligence or recklessness



Misappropriation, s 383A, Criminal Code, Papua New Guinea



383A(1) A person who dishonestly applies to his own use or to the use of another person—

(a) property belonging to another; or ..

is guilty of the crime of misappropriation of property



Misappropriation, s 383A, Criminal Code, PNG



383A(1) A person who dishonestly applies to his own use or to the use of another person–

(a) property belonging to another; or ..

is guilty of the crime of misappropriation of property

Elements:

- Dishonestly
- Applies
- To his own use or the use of another person
- Property
- Belonging to another person

Misappropriation, s 383A, Criminal Code, PNG



Elements

The State must prove beyond reasonable doubt that a person:

- Applies
- To his own use or the use of another person
- Property
- Belonging to another person
- Dishonestly

Havila Kavo v The State (2015) SC1450

Misappropriation – Property



What is “property” for the purpose of s 383A?

S 383A(3)(a) is very wide:

“property includes **money and all other property** real or personal, legal or equitable, including **things in action and other intangible property**”.

S 1(1), Interpretation, provides:

- “property” includes every thing, animate or inanimate, capable of being the subject of ownership
- “money” includes bank notes, bank drafts, cheques, and any other orders, warrants, authorities, or requests for the payment of money

Cf A thing capable of being stolen



Traditionally, **anything capable of being stolen**

An inanimate thing that is **the property of any person** and is **moveable, or capable of being made moveable**, even if it is made moveable in order for it to be stolen: S 362(1) Criminal Code, PNG

Misappropriation – Belonging to another person



To whom does property belong?

S 383A(3)(d):

“persons to whom property belongs include the owner, any part owner, any person having a legal or equitable interest in or claim to the property and any person who, immediately before the offender’s application of the property, had control of it.”

Misappropriation – Belonging to the State



Money allocated subject to conditions

When a sum of money is allocated to a person subject to conditions that it be applied in a certain way, it remains the property of the person who allocates the money unless and until it is applied in accordance with those conditions: *Wartoto v The State* (2019) SC1834; *Kaya v The State* (2020) SC2026 applying *Brian Kindi Lawi v The State* (*supra*).

Misappropriation – Applies to his own use or the use of another



- The term “applies to his own use or the use of another” is not defined in the Criminal Code.
- The ordinary meaning of the word “applies” is “to put to use; to employ, spend, dispose of”. *Oxford Short English Dictionary*
- “The section ... stops short of requiring that there should be some consumption, expenditure or dissipation of the thing, alteration of its form or utilisation of it to secure some collateral material benefit, although these may be involved. I consider that the requirement of this part of the section is met when there has been a utilisation by the person involved for his own purposes...The "application" will involve some deflection from the purposes of the person to whom the property belongs”: *R v Easton* [1994] 1 Qd R 532, adopted and applied *S v Hasu* (2018) N8656.

Cf Fiji – Theft, S 291(1), Crimes Decree



S 291(1) of the Crimes Decree, 2009 creates the offence of theft in that jurisdiction:

(1) A person commits a summary offence if he or she dishonestly **appropriates** property belonging to another with the intention of permanently depriving the other of the property.

S 293 (1) for the purposes of this Division:

any **assumption of the rights of an owner to ownership, possession or control** of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property.

Misappropriation, s 383A – Dishonestly



Subjective Test: The State must establish that:

- What the accused did was dishonest according to the standards of ordinary honest people, and
 - The accused in fact knew that what they were doing was dishonest according to those standards
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- But in determining whether the accused knew that what they were doing was dishonest, you may take into account the standards of ordinary honest people, ie whether it might reasonably be inferred that the accused must in fact have known that he or she was acting dishonestly: *Brian Kindi Lawi v The State* [\[1987\] PNGLR 183](#); *Wartoto v The State* (2019) [SC1834](#); *Havila Kavov*

Cf Intention to Permanently Deprive



To treat as the person's own to dispose of regardless of the other's rights



Obtaining by False Pretence, s 404, Criminal Code, PNG - Elements

Elements

- By
- A false pretence (or a wilfully false promise, or partly by a false pretence and partly by a wilfully false promise)
- Obtains from another person
- Any chattel, money or valuable security
- With intent to defraud

Obtain by False Pretence, s 404, Criminal Code, PNG



Obtain

Traditionally and still in several jurisdictions, the accused must obtain ownership and not merely possession: *Amaiu v The State* [1979] PNGLR 576.

But several jurisdictions across the Pacific have expanded the meaning of “obtain” in the legislation to include possession or control, eg :

“the person **obtains ownership, possession or control of it for himself or herself or for another person**”; or ... 317(1)(a) Fiji Crimes Decree

Intention to Defraud

An intention to deprive a person of property which is his or to which he might be entitled, or to put the property of that other person at risk, or to imperil some lawful right, interest, opportunity or advantage of another person; by using deceit, or fraudulent or dishonest means; knowing that he has no right to deprive that person of that property or to prejudice those rights or interests.



Roland Tom v State (2019) SC1833 applying *Scott v Metropolitan Police Commissioner* [1975] AC 819 and *Peters v The Queen* [1998] HCA 7; (1998) 192 CLR 493

Defence – Honest Claim of Right



A person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any **property** in the exercise of an **honest claim of right** and **without intention to defraud**

S 23(2), Criminal Code, PNG

Defence – Honest Claim of Right



- the act done or omitted to be done must be or omitted to be done with respect to property;
- in the exercise of an honest claim of right; and
- without intention to defraud



Defence – Honest Claim of Right



- The accused must honestly believe he is entitled to do what he is doing with respect to the property the subject of the charge
- The belief must be one of legal entitlement to the property and not simply moral entitlement
- A claim of right must be honest, it does not have to be reasonable.
- It is an excusatory defence and must be excluded beyond reasonable doubt by the State once raised on the evidence.



Defence – Honest Claim of Right



Honest and without intention to defraud

- If dishonesty is an element, and where there is a subjective test, it is a different way of asking whether dishonesty has been established, ie did the accused honestly believe they were entitled to do what they did with respect to the property the subject of the charge?
- For an offence like obtaining by deception, the mere fact that there was a deception will not necessarily be enough to exclude the claim of right, but in many cases it will be strong evidence that the acts were done dishonestly.
- In addition, has the prosecution excluded the possibility that the accused act without an intention to defraud.

In closing



- Regardless of the jurisdiction, the paramount consideration will be the **elements of the offence** as prescribed in the relevant legislation and the requirements of those elements having regard to:
 - What constitutes the subject of the charge - whether it is “property” or some other thing
 - Who owns or has an interest in that property or thing
 - What the accused must do with respect to that property or thing and
 - With what intention



Discussion



**Session 2: Fraud and Related Offences
Scenario Discussion**

Breakout room discussions

Discussion



**Session 2: Fraud and Related Offences
Scenario Discussion**

Scenario Questions have been emailed to you

Next Week: Session 3 - Bribery & Corruption



- Wednesday 31 May
- 12-2pm (GMT +10:00)
- New Zoom link will be sent
- Session 3 Bribery & Corruption Case Scenario that will be emailed to you
- Come to session ready to discuss
- **Judicial Facilitator:** Justice Berrigan



Due to varying locations, local time zones for the discussion are as follows:

Wednesday 31 May, 2023	
11:00am	Koror, Palau
11:30am	Adelaide, Australia
12:00pm	Brisbane, Australia Port Moresby, Papua New Guinea
1:00pm	Pohnpei, Federated States of Micronesia Honiara, Solomon Islands Port Vila, Vanuatu
2:00pm	Suva, Fiji Tarawa, Kiribati Yaren, Nauru Majuro, Republic of Marshall Islands
3:00pm	Nukualofa, Tonga Apia, Samoa Fakaofu, Tokelau

PJIP



See you next week!