THE COURT OF APPEAL

Birmingham J.
Sheehan J.
Edwards J.

226/15

230/15

The People at the Suit of the Director of Public Prosecutions

Respondent

V

Tiarnan O'Mahoney and Bernard Daly

Appellants

JUDGMENT of the Court delivered on the 15th day of March 2016 by

Mr. Justice Birmingham

1. In June and July 2015, the appellants who were former senior officials in Anglo Irish Bank along with another co-accused Aoife Maguire stood trial in the Dublin Circuit Court. On the 30th July, 2015, each accused was convicted of the charges that he or she had faced. Mr. Daly had faced three charges. These were a charge of furnishing incorrect information contrary to s. 1078(2)(a) of the Taxes Consolidation Act 1997, by furnishing to the Revenue Commissioners a list of bank accounts which did not contain a particular deposit account, an offence of conspiracy to commit an offence contrary to s. 243(1) of the Companies Act 1990, by destroying, mutilating or falsifying books and documents relating to particular bank accounts and a conspiracy to defraud the Revenue Commissioners by deleting or concealing particulars of certain bank accounts.

2. Tiarnan O'Mahoney was charged jointly with Mr. Daly on these three counts and was also charged with two further counts of a conspiracy to commit an offence contrary to s. 243(1) of the Companies Act 1990, in relation to a number of other accounts and a further count of conspiring with Aoife Maguire to defraud the Revenue in relation to these accounts. These two charges relate to bank accounts separate from those that featured in the charges facing Bernard Daly.

3. On the 31st July, 2015, Mr. Daly was sentenced to two years imprisonment on each of the offences that he had been convicted of, the sentences to run concurrently. Mr. O'Mahoney was sentenced to three years imprisonment in respect of the offence that he was convicted of, again his sentences to run concurrently.

4. Briefly by way of background, it should be explained that in 1999/2000 the Revenue Commissioners conducted an audit of Anglo Irish Bank in relation to Deposit Interest Retention Tax. That audit established a nil liability to tax on the part of the bank.

5. In the course of a subsequent tax amnesty a number of clients of Anglo Irish Bank came forward to disclose to the Revenue that they had non resident accounts. This led to renewed interest on the part of Revenue in relation to the situation at Anglo Irish Bank.

6. In March 2003, the Revenue obtained a High Court order pursuant to s. 908 of the Taxes Consolidation Act 1997, requiring Anglo to hand over details of non resident deposit accounts held by customers of the bank. The terms of the s. 908 order required the bank to furnish information in relation to relevant accounts in various tranches in accordance with a schedule for disclosure between March and October 2003. Information in relation to accounts with balances over £100,000 was to be submitted by the 30th June, 2003, information in relation to balances over £50,000 by the 31st July, 2003, information in relation to balances over £25,000 by the 31st August, 2003 and balances over £1,000 by the 31st October, 2003.

7. In addition, in late October 2003, Revenue initiated a second DIRT audit of the bank which was formally opened on the 10th November, 2003. The purpose of this audit was to examine relevant deposit accounts in order to establish whether the customers were genuinely non resident or were incorrectly using overseas addresses in order to evade DIRT.

8. A task team was set up within the bank to respond to the audit. The audit involved Revenue seeking and being given lists by the bank of relevant non resident deposit accounts that were held in the bank on various dates, that were nominated specifically on the 31st March, 1990, the 31st March, 1995 and the 31st March 1999. From these lists, Revenue officials selected samples of accounts for detailed examination. The Revenue officials who were conducting the audit decided that they would examine all accounts which had a balance of over £100,000 on those dates and that they would examine samples of accounts where the balance was below that figure. In terms of sampling, the intention was that larger accounts would receive more attention and smaller accounts less.

9. What has come to be known as the substantive offence, the s. 1078 offence that both appellants faced, related to the list for the 31st of March, 1995 which was furnished to the Revenue on the 17th November, 2003. It may be noted that there was no dispute about the fact that the list was physically handed to the Revenue by Bernard Daly on that day and the issue at trial was whether it could be proved beyond reasonable doubt that he knew that the list he was handing over was incomplete and in that sense false. The prosecution case was that it was incomplete in that the list which was handed over did not contain one non resident account held in the name of John Peter O'Toole which had a balance of £132,000 on the relevant date. The prosecution contention was that the omission of the John Peter O'Toole account was entirely deliberate and that its exclusion was prompted by the fact that the account was connected to a named senior figure in the bank.

10. The conspiracy charges that the two appellants initially faced together related to alleged efforts to achieve the deletion or concealment of accounts in the name of John Peter O'Toole held under Client Record No. 581585 and Client Record No. 635464 from the bank's "Core Banking System" (CBS) between May and December 2004. The conspiracy charges that Mr. O'Mahoney faced along

with Ms. Maguire related to the deletion or concealment of information in respect of six trust accounts.

11. In relation to the sequence of events that led to the prosecutions and now to this appeal, the situation is that in 2010, Patrick Peake who held the position of Head of Group Fraud Prevention commenced an investigation on foot of suggestions that a number of accounts had been removed from the bank's core banking system. Contact was made at that stage by the bank with An Garda Síochána and also with the Revenue authorities.

12. On the 23rd October, 2013, Mr. Tiarnan O'Mahoney was interviewed by the gardaí and then on the 31st October, 2013, Mr. Bernard Daly was interviewed.

13. On the 14th November, 2013, Mr. O'Mahoney was arrested and charged with a number of offences. A few days later on the 19th November, 2013, Mr. Daly was charged. For reasons that will be come apparent in a situation where he was briefly out of the jurisdiction a warrant for his arrest had been sought and obtained on the 14th November, 2013.

14. A large number of grounds of appeal had been formulated by each appellant and the Court has had the benefit of extensive written and oral submissions. The written submissions filed on behalf of Mr. Daly ran to 99 pages and the submissions on behalf of Mr. O'Mahoney to 49 pages. The appeal was at hearing for five days.

Limitation Period.

15. Both appellants have contended that the prosecution has failed to prove that the "substantive offences" that they were convicted of were instituted within the time which they contend was prescribed by statute for the institution of proceedings and that rather the offences were not prosecuted within the time prescribed by s. 1078(7).

16. Section 1078(7) provides as follows:-

> "Notwithstanding any other enactment, proceedings in respect of an offence under this section may be instituted within 10 years from the date of the commission of the offence or incurring of the penalty, as the case may be."

17. The context in which this argument is advanced was that count 1 on the indictment, on which the appellants were arraigned in the Circuit Court, was in these terms.

> **Statement of offence**: Furnishing Incorrect Information, contrary to **s. 1078(2)(a**) of the Taxes Consolidation Act 1997.
>
> **Particulars of offence**: Bernard Daly and Tiarnan O'Mahoney, between the 25th day of March 2003 and the 17th day of November 2003, both dates inclusive, within the County of the City of Dublin, knowingly or wilfully furnished incorrect information, namely, a list of bank accounts which did not include the account in the name of John Peter O'Toole held under client Record No. 581585, in **connection with a tax.** (Emphasis added).

18. However, on the 14th November, 2013, Mr. Tiarnan O'Mahoney had been charged that he on a date between the 25th March, 2003, and the 17th November 2003, both dates inclusive, within the Dublin Metropolitan District being an officer of Anglo Irish Bank Corporation plc did consent to the commission by the said Anglo Irish Bank corporation plc of an offence contrary to s. 1078(2)(hh) of the Taxes Consolidation Act 1997, as inserted by s. 211(a) of the Finance Act 1999, namely knowingly and wilfully concealing the account of John Peter O'Toole (Account 581585), which said account Anglo Irish Bank Corporation plc was required to deliver in accordance with an order made under s. 908 of the Taxes Consolidation Act 1997, as substituted by s. 207(1) of the Finance Act 1999.

19. So far as Bernard Daly is concerned, it seems that he was out of the jurisdiction for some days in mid November 2013, in those circumstances and concerned lest the institution of proceedings be prevented by the terms of s. 1078(7), the prosecution, through Detective Sergeant McGinty, applied for and obtained warrants to arrest Mr. Daly from the District Court. Then on the 17th November, 2013, following his return to the country, he was charged by arrangement with the same offence as Mr. O'Mahoney had been charged with just three days earlier.

20. The issue that therefore arises for consideration is whether s. 1078(7) of the Taxes Consolidation Act provides for a limitation period as the defence argued at trial was the case. On this point the prosecution reserved its position as to whether the limitation period applied in the case of indictable offences.

21. If there was a time limit, were the steps taken in mid November 2013 by the prosecution sufficient to "stop the clock" so that the proceedings were instituted in time? This in turn gives rise to two sub issues: was the offence with which Mr. O'Mahoney was charged and the offence referred to in the warrant in the case of Mr. Daly, a different offence to that contained on count 1 of the indictment furnished to the appellants on the first day of the trial on the 10th June, 2015, or to reverse that, was count No 1 on the indictment alleging the commission of the same offence as the offence charged in November 2013? In the case of Mr. Daly there is the further issue as to whether the application for and obtaining of a warrant was a valid procedure and had the effect of "stopping the clock" as contended for by the prosecution.

Is there a time limit?

22. Before going on to address this issue, it is necessary to observe that there is no doubt that in November 2013, the prosecuting authorities at every level were operating on the basis that there was indeed a time limit and that they were up against a fast approaching deadline.

23. The appellants say that the effect of the section is clear and that what it does is to provide that all proceedings, without qualification, may be instituted within ten years and not outside the period. They address the alternative interpretation which is that the section provides that proceedings may be brought within ten years but does not preclude the bringing of proceedings outside a ten year period and say that such an interpretation cannot be supported. If this interpretation was to be accepted then the practical effect of the section would be that it would permit proceedings within a ten year window where absent the section a shorter period would apply, but would not restrict proceedings to ten years where absent the statutory provision a longer time period or indeed no time limitation would have applied.

24. In rejecting the alternative application, the appellants point out that other sections of the same Taxes Consolidation Act address very specifically the question of permitting summary prosecutions outside the time period which would ordinarily be available. They point in that regard to s. 1064 which provides:-

> "Notwithstanding section 10(4) of the Petty Sessions (Ireland) Act 1851 , summary proceedings under s. 889, 987 or 1056 may be instituted within 10 years from the date of the committing of the offence or incurring of the penalty, as the case may be."

25. Likewise s. 531(15) is specifically addressed to summary proceedings it provides:-

> "Notwithstanding any other enactment, summary proceedings in respect of offences under this section may be instituted within 10 years of the commission of the offence."

26. The appellants are dismissive of the attempts on behalf of the Director of Public Prosecutions to look outside the terms of the Taxes Consolidation Act and to refer to other statutory codes as offering support for the rather tentative suggestion by the Director that there is a possibility that s. 1078 does not operate as a stature bar at all. The prosecution attaches significance to the use of the phrase ""proceedings in respect of an offence" and argues that this is broader than the phraseology employed in other legislation, contending that a distinction is to be drawn between "proceedings in respect of an offence" and phrases such as "proceedings for an offence". The prosecution points to s. 240(5) of the Companies Act 1990, which provides:-

> "Notwithstanding section 10 (4) of the Petty Sessions (Ireland) Act 1851, summary proceedings for an offence under the Companies Acts may be instituted within 3 years from the date of the offence."

27. Attention is also drawn by the prosecution to the terms of s. 2(3) of the Criminal Law (Amendment) Act 1935, which provided for a twelve month period for the bringing of summary charges contrary to s. 2(1) of that Act. It provided:-

> "No prosecution for an offence which is declared by this section to be a misdemeanour shall be commenced more than twelve months after the date on which such offence is alleged to have been committed."

28. The appellants say that some significance should be attached to the fact that s. 1078 has always been interpreted by the authorities in the way they contend for. The appellant also say that their position is supported by the weight of academic authority drawing attention to the comments in Horan on *Corporate Crime Bloomsbury*, 2011, which at p. 684 observes:-

> "Rather unusually, it seems that the ten year time limit applies to indictable offences as well as summary offences."

29. The appellants say that their position also draws support from Donnelly and Walsh on *Revenue Investigations and Enforcements* where at p. 40 the authors commented:-

> "That although the use of the word 'may' gives an initial appearance of a non binding time limit, ten years is in fact the outer limit of time."

Later the authors commented:-

> "For revenue purposes under the TCA 1997, the period within which to prosecute may have an appearance of being longer, but the ten year period is finite and not extendable. Revenue Offences under the TCA 1997 which are prosecuted on indictment appear subject to this ten year rule."

30. The interpretation contended for by the appellants, supported as it is by academic authority, appears the correct one. From the perspective of the prosecution the height of what can be said is that the section is at best ambiguous. If s. 1078(7) is in fact ambiguous, then because it is a penal section, the interpretation most favourable to the accused should, in accordance with the ordinary canons of statutory construction, be given. In these circumstances the Court feels, though not without some hesitation, that it must approach the case on the basis that the effect of the subsection is to provide a time window of ten years within which both indictable and summary offences, including of course the offences in issue in this case, must be brought.

Were proceedings commenced within this statutory period?

31. The Court turns then to the question of whether what occurred in November 2013, was sufficient in order to be able to say that the proceedings were commenced in the statutory period. It doing so, the Court is conscious of the fact that the phrase used is "proceedings in respect of an offence" and that as contended for by the prosecution, this might be seen as somewhat less prescriptive than the language sometimes used when dealing with time limits.

32. The Court can say at the outset that it does not see any merits in the arguments made on behalf of Mr. Daly that the obtaining of a warrant on the 14th November, 2013, was invalid and still less does the Court regard the procedures that were followed as in any way improper. In a situation where everybody on the prosecution side was proceeding on the basis that the period within which proceedings could be brought would expire within days, the Court sees nothing improper in an attempt to "stop the clock" by seeking a warrant. It is of note that when Mr. Daly returned to the jurisdiction just some days later, he met with gardaí by arrangement and there was no question of him being unnecessarily deprived of his liberty at that stage.

33. There remains the question in respect of both appellants whether what occurred in November 2013, can be regarded as "proceedings in respect of the offence" for which they subsequently stood trial. It would be recalled that the charges in November 2013, had been laid contrary to s. 1078(2)(hh) of the Taxes Consolidation Act 1997, and there had been reference to the fact that the account details delivered, which were the subject of the charge, were ones that were required to be delivered in accordance with an order made under s. 908 of the Taxes Consolidation Act 1997. The indictment though, on which they stood trial, in the statement of offences referred to the offence as being ones of furnishing incorrect information contrary to s. 1078(2)(a) of the Taxes Consolidation Act 1997.

34. The DPP says that the charges and the count on the indictment are in substance the same, while the appellants say that the charges and the indictment are quite separate. This, they says is particularly significant if one has regard to the fact that s. 1078 deals with upwards of 20 ways in which offences can be committed.

35. Subsection (hh) is in these terms:-

> "Knowingly or wilfully falsifies, conceals, destroys or otherwise disposes of, or causes or permits the falsification, concealment, destruction or disposal of, any books, records or other documents –
>
> (i) which the person has been given the opportunity to deliver, or as the case may be, being made available in

accordance with s. 900(3) notice served under ss. 900, 902, 906(a), or 907, or an order made under s. 901, 902(a), or 908."

36. In this case there is no doubt that the focus of attention at the time of charging was with a High Court order made pursuant to s. 908 on the 25th March, 2003.

37. The appellants have relied on the case of *MacAvin v. DPP* [2003] IEHC 148. In that case the original charge against Mr. MacAvin was that he had failed following a requirement under s. (1)(b) of s. 13 of the Road Traffic Act 1994, to comply with the requirement of a designated doctor in relation to the taking of a specimen of blood contrary to s. 13(3) of the Road Traffic Act 1994. The offence in question occurred on the 9th October, 1998. When the matter was before the Court on the 24th November, 1999, i.e. more than a year later, the Director applied to amend the summons so that it would read that Mr. MacAvin, having been required by Garda John Cullinane to permit a designated doctor to take from him a specimen of his blood or at his option to provide for the designated doctor a specimen of his urine, refused to permit the doctor to take a specimen of blood contrary to s. 13(3) of the Road Traffic Act 1994. Ó Caoimh J. was satisfied that the section provided for distinct offences in regard to the failure to comply with the requirement of a member of An Garda Síochána on the one hand and the failure to comply with the requirements of a designated doctor in relation to the taking of a specimen on the other hand. He was satisfied that the power of amendment was exercised in order to convert an accusation of the commission of one offence into an accusation of the commission of a separate offence. Therefore the Court held that the District Court judge was not entitled to amend the accusation in the manner sought.

38. In this case the November 2013 charges were laid contrary to s. 1078(2)(hh) and the statement of offence in the indictment was laid contrary to s. 1078(2)(a). Perhaps more significantly the November 2013 charges refer to the concealment of an account, details of which Anglo Irish Bank was required to deliver in accordance with the terms of an order made under s. 908 of the Taxes Consolidation Act 1997, as substituted by s. 207(1) of the Finance Act 1999, ie. which Anglo was required to deliver pursuant to an order of the High Court. Had the charges as originally formulated concluded after the reference to knowingly and wilfully concealing the account of John Peter O'Toole (account No. 581585) the charge would have been complete at that point. The question then arises as to whether the recital that the account that was required to be delivered in accordance with an order made under s. 908 is superfluous or whether that reference can be overlooked. In the view of the Court the reference to s. 908 is a matter of substance and cannot be simply ignored. There is a further point; the charges originally preferred alleged that as officers of the company they consented to the commission of an offence by Anglo Irish Bank while the offences on which they stood trial saw them charged as principles.

39. In this case is it is impossible to avoid the conclusion that the decision to reformulate the charges and in effect to recharge was as a result of the fact that the prosecution discovered that there was a complete defence to the charge that had been presented originally. In those circumstances the Court cannot conclude that proceedings in respect of the offence for which the appellants stood trial were commenced within the ten year window that was available. Because of the passage of time, the appellants should not have had to stand trial on the so called substantive count.

The implication for other counts on the indictment

40. The Court has considered whether the fact that the appellants were required to stand trial on the substantive offence when they ought not to have been has implications for the various conspiracy counts on the indictment in respect of which no time limit applies. In a situation where the evidence in relation to what occurred on and in advance of the 17th November, 2003, would have been admissible on the conspiracy counts, the Court is satisfied that there is nothing to prevent the conspiracy counts proceeding. It is also to be noted that the nature of the conduct that was in issue in relation to the substantive count is not radically different to the nature of the conduct at issue in relation to the conspiracy counts. There can be no question of the appellants being damned in the eyes of the jury by the wrongful inclusion of the substantive counts. Indeed, it is an everyday occurrence that will see a directed acquittal in relation to one or perhaps several counts on the indictment, but the jury being permitted to consider and return verdicts on remaining counts. The position here is no different.

Grounds of Appeal relating to the Criminal Evidence Act 1992

41. It may be helpful in terms of the discussion about to be embarked upon to set out the terms of s. 5 of the Criminal Evidence Act, 1992 (the Act of 1992):

> "5.—(1) Subject to this Part, information contained in a document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible if the information—
>
> (a) was compiled in the ordinary course of a business,
>
> (b) was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and
>
> (c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.
>
> (2) Subsection (1) shall apply whether the information was supplied directly or indirectly but, if it was supplied indirectly, only if each person (whether or not he is identifiable) through whom it was supplied received it in the ordinary course of a business.
>
> (3) Subsection (1) shall not apply to—
>
> (a) information that is privileged from disclosure in criminal proceedings,
>
> (b) information supplied by a person who would not be compellable to give evidence at the instance of the party wishing to give the information in evidence by virtue of this section, or
>
> (c) subject to subsection (4), information compiled for the purposes or in contemplation of any—
>
> (i) criminal investigation,
>
> (ii) investigation or inquiry carried out pursuant to or under any enactment,

(iii) civil or criminal proceedings, or

(iv) proceedings of a disciplinary nature.

(4) Subsection (3) (c) shall not apply where—

(a) (i) the information contained in the document was compiled in the presence of a judge of the District Court and supplied on oath by a person in respect of whom an offence was alleged to have been committed and who is ordinarily resident outside the State,

(ii) either section 14 (which deals with the taking of a deposition in the presence of such a judge and the accused) of the Criminal Procedure Act, 1967 , could not be invoked or it was not practicable to do so, and

(iii) the person in respect of whom the offence was alleged to have been committed either has died or is outside the State and it is not reasonably practicable to secure his attendance at the criminal proceedings concerned,

or

(b) the document containing the information is—

(i) a map, plan, drawing or photograph (including any explanatory material in or accompanying the document concerned),

(ii) a record of a direction given by a member of the Garda Síochána pursuant to any enactment,

(iii) a record of the receipt, handling, transmission, examination or analysis of any thing by any person acting on behalf of any party to the proceedings, or

(iv) a record by a registered medical practitioner of an examination of a living or dead person.

(5) Without prejudice to subsection (1)—

(a) where a document purports to be a birth certificate issued in pursuance of the Births and Deaths Registration Acts, 1863 to 1987, and

(b) a person is named therein as father or mother of the person to whose birth the certificate relates,

the document shall be admissible in any criminal proceedings as evidence of the relationship indicated therein.

(6) Where information is admissible in evidence by virtue of this section but is expressed in terms that are not intelligible to the average person without explanation, an explanation of the information shall also be admissible in evidence if either —

(a) it is given orally by a person who is competent to do so, or

(b) it is contained in a document and the document purports to be signed by such a person.

42. The prosecution sought to adduce many documents in evidence in support of their case. One of the appellants' grounds of appeal is that a substantial number of them were wrongly admitted in evidence under Part II of the Act of 1992 and specifically s. 5 thereof.

43. Part II of the Act of 1992 was enacted to ameliorate, in so far as records compiled in the ordinary course of a business were concerned, the ordinary rules of evidence relating to adduction of testimonial documentary evidence. However, to properly understand its intended operation it is necessary to briefly rehearse some of those rules.

44. A document can potentially be used in evidence for one of three purposes. It might be adduced as real evidence, alternatively as original evidence or as testimonial evidence.

45. A document is a physical thing, and where its potential evidential value lies in its physical appearance or some physical characteristic that it has, it may be used as real evidence. What that means is that it is introduced so that the tribunal of fact may observe for itself the appearance or characteristic in question, and take account of it. So, for example, it might be relevant from an evidential point of view that a document is torn or damaged, or stained with some substance.

46. However, a document is also a medium of communication and if its potential evidential value lies not in its physical appearance or characteristics, but rather in its content, i.e, in the information that it contains and communicates, then it may be used either as original evidence or as testimonial evidence. This is because content may be of evidential value in one of two ways. The mere fact that the document has certain content, whether or not it is true, may sometimes be probative and relevant in and of itself. If the intention of the party adducing the document is simply to demonstrate that the document has certain content, but that party is not seeking to rely on the truth of that content, then it is correctly to be characterised as constituting original evidence. However, if the document is adduced for the purpose of relying both on the existence of its content and the truth of its content, then it is properly to be characterised as constituting testimonial evidence.

47. If the intention is merely to use the document as original evidence it is sufficient to establish in evidence, through an appropriate witness or witnesses, provenance, due execution and content.

48. If, however, the intention is to use the document as testimonial evidence, i.e., the party adducing it is relying on the truth of its contents, then in addition to establishing, provenance, due execution and content, it is necessary to go further and show that the "testimony" contained within it is admissible in evidence. In that regard such "testimony" is subject to the ordinary rules of evidence, including the rule against hearsay.

49. Every third party documentary statement is by its very nature a hearsay statement. It is hearsay because it is not the direct utterance of its maker, and it is not a statement made by the person adducing it and seeking to rely upon on it. A party wishing to adduce it as testimony, assuming he is not in a position to call the maker of the statement to give *viva voce* evidence, must establish that it comes within one of the recognised common law exceptions to the hearsay rule, alternatively some statutory exception.

50. A particular problem arises in terms of the proof of business records as testimonial documentary evidence in criminal trials, particularly where the records in question are those of a very large entity, which perhaps has been in business for a long time, which has many branches and many personnel, where personnel may be constantly changing, and which deals with vast numbers of transactions in any particular year. In the case of such records, the idea that that they might be proved in the traditional way by calling the creator of the record as a witness will frequently be at the very least impractical and often impossible.

51. In the case of routine, and from an individual employee's perspective, unremarkable transactions that have been processed by him or her, particularly within a large entity, it is likely to be completely unrealistic, and indeed unreasonable, to expect such a person to be able to remember, and therefore be in a position to prove by way of direct evidence, the creation of any specific record, particularly if it was a transaction that was processed quite some time ago. The situation might be even more difficult if the employee concerned had retired, or had perhaps died, or had emigrated or could not be traced or was otherwise unavailable as a witness.

52. These difficulties were recognised by the UK House of Lords in the well known case of *DPP v Myers* [1965] AC 1001, following which, and later that same year, the UK parliament created a statutory business records exception to the hearsay rule. We, in Ireland, did likewise when the Oireachtas enacted Part II of the Act of 1992, at the heart of which is s. 5.

53. It is an essential feature of the exception to the hearsay rule created by s. 5 (1) of the Act of 1992 that for the information contained in a document to be admitted in evidence it must have been compiled in the ordinary conduct of a business, and not for the purposes of investigating or prosecuting the accused. It is considered that such information can have great probative force precisely because it was created prior to and independently of any allegation of criminality made against the accused. As the Law Reform Commission has stated in its Consultation Paper on Hearsay in Civil and Criminal Cases (LRC CP 60 – 2010) it has long been recognised that records which are systematically kept, for example in business or government, are often reliable, even though the person who compiles them relies on information supplied by others. The Act of 1992 acknowledges the reliability of statements and information recorded in documents where these have been compiled in the ordinary course of business and the information was supplied by persons (even if unidentified or unavailable to testify in court) who would have had personal knowledge of the subject matter.

54. All of that having been said, it is not the case that every record asserted to be a business record is to be admitted "willy nilly" in a criminal trial. Contrary to what counsel for the prosecution in this case submitted to the trial judge on day 3, it is not the case that information contained in a putative business record is, by virtue of s. 5 of the Act of 1992, to be regarded as presumptively admissible. The legislation provides for no such presumption. While the Law Reform Commission in its Consultation Paper on Documentary and Electronic Evidence (LRC CP 57-2009) has recommended that the law be amended to render business records presumptively admissible, no legislation creating a presumption in favour of their admission has so far been enacted.

55. On the contrary, the effect of s. 5 of the Act of 1992 is that, where subs. (1) applies in the case of a document, information contained within that document shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible, **providing** three statutory preconditions are met.

56. The three statutory pre-conditions are that the information—

> (a) was compiled in the ordinary course of a business,
>
> (b) was supplied by a person (whether or not he so compiled it and is identifiable) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with, and
>
> (c) in the case of information in non-legible form that has been reproduced in permanent legible form, was reproduced in the course of the normal operation of the reproduction system concerned.

57. In addition, subss. (2), (3) and (6), respectively, of s.5 of the Act of 1992 impose restrictions or limitations on the circumstances in which subs. (1) can be relied upon or availed of, while subs. (4) restricts in turn the application of subs. (3)(c) of s.5, and subs. (5) of the said s.5 renders birth certificates admissible in criminal proceedings without prejudice to subs. (1).

58. It follows from the application of general principles with regard to admission of evidence that a party proposing to adduce evidence that is hearsay and therefore inadmissible unless it comes within a recognised exception to the hearsay rule, bears the onus of establishing that he or she can avail of the exception in question, in this instance s. 5(1) of the Act of 1992.

59. Accordingly, any party seeking to rely on s. 5 must first be in a position to prove by the adduction of appropriate evidence that the three statutory preconditions set out in subs. (1) are satisfied. In that regard, mere assertion will not be sufficient. On the contrary, *prima facie* evidence of the existence of facts satisfying those conditions is required to be adduced even where the asserted ability to satisfy those pre-conditions is not being challenged.

60. Such evidence can, in appropriate circumstances, be adduced by certificate under s.6 (1) of the Act of 1992, alternatively by means of oral evidence under s. 6(3) of the Act of 1992.

61. Secondly, insofar as the restrictions or limitations created by subss. (2), (3) and (6), respectively, of s.5 of the Act of 1992 are concerned, it is also necessary for a party seeking to avail of subs. (1) in respect of information in a document to adduce, whether or not admissibility is being contested, *prima facie* evidence tending to prove that none of those restrictions or limitations apply to the information in question so as to cause it to fall outside of the scope of subs. (1). That such proof is required follows from the wording of the relevant provisions. To give some examples, the restriction created by s. 5 (2) is framed in terms that "[s]ubsection (1) shall apply … only if", while the exceptions in s. 5(3) are framed in terms that "[s]ubsection (1) shall not apply to … ". In circumstances where general principles governing admissibility of evidence require the party seeking to adduce the evidence in controversy to demonstrate that subs. (1) of s. 5 in fact applies, it is necessary for that party to show by the adduction of appropriate evidence that none of the restrictions or limitations created by subss. (2), (3) and (6), respectively, would cause it to fall outside of the scope of subs. (1).

62. Once again, such evidence can, in appropriate circumstances, be adduced by certificate under s.6 (1) of the Act of 1992,

alternatively by means of oral evidence under s. 6(3) of the Act of 1992.

63. In this particular case, the prosecution sought in the first instance to rely on a certificate of a Mr. Patrick Peake made under s.6 (1) of the Act of 1992 for the purpose of establishing their entitlement to rely on s. 5(1) of the Act of 1992 in respect of the information contained in 192 documents (being exhibits MPP 1 to MPP192 inclusive) annexed to the said certificate, and duly gave notice to the defence of their intention to do so. However, the appellants, as was their entitlement, filed a notice of objection to the admissibility of the information in question. In those circumstances the s.6 certificate of Mr Peake could not be further relied upon by the prosecution, and by virtue of s. 6 (3) (a) of the Act of 1992 the judge was obliged to require them to establish by means of oral evidence their entitlement to rely on s. 5(1) of that Act in respect of the information contained in the documents in controversy.

64. This situation arose in the context of a trial on indictment. Approaching matters at the level of general principle, in such a situation while the required evidence could in theory have been adduced before the jury, and any objection(s) could also in theory have been dealt with in the presence of the jury, any attempt to deal with it in that way was going to be fraught with danger. The obvious danger of dealing with such matters in front of a jury is that, if the evidence necessary to establish the application of s. 5(1) of the Act of 1992 proves inadequate, or if any specific ground of objection is ultimately upheld, the jury, having seen the documents at issue or at least being aware of their contents, would, at a minimum have to be directed to disregard the controversial evidence but, more probably, have to be discharged. By far the better practice is for the jury to be asked to retire and for the trial judge to hear evidence and then rule upon the objection or objections in the course of a *voir dire*.

65. Recognising this, counsel for both appellants applied to have the admissibility of the documents in controversy determined in the course of a *voir dire*. At the outset, the trial judge appeared quite open to this in principle. However, it became apparent in the course of initial discussions with counsel, held in the absence of the jury, that such was the number of documents involved, and the number and extent of the objections being framed by the defence, that any such *voir dire* was likely to be very lengthy.

66. Counsel for both appellants made it clear to the trial judge from the outset that the prosecution was being put on full proof of the admissibility of the information contained in each and every document annexed to the redundant s. 6 certificate. In addition, the defence flagged that they intended to raise numerous specific objections to the admissibility of individual documents and that this would involve, *inter alia*, challenging the adequacy and reliability of any evidence adduced in support of the prosecution's claim to be entitled to rely on s. 5(1) of the Act of 1992, and, depending on the document at issue, variously contending that the three statutory preconditions to admissibility were not in place and/or that s. 5 (1) could not apply by operation of the restrictions or limitations created by s. 5(2), and/or s. 5(3), and/or s. 5(6), of the Act of 1992. It was further stated that, in the event of the trial judge ruling that some or all of the documents in controversy were admissible pursuant to s.5(1), that the defendants would have further arguments to make, relying on s. 8 of the Act of 1992, that the documents should not be admitted in any event "in the interests of justice".

67. The trial judge was understandably very anxious to make best use of court time, and to ensure that the jury would be away from court for the shortest time that was reasonably and realistically possible, and he sought ways, in discussions with counsel, of proceeding with the *voir dire* as efficiently as possible.

68. It is clear from the transcript that the trial judge formed the view at a relatively early stage of the *voir dire* that much time could be saved if, for the purposes of the intended challenges, the numerous documents at issue could be sorted, in so far as was possible, into groups of documents with shared characteristics, so that rolled-up submissions could be made with respect to groups of such documents rather than in respect of individual documents. On several occasions he broached with defence counsel the possibility of such sorting or categorisation, and the transcript makes clear that, with respect to the desirable objective of improving efficiency in the conduct of the *voir dire*, he met no principled opposition, and indeed there was an openness by the defence to co-operating with the Court in that regard.

69. Regrettably, however, before the trial judge's very sensible suggestion could be implemented, all concerned i.e., both trial judge and counsel, became diverted or distracted by a very important subsidiary issue, and it was never returned to. The subsidiary issue concerned whether or not the *voir dire* could in fact be conducted without the necessity to hear any evidence. The trial judge appears to have assumed from an early stage that that would be possible. It was not possible for reasons that will be elaborated upon shortly, and the trial judge was mistaken in believing the contrary.

70. The transcript reveals that the trial judge had formed the view, based on the preliminary outline that he had received of the defences' objections to the admissibility of the documents in controversy, that sufficient information could be gleaned from the statements of proposed evidence of Patrick Peake, and from the description of the individual documents contained in the schedule to the redundant s.6 certificate, to enable him rule upon those objections and determine the admissibility or otherwise of the documents without hearing any oral evidence.

71. The issue as to whether s.5 (1) of the Act of 1992 applies in the case of a document or documents involves mixed questions of fact and law. The trial judge might have been justified in his view that evidence was unnecessary if the flagged challenges had been solely concerned with an issue, or issues, of law, such that argument and counter-argument could be made and considered on the basis of an agreed factual matrix. However, from the outset of the *voir dire* the defence teams stressed that their challenges were with respect to both issues of fact and issues of law. In particular, it was made plain that there was no agreement as to facts, that in fact the prosecution were being put on proof with respect to relevant issues of fact, and that it would be necessary for the trial judge to have evidence as to existence of a specific factual matrix to justify any ruling by him that s. 5(1) of the Act of 1992 applied to the information contained in any document such as to render it admissible in evidence.

72. In the course of the discussions around this controversy between bar and bench, the trial judge had posed the question*:"[w]here do you get the presumption that we're going to hear evidence on the voir dire?*, which led to the following exchanges:

> *"MR GUERIN: Well, there's going to be a voir dire and the normal course in a voir dire is for evidence to be called and then submissions.*
>
> *JUDGE: I'm going to hear submissions. I haven't heard anything of calling or hearing witnesses.*
>
> *MR GUERIN: Well, Mr McGinn hasn't told you that he's not calling evidence so I don't know why you presume that you're not hearing evidence. It's a voir dire.*
>
> *JUDGE: Because I had heard that we were going to hear legal submissions with regard to the admissibility or otherwise of evidence. I haven't heard anything of witnesses being called and I wondered where you had got that impression from.*

MR GUERIN: Well, I may require a witness on the issue and I don't know whether I do until I've completed the exercise that I'm engaged in at the moment. I may require Mr Peake on the issue.

MR McGINN: I don't think there's anything I can usefully add, Judge. I've made my position clear that in our submission we can embark on this issue now.

JUDGE: I must say I can't see any reason why we can't either … .”

73. Counsel for the prosecution then took the trial judge through sections 5, 6, 7 & 8 of the Act of 1992, and contended on foot of doing so that the documentary evidence that he wished to adduce (being exhibits MPP1 to MPP192 inclusive, the 192 documents scheduled to the s. 6 certificate of Mr Peake that had been objected to) were presumptively admissible having regard to the terms of the legislation. The trial judge appears to have been encouraged in his view that evidence would not be necessary by the incorrect submission made to him by prosecuting counsel to the effect that under the Act of 1992 the documents in controversy were presumptively admissible.

74. Moreover, although repeatedly called upon to do so by defence counsel, the prosecution were reticent about making a clear statement of their intentions with respect to whether or not they would be going into evidence on the *voir dire*. The prosecution adopted the position that while they were not prepared to rule out the possibility that they would wish to call Mr Peake to give evidence on the *voir dire*, they first of all wanted the defence to outline the specifics of their objections with reference to Mr Peake's statement of proposed evidence and the documents as described in the schedule to the s.6 certificate, as suggested by the trial judge, and they were not going to make any decision on calling evidence until they had heard those defence submissions.

75. There then followed lengthy submissions in respect of yet another subsidiary issue (whether or not the redundant s.6 certificate could itself be treated as a statement served for the purposes of s. 6(1)(d) the Criminal Procedure Act 1967 as amended by s. 10 of the Criminal Evidence Act 1992 in respect of any evidence that the prosecution might ultimately seek to lead from Mr Peake on the s. 5(1) issue, regardless of whether that would be in the course of the *voir dire* or before the jury), which resulted in a ruling that is not appealed against. At the end of all of that, the prosecution then indicated, presumably following some reflection, that they had now decided that Mr Peake should in fact be called to give evidence in the course of the *voir dire*. This announcement then gave rise to the following exchanges between the bench and counsel for the prosecution:

“JUDGE: Why?

MR McGINN: To give oral evidence in relation to the certificate, Judge.

JUDGE: Sorry, that's I had understood that that was a requirement within the realm of the trial. He's not required within the voir dire.

MR McGINN: Yes.

JUDGE: If I understand the regime, I may be wrong.

MR McGINN: If that's the Court's understanding I'm not going to disabuse the Court of that.

JUDGE: I had understood we were here for legal argument. I don't see any necessity to hear I don't but it is your the onus is on you. I had understood we were now proceeding on to hear submission from the defence starting with Mr Grehan with regard to the substantive issues.

MR McGINN: Yes. I'm more than happy with that, Judge.”

76. Counsel for the first named appellant, Mr Grehan SC, while seeking to place on the record his unhappiness with the proposed procedure, and making it clear that he was not resiling from his contention that evidence was required in circumstances where the onus of proving that s. 5(1) of the Act of 1992 applied to the information contained in the documents in controversy rested on the prosecution, agreed with some reluctance to proceed *de bene esse* with submissions on behalf of his client.

77. However, counsel for the second named appellant, Mr Guerin SC, was not prepared to do even that, stating that he wished to insist upon oral evidence being adduced so that he might have an opportunity to cross-examine Mr Peake on issues relevant to the *voir dire*. The judge then enquired of counsel for the prosecution:

“JUDGE: Mr McGinn, do you propose calling oral evidence on the issues?

MR McGINN: When I hear the detail of Mr Grehan's objections, which is what the Court has invited, then I'll be able to make that judgment. At the moment the documents that have been served suffice.”

78. The prosecution having thus reverted yet again to their previously indicated position, counsel for the second named appellant protested vehemently stating:

“MR GUERIN: Well, Mr McGinn hasn't proved the documents that have been served so nothing can suffice without proof. The position is that the prosecution has to decide whether they are calling evidence or not and the Court may indeed have to rule as to whether or not they're required to call evidence. Mr McGinn is approaching this in the most pusillanimous manner possible by failing to nail his colours to the mast as to whether or not he wants to call evidence on the issue.”

79. It is apparent to this Court from a detailed review of the transcript that the trial judge regarded the prosecution's continued reticence as representing support for his own suggestion that it was unnecessary for evidence to be adduced on the *voir dire*.

80. The trial judge ultimately resolved the controversy as to how the *voir dire* should proceed in the following way:

“JUDGE: …. . And Mr Guerin has intervened on the issue of oral evidence. As I made the observation to him it seems to me to be somewhat previous but he felt he was entitled to be heard on the issue at this juncture though his position before lunch was that he wasn't in a position to engage with the inquiry at this juncture to indicate that he was raising objections on issues within the legislation as provided with regard to authenticity, reliability and such matters and I've

heard him and I am satisfied that we proceed on. It is a matter for the prosecution whether or not they wish to rely on oral evidence on these issues. I am satisfied to deal with them on the submissions to be made."

81. Mr Grehan SC then began taking the trial judge through each of the documents at issue, commencing with MPP1, moving on the MPP 2, MPP3 and so on, and in each instance sought to identify his specific objections, and by the end of day 3 (the first day of the *voir dire*) had got as far as MPP19.

82. On the second day of the *voir dire* (day 4 of the trial), the defence legal teams having taken stock overnight of how the *voir dire* was progressing, junior counsel Mr Staines BL sought to renew the objection on behalf of the first named appellant to the plan to proceed to submissions without oral evidence having been heard in the first instance. He submitted:

"I ask and I wonder how the Court can make those determinations that it is mandated to make in terms of not weight but admissibility, because weight is obviously a matter for the jury, but how can the Court make those admissibility type decisions where the Court doesn't have any evidence upon which to decide whether it was in the ordinary course of business, whether the information in question was compellable, all the seven criteria that I mentioned earlier and Mr Grehan mentioned earlier. So, I just wonder if the process that we're now embarking on is flawed from the start and if it's not I'll proceed but I just don't want to proceed for a number of hours and then the Court finds itself in a position where it might now agree with the argument that I'm making and I don't wish to revisit your order but I'll be fully bound by whatever the Court has to say in relation to that."

83. The trial judge then ruled:

"Yesterday Mr Grehan commenced the submissions to the Court on the issues on behalf of Mr O'Mahoney by taking the Court through the documents step by step and I am satisfied from what I have heard and having regard to the statement of Mr Peake that there is sufficient information available to the Court in regards to the various different documents that have been referred to. They appear, on the face of them, all to have originated within the bank for different reasons and can be considered, on the face of them, to be documents generated in the course of ordinary business within the bank and if, at some stage, it appears that there is a deficiency the section requires the Court to hear oral evidence I haven't approached that position as of yet. It is conceivable, I think there was a criticism made yet when Mr McGinn suggested that at some stage, it being a matter for the Court, although the onus is on the prosecution, that's some dilemma, I suppose to some degree it has to be resolved, but at this juncture I am satisfied that there's more than sufficient information available on the papers for me to make any decision necessary in the context of the application."

84. Mr. Staines BL then continued with the process that had been begun by Mr. Grehan SC on the day before and by the end of that day had only reached exhibit MPP42 or 42 out of 192. At the end of the day's hearing the trial judge intervened in the following way:

"JUDGE: Can I cut in just for a moment just to make a suggestion.

MR STAINES: Yes.

JUDGE: In the course of your careful procedure through the documents so far you have highlighted, it would seem, a number of issues, whether it was made in the ordinary course of business, whether it's an original document, whether it is made under a supervision and whether it is whatever, those there.

MR STAINES: Compellability.

JUDGE: And compellability.

MR STAINES: Yes.

JUDGE: And the Isle of Man issue, yes. Can't they be argued can't you debate those with me as issues and as and how they're resolved then they apply to each of the documents as they exist?

MR STAINES: Yes but I'm just not satisfied that I've actually dealt with all the issues until I see all the documents and that's part of the difficulty I had in terms of time. I could have done it a quick way either if I

JUDGE: Again rather than immediately react with the knee, stop and think for a moment about what I'm suggesting. I'm not trying to curtail you. I'm trying to assist you in the burden of what you're carrying.

MR STAINES: Yes.

JUDGE: But, you know, scrolling through them from beginning to end and saying well the same applies, date issues, supervision, that's there, that's evident from the document. Evident to you, it will be evident to Mr McGinn, it will be evident to me and to Mr Peake and anyone else but why don't we resolve the issues.

MR STAINES: Yes.

JUDGE: Have the arguments on the issues. I mean are there other points of issue that you have identified as you went through your research into the documents? You know, I have tried to isolate them and you corrected me by adding at least two more.

MR STAINES: Yes.

JUDGE: Are there more?

MR STAINES: There are. There are, the other issue is it seems as though some of the information contained in the documentary evidence was not gathered or compiled by Anglo Irish Bank PLC or its later manifestations at all. That applies to some of the documentation and

JUDGE: Can you pick out an example of that there?

MR STAINES: That's the difficulty.

JUDGE: All right, okay. Keep going."

After some further debate the judge then said:

"JUDGE … I mean I appreciate what you're doing. I'm not in any way deprecating your efforts and the assistance you're giving the Court. It just struck me that as you were repeating and repeating this is a date point, this is a supervision point, this is the whatever point, I thought you perhaps had got to the point where you had made your points.

MR STAINES: Yes.

JUDGE: And ought we not debate them and then the documents follow the resolution of those debates. However, you told me that there are other issues to be identified as you go through the documents later and you say that this is part of your difficulty. Now, I do appreciate you're working under difficult conditions and if I was to say we'll resume again in the morning might it help you in your endeavours."

85. When the Court reconvened on day 5 of the trial (day 3 of the *voir dire*) Mr Staines produced a document, agreed as between the defendants, for the Court that was thought to provide the analysis that the judge had been asking for on the previous day, i.e., a roadmap, so to speak, concerning the defences' objections to the admissibility of the documents in controversy.

86. The said document commenced with a table identifying 23 out of the 192 documents in the s.6 certificate in respect of which a recent indication had been received from the prosecution that they were no longer seeking to rely on the Criminal Evidence Act 1992 in respect of their admissibility.

87. It was then indicated that the following three objections were being relied upon in respect of all remaining documents:

A. There was no evidence that Patrick Peake was "duly authorised" to make the s.6 certificate on behalf of "Anglo" on the 07th May 2014. He was not even an employee of Anglo Irish Bank on that date;

B. On 07th May 2014 Patrick Peake was not "a person who occupies a position in relation to the management of the business in the course of which the information was compiled or who is otherwise in a position to give" the evidence necessary to satisfy the Court that the requirements of the Criminal Evidence Act 1992 had been complied with;

C. Patrick Peake was not sufficiently qualified to say that the reproduction of electronic computer records was "effected through the normal operation of the reproduction system for such records".

88. It then sought to categorise and identify specific objections that would be made in respect of certain documents only, and listed the documents question in tabular format. The categories of intended specific objections were:

1. documents in respect of which it was being contended that they were not compiled under Patrick Peake's supervision;

2. documents in respect of which it was being contended that the information contained in them was not compiled in the ordinary course of the business of Anglo Irish Bank Corporation PLC (or it's later manifestations);

3. documents in respect of which it was being contended that the information contained in them was not supplied by a person who had or may reasonably be supposed to have had personal knowledge of the matters dealt with;

4. documents not admissible as the information was supplied indirectly and not demonstrated that each person through whom it was supplied received it in the ordinary course of business;

5. documents not admissible as the information contained in the document was supplied by a person who would not be compellable to give evidence at the instance of the prosecution;

6. documents not admissible as the information contained in the document "was information compiled for the purposes or in contemplation of " a criminal investigation, civil or criminal proceeding or proceedings of a disciplinary nature;

89. The said document then went on to state that in the event of the Court determining that any of the documentation was admissible notwithstanding the objections raised it would be submitted pursuant to s.8 of the Act of 1992 that the information ought not to be admitted in the interests of justice. It was submitted that an individual assessment of the interests of justice would be required in respect of each particular document.

90. It was further indicated that in respect of some such documents a s.8(2) (a) objection would if necessary be pursued, on the basis that such documents ought not to be admitted in the interests of justice because, having regard to the document's content, the source of the information and the circumstances in which it was compiled, a reasonable inference could not be drawn that the information in question is reliable. The potentially affected documents were tabulated as before.

91. Similarly, it was indicated that in respect of some such documents a s.8(2) (b) objection would if necessary be pursued, on the basis that such documents ought not to be admitted in the interests of justice because, having regard to the nature and source of the document containing the information, and other relevant circumstances, the Court could not draw a reasonable inference that the document was authentic. Again, the potentially affected documents were tabulated as before.

92. Finally, it was indicated that in respect of some such documents a s.8(2) (c) objection would if necessary be pursued, on the basis that such documents ought not to be admitted in the interests of justice because, of a risk, having regard in particular to whether it was likely to be possible to controvert the information where the person who supplied it would not be attending to give oral evidence in the proceedings, that its admission will result in unfairness to the defendant(s). Again, the potentially affected documents were tabulated as before.

93. The trial judge clearly appreciated the considerable work that had gone in to the preparation of Mr Staines's document and seemed initially to be of the view that it would indeed be helpful in speeding up the process. However, it rapidly became apparent that this would not be so because while it sorted out which documents were being objected to in which way or ways, it did not

identify what it was about any particular document that justified it being placed into a particular category, or particular categories, of objection. It was therefore still necessary to go through each document in the absence of an additional analysis which further sorted the documents (in so far as possible) into groups with shared characteristics. If that had been done then objections with respect to documents with shared characteristics could, unless there was some discrete reason for distinguishing one from the other, have been considered together.

94. It seems clear to this Court that what the trial judge had really wanted (although regrettably he did not articulate his wishes with sufficient clarity) was a sorting of the documents in both respects in the interests of the efficient running of the *voir dire*. However this never happened.

95. To illustrate what might have been done, but which was not done, this Court has itself, based on the description of the documents in the schedule to the s.6 certificate, endeavoured to perform the sort of analysis that might have assisted. It seems to us that the documents at issue could perhaps have been sorted and broadly grouped as follows:

(1) Paper Bank Account Records – originals or copies

☐ Documentation associated with the opening of an account

☐ Non Resident Declaration Forms

☐ Statements of Account

☐ Intra bank payment transfer requests

☐ Isle of Man payment request forms

☐ Withdrawal / debit dockets

☐ Cheques

☐ Swift messages

☐ Requests for FX (Foreign Exchange) deals

☐ Credit committee application forms

☐ Loan Facility letters

☐ Investment execution mandates

☐ Authorised signatory lists

☐ Correspondence, inc faxes, received from clients and concerning clients

☐ Intra bank memos / file notes re client transactions.

☐ Credit / lodgement dockets

☐ Drawdown forms

☐ Joint account mandates

☐ KYC (Know Your Customer) documentation

☐ Terms of Business Documents

☐ Transcripts of telephone calls re share dealings

☐ Share dealing contract notes

(2) Electronic Bank Account Records – printouts or screenshots

☐ Customer Names and Addresses (Information on the NAD database).

☐ Account transaction histories / statements of account on the CBS (Core Banking System).

☐ Illustration of deletions to, or amendments of, records

☐ Transaction records on the DIS (Dublin Investment System)

☐ Network Folders inc folder entitled "Rev Team"

(3) Emails – printouts or copies of printouts and e-mail attachments

☐ Routine internal e-mails re customer transactions e.g. Reconciliation Dept to Lending Team

☐ Communications to and from clients of the Bank

☐ Communications re internal audit process

☐ Communications re e-discovery and retrieval of network folders

☐ Communications re internal review of non resident clients and non resident accounts

☐ Communications with IT Dept of Bank

☐ Communications re Revenue investigation and with Revenue

☐ Communications with Bank's Company Secretarial Dept

(4) Paper documents / electronic documents (other than e-mails) created in the context of investigations.

☐ Lists created for the Revenue Commissioners

☐ Minutes of meetings with Revenue officials

☐ Minutes of meetings between internal investigators

☐ Excel spreadsheets tracking transactions

(5) Court Orders

96. Regrettably, rather than the Court being able to address objections with respect to groups of documents with shared characteristics, the tortuous process of identifying, document by document, the basis for the objections being made, continued following the introduction of Mr Staines's document. By the middle of day 5 Mr Staines had got to MPP139 when the trial judge, whose growing frustration was evident, interjected to plead yet again for a degree of focus and a distillation of the issues. After some discussion, there was the following exchange:

> *"JUDGE: Sorry, … I only interjected to … to see if I can focus the presentation.*
>
> *MR STAINES: Yes. Well, I would hope that this document is entirely focused as to what you asked for yesterday. That's what the attempt of it is, is to provide exactly what the Court sought.*
>
> *JUDGE: All right."*

97. This indicates that the defence had not appreciated precisely what it was that the trial judge was really looking for (which was a means of dealing with documents in groups in so far as possible, rather than individually); that there had nevertheless been an attempt to provide what it was thought that he was looking for; and that in responding *"All right",* there was an ostensible acceptance by the trial judge that counsel had attempted in good faith to be of assistance. Moreover, and to be fair to defence counsel, the document produced by Mr Staines was exactly what the judge had in fact asked for on day 4, namely an identification or categorisation of which objections were being relied upon in respect of which documents. The problem was that that analysis having been produced, it was not going to greatly speed up the process without a corresponding further sorting of the documents concerned into groups with shared characteristics.

98. Later on day 5 of the trial, Mr Staines finally finished the exercise of taking the trial judge through each individual document and identifying the objections that were being made in respect of each of them. The judge then heard submissions from counsel concerning how he should rule. All submissions were based upon the statements of the evidence to be given by Mr Peake that had been served on the defendants, and not on any actual evidence. Moreover, such submissions were without prejudice to the contentions of the defendants, reiterated numerous times and reprised yet again on this appeal, that evidence should in fact have been adduced on the *voir dire* and that without it the judge had no foundation upon which he could consider the possible admissibility of the documents in controversy under Part II of the Act of 1992.

99. Despite their equivocation, the prosecution ultimately called no evidence on the *voir dire*.

> *100. The trial judge gave his ruling on the admissibility issues with respect to the documents in controversy on day 6 of the trial, stating:*
>
> *"The issue remaining in this application is whether the many documents uncovered and produced by him in the course of his investigations meet the requirements of the act. Before dealing with them it is necessary to make some comment on the manner in which this inquiry was conducted. All of the documents were uncovered by Mr Peake and others in the course of the investigation begun by him in early 2009. This investigation occurred in the following circumstances. In March of that year Walter Tyrell had brought the issue of the missing files in the bank to the attention of the bank's audit committee. Then on the 28th of April 2010 Mr Peake was contacted by Mr Tyrell who set up a meeting with him, Michael Kelly, Head of Compliance Ireland, money laundering reporting officer, and Brian Gillespie Associate Director Group Compliance. At this meeting Mr Tyrell advised that a number of accounts were removed from the Irish and Isle of Man Central Bank record systems. Mr Tyrell sought their views and it was decided at the meeting, including Mr Peake, to immediately submit a complaint suspicious transaction report to the Garda Bureau of Fraud Investigation, the Financial Regulator and the Revenue Commissioners. Also at this meeting it was agreed that Mr Peake would investigate this matter further on behalf of the bank as head of group fraud prevention. Given the sensitivity of the matter he stated, "I personally dealt with the investigation and was later assisted in the preparatory workings by Fergal O'Farrell," described as assistant manager group fraud prevention. It is clear at this stage a possible police investigation or prosecution was in the offing.*
>
> *Much argument has turned on the provisions of section 5 (3) (c), that as a result of his work the documents uncovered in this investigation could not be admitted in this evidence as compiled for the purposes or in contemplation of any criminal investigation. This argument accounts for the large amount of documents scheduled in the witness submission helpfully provided by Mr Staines in the course of his address to the Court. The fact that this investigation is the backdrop to Mr Peake's evidence has led to a lot of misunderstandings of the working of the act. This is a matter to be returned to at a later stage. The prosecution sought to rely on the production of these documents based on the provisions of Part II of the act and sections 4, 5, 6, 7 and 8. It is not necessary to repeat the provisions at this stage.*
>
> *A section 6 certificate was prepared and served in proper time under the act on the accused. Mr O'Mahoney raised objection to the certificate being relied upon and this objection was extended by the Court to the other two accused to*

ensure no injustice would be done or no imbalance created where the three were on trial together on charges arising broadly from common facts and events. The effect of allowing or making objection to the certificate is that matters contained within the notice no longer are taken as proven and will not be "evidence of any matter stated or specified therein as provided for in section 6 (1)." Section 6 (3) requires the Court to hear oral evidence of any matter stated or specified in the certificate and this relates to evidence in the trial and before the jury. Submissions have been made to the effect that the Court must hear such oral evidence in the voir dire and in its absence there is no evidence in the inquiry to allow the Court to make an adequate or informed decision. I don't accept this submission. In many, if not most, such inquires oral evidence is not called or relied upon. Argument and submissions are raised and made on the issues identified on the papers filed. Here the Court has relied on the statement of Mr Peake in the book of documents and including the contents of the certificate. That is why Mr McGinn in his submission indicates that the section 6 certificate is now no more than a statement of purported evidence which has been served on the accused under the provisions of 7 (1) (b). I am satisfied that the nature of the objections raised and the issues pursued amount in the main to issues of legal definition and application of the provisions of Part II of the act and my rulings can be adequately made without resort to oral evidence."

101. This Court considers that the trial judge was in error in believing that he could adjudicate on whether information contained in the documents in controversy could be admitted pursuant to s. 5(1) of the Act of 1992 without hearing evidence. While the issue of admissibility was of course a matter of law, whether the statutory pre-conditions to any valid reliance on s. 5(1) existed, involved mixed issues of law and fact, but mostly issues of fact, in respect of which the judge was required to be satisfied to the required standard having received evidence as to the factual position.

102. Take, for example, the pre-condition in s. 5(1)(a) which requires that the information in a document should have been "compiled in the ordinary course of business". While "business" in this context certainly has a specific legal meaning and must be read in conjunction with the definition of that term for the purposes of Part II contained in s. 4 of the Act 1992, satisfaction of the precondition in s. 5(1)(a) still unquestionably requires that evidence be given concerning the circumstances in which the information at issue was compiled so as to show that it was in fact compiled in the ordinary course of "business" as it is so defined.

103. In the course of ruling on the admissibility of the documentary evidence the trial judge had gone on to purport to address substantively the various objections raised by the defence in respect of individual documents. He said:

"Turning to the issues of definition that have been raised and requiring a finding as to the meaning and range of the act. Here it is proposed to follow the order set out in the written submission of Mr O'Mahoney already referred to. The first issue is that of the certificate describing Mr Peake as duly authorised to make the statement and that the information contained therein was compiled under his supervision. The submission is made that the very sentence that this assertion is contained in reveals an inherent contradiction in that Mr Peake indicates that he is the former head of group fraud prevention. It seems that in May 2014 he was no longer a member of the bank and the bank no longer existed as having been liquidated by special act of the Oireachtas. The act does not require a person to be duly authorised and this assertion is to some extent superfluous. Section 6 (1) requires that the person to produce the documents be someone who occupies the position in relation to the management of the business or who is otherwise in a position to give the certificate or, in this case, the evidence. The fact that the person has moved on or that the business has ceased to trade cannot adversely affect the collection or presentation of evidence at trial. To argue otherwise would be to suggest that any police investigation would of necessity end with the departure of the appropriate employee of the company or its suspicion from trading due to court liquidation or other such process, even where the very act under investigation may have led to the business's demise in the first place. Whilst the legislation must be carefully construed so as not to create unfairness, the rules of evidence generally must not offend common sense.

Mr Peake was at the heart of the events that uncovered the documents in question. He personally supervised them and he worked throughout the period of their compilation with the bank and has intimate knowledge of the workings and the recordings of the bank, especially from an accounting and recording point of view. He is in a very good position, if not the best, to give the evidence proposed. In the same context Mr McGinn accepts that there is an inherent contradiction between the witness indicating that he is formerly employed as head of group fraud prevention and that the information was compiled under his supervision. The document later indicates that the records of the bank were ones that he had in the past access to and the present tense word "have" is corrected when he came to sign the declaration in 2014. One possible construction of the assertion is that as an employee in various positions of responsibility the documentary evidence to be produced by him he can say was compiled in the ordinary course of business of the bank as required by the legislation and was assembled under his supervision at the time he personally conducted his investigation in 2009 as referred to above.

I do not see the contradiction being spoken of and in any event whether the work was done under his supervision or not is not the test. The legislature requires him to be in a position otherwise to give the evidence and, as I have indicated, Mr Peake is more than well positioned to do so. The act is designed to allow a person with intimate knowledge and expertise to give post fact evidence based on documents generated in the normal course of business and to facilitate that process.

The second issue relates to documents in non legible form. It is submitted that all the documents are of an original non legible form and that their reproduction was "In the course of normal operation of the reproduction system." It is submitted that Mr Peake does not indicate any expertise to base the assertion he makes in his purported certificate that any reproduction was effected "through the normal operation of the reproduction system of such records." The act defines legislation in non legible form as including information on microfilm, microfiche, magnetic tape or disk and was defined as such at a time when the legislation contemplated the existence of computers. I am satisfied that the documents in the case are not or were not of non legible form. They of necessity may have been stored out of immediate sight. That storage in the normal operation of any computer system would not involved the corruption or alteration of the nature of the document or its content unless the system was under attack from an outside hacker or a system virus. The information contained in any of the non legible forms specifically referred to such as film, fiche or tape do not speak of such integrity. The assertion in the certificate is one based there. It would seem to follow the form of the legislation and it's to some degree again superfluous as the documents were retained by the bank at all times in legible form and this is well illustrated by the original completion of those various documents except those to which Mr Peake admits to addition or alteration since production and which the prosecution do not propose to rely upon other than in redacted form.

The third issue relates to the definition or understanding of what ordinary course of business. The arguments here turn

on the individual nature of many of the documents. It is submitted that emails that passed between employees of the bank do not fall under this definition. I am satisfied that they do having regard to the nature of the business and how its work was facilitated internally on a daily basis by such traffic and communications. It is argued that the definition could not cover documents that were created or described on their face as ...

Turning, as I say, to the third issue, that is the understandings of what ordinary course of business means, the arguments here turn on the individual nature of many of the documents. It is submitted that emails that passed between employees of the bank do not fall under this definition. I am satisfied that they do having regard to the nature of the business and how its work was facilitated internally on a daily basis by such traffic and communications. It is argued that the definition could not cover documents that were created or described on their face as originating in or the property of another person or entity and, in particular, Anglo Irish Bank in the Isle of Man. Here it would seem that documents are to be produced that reflect business in the Isle of Man and accounts there. These documents find their way to the bank in Dublin by reason of daily business traffic of both banks and in that way become part of the ordinary course of business of the bank and are so retained if on the central records system of the bank and available to this trial under the legislation.

The next issue relates to compellability. Section 5 requires that evidence to be produced under this section is evidence that is capable of being given to direct oral evidence and is admissible. Evidence that comes from a person who would not be compellable to give evidence at the instance of the party wishing to give the information in evidence by virtue of this section is prohibited under section 5 (3) (b). I am satisfied that this prohibition refers to a class of witness or evidence that can never be compellable at trial and not to the fact that a witness was outside the jurisdiction of the Court at the time the document was created. Documents created by a person working at the time abroad or with another company cannot be excluded on that basis alone. Documents that are created by one of the accused cannot be admissible by this process if they in any way incriminate the person and fall to be considered separately as real evidence. This prohibition would seem to cover exhibits MPP33, 37, 86 and 192 affecting Ms Maguire and MPP83, 84 and 85 affecting Mr O'Mahoney.

Knowledge of the contents under sections 5 (1) (b) and 5 (2) of the act. The submission on these two parts of the act confuses the role played by the compiler of information and the supplier of the information formed in the actual document. The supplier is in effect the creator of the information in the first instance, namely the customer at the counter in the example used to illustrate the argument. The certificate or statement of Mr Peake states that the information in the documentary evidence was gathered that is compiled by employees of the bank who receive the information in the ordinary course of business. Some have been identified and are indicated in the schedule of his statement and all are stated for personal knowledge of the facts contained in the documents from the point of compilation onwards, including any intermediaries. It is not an unreasonable conclusion to find, as a fact, that the supplier, the customer, had personal knowledge of the business being traced by him on the occasion the information was first created. I am satisfied that these assertions and conclusions properly and adequately comply with the provisions of the legislation and the assumption is not an unreasonable one for the Court to act upon.

The next issue is whether or not the information was created in the course of a criminal or other investigation. All of the documents and the information contained in them were created at the time the business reflected in them occurred, namely in the early part of the 2000s and thereabouts. They were created at a time of everyday business of the bank. No criminal or other investigation was in being then or contemplated. Mr Peake did not create them. He brought them all together for his report and from his later 2009 investigation. That work, as indicated, did contemplate the involvement of An Garda Síochána. However, this fact is again not relevant to the position at the time the documents and information were originally created.

The final area of concern for the Court is that under section 8 dealing with reality, authenticity and overall fairness. In general the act introduces a significant exception to the hearsay rule in specifically criminal trials and relating to business operations. The need arose out of the multiplicity of records created by many different persons over considerable time in many multi located outlets of a single business operation. It is based on the realities of commerce and it is designed to ensure that prosecutions are facilitated and not made impossible arising from questionable transactions from within such businesses. Proper balances have been built in to protect against unfairness. Many of these have been raised and dealt with in the course of this voir dire. Again justice requires a court to have regard to the overall position proposed in the evidence of the witness to ensure against any potential injustice. The basic framework allows for one or more properly positioned or qualified person to draw all the various records and facts of a particular nature to a single focus, namely the witness and to present it in a coherent way at trial. The legislation in fact envisages that even where this coherency has been achieved but complexity remains for the evidence or witness to provide an explanation by a competent witness in oral or written form under section 5 (6).

Here all the documents were stored in the central banking system of the bank. They have been retrieved and presented in original form. Where there appears any addition or alteration a comment is made and provided where possible. Where such explanation is not possible this is also reported. There are some documents where Mr Peake has added his note or commentary and these can and will be redacted from the documents before it is adduced in evidence. For these reasons, and having reviewed the documents, I am satisfied that they are reliable and authentic. While the complaint of potential unfairness has been raised no instance of substance has been set out in the submissions and the matter is taken no further. Their admission in evidence arises under legislation which is designed to present them in this particular way and does not present any unfairness in itself. For these reasons I am satisfied that Mr Peake is a competent and relevant witness and the prosecution are permitted rely on him to produce in evidence those documents referred to in the proposed statement of evidence as redacted and prepared in the course of this hearing, except of course the seven documents identified and referred to earlier."

104. As can be seen from this lengthy quotation, it is unfortunately the case that the trial judge proceeded to deal with various admissibility issues by assuming that a certain factual matrix would in fact be proven in evidence before the jury through the evidence of Mr Peake. He was seemingly prepared to make that assumption without having heard any actual evidence from Mr Peake, and most importantly without having heard Mr Peake being tested in cross-examination as to his credibility or reliability, and without any regard to the possibility that the defence teams might have been able to call some evidence in rebuttal. This was not the correct way of proceeding. The notion of trial in due course of law as mandated by the Constitution demands proof of contested issues of fact by means of evidence and further demands that witnesses as to issues of fact be available for cross-examination if required.

105. This Court acknowledges and has a good deal of sympathy for the trial judge's frustration, evident from the outset, at the time

that it was going to take to test the admissibility of the documents in controversy on the *voir dire*. In addition, we wholly support him in his expressed desire that it should be done as efficiently as possible. However, in seeking to pursue the objective of the efficient use of court time he was not justified in dispensing with the requirement for proof by means of viva voce evidence of the factual matrix necessary to underpin the validity of a document's admissibility. In that regard this Court is of the view that the trial judge was entitled to expect, and to have received, greater assistance from the prosecution than was in fact provided to him.

106. Once the s.6 certificate was objected to, the prosecution knew that they were being put on proof of admissibility. It was then a matter for them to determine what evidence they required to adduce to enable them to legitimately rely on s. 5(1) of the Act of 1992. As the prosecution bore the burden of proof with respect to the admissibility of the documents at issue, they would have been wise to seek to establish in advance discussions with the defence to what extent factual issues relevant to the issue of admissibility were in controversy, or required to be proven. If some matters were not in controversy and proof of them was not required then there were procedures by means of which formal admissions could be made by arrangement, and time saved in that way . However, where proof of a matter in controversy was required, it was incumbent on the prosecution to be prepared for this, to marshal the necessary witness(es), to have them available to give evidence on the *voir dire*, and to actually call the required evidence.

107. Moreover, it was also for the prosecution to consider how to most efficiently present the necessary evidence where there were a very large number of documents involved. The trial judge should not really have had to suggest a sorting and categorisation of documents with shared characteristics. The prosecution, being the party bearing the onus of proof, bore primary responsibility for presentation of the required evidence in an efficient way.

108. If the prosecution had called Mr Peake on the *voir dire* there would have been nothing wrong with leading evidence in chief from him dealing with groups of similar documents or documents with shared characteristics all at once on a rolled up basis, providing there was adequate evidence covering the group or class of documents in question. It was not necessary for discrete evidence to be led in respect of each document, absent some distinguishing feature in respect of an individual document that might call for such evidence.

109. Thus, for example, if Mr Peake had given evidence on the *voir dire* concerning the type of paperwork that needed to be completed to make a cash withdrawal from an account in the day to day business of the bank, and he exhibited MPP17 as an example of a cash withdrawal docket used in such a procedure, and explained who would have supplied each piece of information contained within that docket, his said explanation would have been sufficient to cover MPP18, MPP19 (also cash withdrawal dockets on the list) for the purposes of satisfying s. 5(1)(a) providing the witness identified the other documents as belonging to the same class or group. It would not have been necessary to adduce the evidence as to the compilation procedure a second or subsequent time.

110. In this case, however, the trial judge had heard no evidence whatever with which to adjudicate on the admissibility of the documents in controversy. The prosecution opted not to call evidence once the judge had made plain that he would not welcome evidence being adduced on the *voir dire*. The judge then purported to determine the objections raised solely with reference to Mr Peake's statement of proposed evidence, and the description of each document contained in the s.6 certificate that had been objected. Absent express acquiescence from the defendants, including express waiver of the requirement to hear evidence, the trial judge was not entitled to proceed as he did. On the contrary, counsel for both defendants had expressed deep unhappiness at the proposed procedure, and only went along with it under protest, reserving their rights to complain about the absence of necessary evidence at a later stage.

111. It is not necessary for this Court to express a view as to whether, if Mr Peake had given evidence as advertised on the *voir dire*, and had been cross-examined without having been significantly impeached, the trial judge's ruling on some, or all, of the various admissibility issues raised in respect of the documents in controversy might have been correct in any event. It is unnecessary to do so because the entire procedure that was in fact adopted was flawed and unsafe. It is clear that almost every aspect of the trial judge's ruling was predicated on evidence that he simply did not have at that point, but which he was assuming would be given by Mr Peake before the jury in due course, and in circumstances where Mr Peake's credibility and reliability would not be in doubt.

112. What happened next in the trial was that Mr Peake duly gave evidence before the jury. His evidence in chief straddled days 6, 7, 8, 9, 11, 12 & 13. In his evidence in chief before the jury Mr Peake testified in accordance with his statements concerning the documents at issue, and counsel for the prosecution in eliciting that evidence skilfully guided him within the limits of what was permissible.

113. He was briefly cross-examined by defence counsel for both appellants on day 13 but was not cross-examined on any issue relevant to the objections that had been raised on the *voir dire* concerning the admissibility of the documents in controversy.

114. On one view this is difficult to understand given the vehemence with which the objections had been pursued on the *voir dire*, the fact that Mr Peake's evidence had now been heard for the first time and was available to be tested, and the fact that the evidence had been adduced before the ultimate trier of fact, i.e., before the jury. Counsel for the second named appellant certainly, and in truth both counsel, had made it clear at all stages that they desired the opportunity to cross –examine Mr Peake on matters relevant to admissibility issues, and that they were in no way waiving that entitlement.

115. However, we consider that it is probably safe to infer that the view was taken that the issue of admissibility was a matter on which the judge had ruled for better or for worse in so far as the trial at hearing was concerned, and that to seek to raise it again through cross-examination of Mr Peake before the jury might be seen as argumentative and disrespectful.

116. At any rate no cross-examination was ultimately conducted relevant to admissibility issues.

117. We are satisfied that Mr Peake's evidence before the jury cannot be regarded as validating the trial judge's admissibility rulings on an *ex post facto* basis, particularly in circumstances where Mr Peake's evidence was untested, and potential admissibility issues arising from his evidence were not pursued, after he had given his evidence. The circumstances of this case do not lend support to any suggestion that the failure to cross-examine Mr Peake, or to seek to re-open admissibility issues following his evidence before the jury, was strategic. It would be unsafe, and could give rise to a potential injustice, to seek to draw any such inference.

118. The bottom line is that the documents in respect of which s. 5(1) of the Act of 1992 was relied upon were wrongly ruled as being admissible, in the absence of evidence, that was available to be tested, having been adduced concerning matters of fact relevant to issues bearing on their admissibility.

119. The documents ruled admissible by the trial judge were, for the most part, vital to the prosecution case, and particularly the conspiracy counts, in that it was by means of many of those documents that Mr Peake was able to, *inter alia*, trace for the jury, and explain and illustrate, the means by which accounts in Anglo Irish Bank (in its various manifestations) were opened, the manner in

which records were kept, the designation of ownership of various accounts, the source of funds in certain accounts, the movement of certain funds as between different accounts, and how the names of different accounts were changed or re-designated at various times. There were also documents that specifically related to the substantive charges, and which again served to explain and illustrate the transactions upon which the prosecution were relying as evidence in support of those charges.

120. In circumstances where crucial documentary evidence was wrongly admitted before the jury in breach of the rule against hearsay, this Court must uphold the grounds of appeal relevant to this issue.

The direction application on behalf of Bernard Daly in respect of counts 2 and 4

121. Counsel on behalf Bernard Daly consistently contended that there was just no evidence linking his client to these counts, being the counts of conspiracy to commit an offence contrary to s. 243(1) of the Companies Act 1990 and the conspiracy to defraud. The contention first surfaced in the course of an application pursuant to s. 4E of the Criminal Procedure Act 1967. The s. 4E application was confined to the two conspiracy counts, the substantive count was not included as it was tacitly accepted that there was sufficient evidence to put Mr. Daly on trial for this offence. Then when the s. 4E application failed, essentially the same arguments were repeated in the course of the direction application that followed the close of the prosecution case.

122. In resisting the application for a s. 4E order, counsel for the prosecution went in some detail through various statements of evidence for the purpose of showing that the conspiracies alleged existed. He then turned to the evidence that was specific to each of the accused. The evidence he indentified as relevant in the case of Mr. Daly was the statement of evidence of Brian Gillespie as to a brief doorway conversation that he had with Mr. Daly in or around late October 2003. Then, prosecuting counsel summarised the position as being:

> *"The prosecution case is that Mr. Daly was part of that plan to hide material from Revenue and that when Mr. Gillespie indicated that he would not comply with that instruction, that Mr. Daly took a decision not to appoint him to the team".*

123. When asked by the trial judge to address directly the submissions that there was no evidence linking Mr. Daly to the later conspiracies, prosecuting counsel responded:

> *"There isn't any direct evidence to say that the conversation was limited to what was happening in October and November 2003, he talks about the deletion of an account".*

124. Mr. Gillespie's evidence was given on the 6th July, 2015, day 13 of the trial. As his evidence was at the heart of the prosecution case it is helpful to set it out:

> "Q. And did you expect the disclosure to be made under the audit or the information that the Revenue was seeking under the audit to cover some or perhaps all of the same ground as the information that was sought under the High Court order?
>
> A. Well you would – I would have expected not necessarily identical grounds, but it would be surprising if there wasn't a lot of cross over in relation to non resident accounts.
>
> Q. Do you recall who was in charge of assimilating the information for Revenue for that audit?
>
> A. For the DIRT audit, my understanding is that Bernard Daly was in charge of the field work team.
>
> Q. Do you know who was on the field work team?
>
> A. I couldn't list out individuals who were involved. At the time I would have known but I can think of certain people who would have been – who I understood were the on field work team, yes.
>
> Q. Well do you know who put the team together?
>
> A. Well my understanding is that Bernard put the team together.
>
> Q. Was there any – were you asked to be on the team?
>
> A. I wasn't asked that specific question, no.
>
> Q. Were you asked any specific question?
>
> A. Yes.
>
> Q. Could you tell us about that?
>
> A. Well basically I bumped into Bernard and he said – he asked me if, in the context of the DIRT audit team, would I be prepared to delete an account if asked to do so by Sean Fitzpatrick and obviously I said no. I thought at the time that there was a reference to the conversations with Sean Fitzpatrick. I don't know if it was or it wasn't.
>
> Q. What was Mr. Daly's reaction to your refusal or your response?
>
> A. He – we had a very brief conversation. His reaction was more or less, you know, that I wouldn't be needed and, you know and that was it, he walked on and I walked on . . ."

125. It is of some significance that in the course of his direct evidence Mr. Gillespie volunteered, without being asked, that his conversation with Mr. Daly which took place in October 2003, was in the context of the DIRT audit which was then getting underway which would require the bank to compile and submit a list of accounts. It was in that context that Mr. Gillespie was asked what his reaction would be if a request was made of him by Mr. Fitzpatrick.

126. Counsel for the prosecution made it clear throughout that, as he put it, in responding to the s. 4E application, that the second part of the prosecution case was premised on evidence indicating a concerted effort to delete certain bank accounts.

127. In a situation where, there was cogent evidence that Mr. Daly was ascertaining whether Mr. Gillespie would be a party to

impropriety, there has to be suspicion, indeed strong suspicion that when further impropriety in the form of the intended deletion of documents from the Central Bank System took place designed to achieve the same objective, being the protection of the interest of the senior named figure in the bank that Mr. Daly was likely to have been party to that. The question is whether it went beyond strong suspicion and whether the evidence was such, that when taken at its high watermark a jury, properly charged could be satisfied beyond reasonable doubt of his guilt on the conspiracy counts. The Court has already commented that there were grounds for real suspicion that it was likely that he was involved in attempts to delete records of the same account that had been excluded from the list submitted to the Revenue. It was undoubtedly the case that a jury could be expected to have regard to the fact that Mr. Daly's position as Company Secretary and as the individual who was interacting with Revenue on a daily basis meant that he would have been a valuable ally for those who were party to the conspiracy. The prosecution put the matter further and say that is reasonable to infer that the efforts to keep the accounts linked to the very senior bank figure outside the ambit of the Revenue audit would not have succeeded without the participation of Mr. Daly. In the view of the Court, this contention goes further than is justified. There is no question that his involvement would have been helpful, but there can be no real doubt that the conspiracy could have proceeded without him.

128. The prosecution has attached significance to certain answers given by Mr. Daly when interviewed by gardaí where it is said showed Mr. Daly anxious to distance himself from Aoife Maguire and also from Zeta Madden (nee Vance). Ms. Vance was a senior figure in the Treasury Department of the bank and had been asked by Tiarnan O'Mahoney to head up the task force to deal with the DIRT audit. Her evidence at trial was that she initially accepted that role and had put the team together, but then was asked by him whether she would be willing to remove an account from the audit list and that she rang Mr. O'Mahoney and told him she would not be prepared to do so and at that stage she was told that she would no longer be needed for the task team. The prosecution say that the efforts to distance himself from Ms. Maguire and from Ms. Vance is indicative of an individual with matters to hide.

129. The case which the prosecution was in a position to mount on the conspiracy charge could not by any stretch of the imagination be seen as a strong one. That was always likely to give rise to a difficult decision for the trial court as to whether to withdraw the conspiracy charges from the jury or allow the matter to be considered by the jury. How a trial judge should approach a submission of no case to answer has been considered in many cases in this jurisdiction and indeed in the neighbouring jurisdiction. The classic statement of the law is to be found in the judgment of Lord Lane in the case of *R. v. Galbraith* [1981] 1 WLR 1039, a case which has been cited with approval in this jurisdiction on many occasions. In the course of his judgment Lord Lane L.C.J. posed the question:

> "How then should the judge approach a submission of no case?
>
> 1. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> 2. The difficulty arises where there is some evidence, but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

130. In this case it is not the situation that there is no evidence. The difficult question is whether the evidence can be categorised as tenuous. The examples of tenuous evidence offered by Lord Lane of inherent weakness or vagueness or inconsistency with other evidence have really little application. There remains the question of whether the evidence is to be seen as slight or of little substance or as thin; these some of the definitions of tenuous provided by the Concise Oxford Dictionary.

131. In the course of the trial it was acknowledged by prosecution counsel that there was no direct evidence linking Mr. Daly to the attempted deletion of records. However the prosecution say it can safely be inferred that he was a party to those attempts. In the view of the Court the evidence was at too distant a remove.

132. We have seen that prosecution counsel responded to the trial judge's invitation to address directly the submission that there was no evidence linking Mr. Daly to the later conspiracies by saying "there isn't any direct evidence to say that the conversation was limited to what was happening in October and November 2003, he talks about the deletion of an account". In accordance with first principles there is no obligation on the defence to adduce evidence that the conversation was in fact so limited. The onus is on the prosecution to discount that possibility. The evidence of Mr. Gillespie appears to put his doorway conversation in the context of what was happening in October/November 2003 and so at some remove from the later efforts at deletion. In the view of the Court the time remove between doorway conversation and attempted deletion is such that the prosecution case can properly and indeed must be categorised as tenuous. An appellate court considering whether a judge erred in permitting a case to go to a jury would be conscious of what Lord Chief Justice Lane had to say in relation to borderline cases, where he expressly commented that these can safely be left to the discretion of the judge. This Court is in complete agreement with that observation. However, a case that turns on whether the available evidence is sufficiently connected or too remote from the offence charged is in a somewhat different category than many others. The evidence available to the prosecution was thin, was tenuous and in those circumstances the Court finds itself in disagreement with the trial judge and feels that this was a case where notwithstanding the level of suspicion that existed, that it would have been appropriate to withdraw the case from the jury. Accordingly, on this ground of appeal Mr. Daly succeeds.

133. The conclusions that we have reached mean that the convictions of Mr. O'Mahoney and Mr. Daly must be quashed. Insofar as we have concluded in the case of Mr. Daly that there was insufficient evidence to go to the jury the question of ordering a re-trail does not arise. The position as regards Mr. O'Mahoney is different. He has presented what has been described as an omnibus ground, complaining that evidence which was impermissible was allowed go before the jury and that the judge erred in failing to accede to repeated requests for a discharge of the jury and/or for a separate trial.

134. So, by way of example, Mr. O'Mahoney protests that the nature of the cross examination conducted on behalf of his co-accused of the key prosecution witness Brian Gillespie and the nature of the prosecution re-examination that followed was unfair to him. Another ground of complaint centres on the admissibility of an email in which Mr. O'Mahoney's then co-accused Aoife Maguire stated that she was working "directly for" Mr. O'Mahoney and the impact that this might have had. While the jury was ultimately told to have

regard to this email only as part of the case against Aoife Maguire and not to have regard to it as regards Mr. O'Mahoney, the appellant says that the evidence is bound to have had a very considerable impact. There was cogent evidence that for a period of over a year, Ms. Maguire was seeking the removal of files and accounts. A suggestion that she was working for Mr. O'Mahoney could not have been more damaging. A further complaint relates to another significant prosecution witness, James Shaw, from the IT Department. The appellant says that he was permitted to give what was in effect highly damaging opinion evidence to the effect that the instructions in relation to deleting were coming from Mr. O'Mahoney and possibly also from an even more senior figure in the bank. A still further complaint is made about the impact of the memoranda of interviews with Mr. Daly. These interviews were of course evidence only in the trial of Mr. Daly, but it is said that these interviews, as even the judge accepted did not place Mr. O'Mahoney in "a good light".

135. In the Court's view, these and related complaints all arise out of the July 2015 trial and do not have any relevance to the question of whether there should be a retrial.

136. If there is a retrial, similar issues may arise or indeed quite different issues in relation to admissibility may arise, but it would be for the trial judge to deal with them on the basis of the evidence in that trial and the submissions made to him. Again, in the event of a retrial, it would be for the judge to assess the significance of the Carnhalla evidence and to determine to what extent it is probative as the prosecution will no doubt contend or prejudicial as it is likely to be argued by the defence.

137. Mr. O'Mahoney has contended that the judge erred in failing to direct the jury to acquit him in respect of the count of conspiracy to defraud the Revenue. It is said that there was no evidence of any actual loss or indeed of potential loss by the Revenue and that the evidence established that there were a number of other possible motives. Insofar as the evidence suggested that the motivation was to advantage a named senior figure within the bank and to fulfil his wishes, there was any number of reasons why he might have wanted material covered up or documents deleted.

138. However, in the view of the Court, there was material on the basis of which a jury could conclude that the motivation of those involved in the conspiracy was to keep material away from the Revenue and, if that conclusion was reached, to further conclude that it was designed to advantage individuals and disadvantage the Revenue to cause loss to the Revenue. If that was established, it was not necessary to prove that any actual loss to the Revenue had occurred. In the Court's view, the conclusion that this was a matter to be left to be determined by the jury was a proper one and so this ground fails.

139. In the Court's view the ground on which Mr. O'Mahoney has succeeded do not preclude the ordering of a re-trial. In these circumstances the Court will hear the parties on the issue.