COURT OF APPEAL

[2016 Nos. 258 and 244]

The President

Birmingham J.

Edwards J.

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

AND

JOHN BOWE

AND

DENIS CASEY

APPELLANTS

JUDGMENT of the Court delivered by the President on 30th June 2017

Contents

Introduction

1. The appellants were each convicted of a single count of conspiracy to defraud in a trial in Dublin Circuit Criminal Court that was one of the longest in the history of the State. It began with the prosecution opening on 20 January 2016 involving four accused and culminated on 9 June in jury verdicts of guilty in the cases of three accused including these appellants and the acquittal of a co-accused. They were sentenced to terms of imprisonment on 29 June 2016. Their appeals to this court against conviction also were exceptionally protracted and lengthy, extending over five days. The severity of the sentences remains as an issue depending on the outcome of this part of the appeal.

2. The case has its origins in the global banking catastrophe of 2007/2008 and its impact on the Irish financial sector. More specifically, it relates to the existential crisis that befell Anglo-Irish Bank Corporation plc that ultimately resulted in its demise. Mr Bowe was a senior official in Anglo and Mr. Casey was the Chief Executive Officer of Irish Life and Permanent plc. They were accused of conspiracy to defraud in the following factual circumstances. Between 25th and 30th September 2008, and prior to the financial year-end of Anglo Irish Bank Corporation plc. on the 30th September, 2008, a series of back-to-back transactions took place between Anglo Irish Bank Corporation plc. (hereinafter 'Anglo'), Irish Life & Permanent plc. (hereinafter 'IL&P') and Irish Life Assurance Limited (hereinafter 'ILA') in the total amount of €7.2 billion. The details of the sequence of money transfers is described in the section of the judgment dealing with the evidence of the prosecution's expert witness, Mr Mark Hunt FCA. They had the effect of significantly increasing Anglo's accounts in regard to deposits as at 30th September, 2008.

3. The Prosecution submitted that these transactions were circular in nature and had no commercial substance. It was further submitted that the purpose of the back-to-back transactions was to deceive the market (potential and actual investors, depositors and lenders) by giving the false impression that Anglo had received customer deposits to that amount and therefore that the state of health of Anglo at that time was better than it actually was.

4. The indictment charged Mr Bowe as follows and Mr Casey's count was similar:-

"John Bowe did between the 1st of March 2008 and 30th of September 2008, both dates inclusive, within the County of the City of Dublin, conspired with Denis Casey, Peter Fitzpatrick, William McAteer and others to defraud by engaging in transactions between Anglo Irish Bank Corporation plc., Irish Life & Permanent plc and Irish Life Assurance dishonestly to create the false and misleading impression that deposits from a non-bank entity to Anglo Irish Bank Corporation plc during the year ending 30 September 2008 were approximately 7.2 billion larger in amount than they really were, with the intention of inducing existing and prospective depositors with, existing and prospective investors in, and existing or prospective lenders to, the said Anglo Irish Bank Corporation plc to make decisions concerning their deposits or investments in, or loans to, the Bank on the assumption that the said Bank received larger deposits from a non-Bank entity during the year ending 30 September 2008 than it really did."

5. On the 29th July, 2016, the court sentenced Mr. Bowe to two years imprisonment in respect of the offence. Mr Casey received a sentence of two years and nine months imprisonment.

6. The Grounds of Appeal for both appellants are extensive, with many overlapping issues. Mr Casey's grounds in respect of conviction number 18, some with sub-grounds. For Mr Bowe there were 24, also containing some sub-grounds, although counsel Mr. Bowe did not proceed with nine grounds. They include: arguments about the role of the State authorities, among them the Financial Regulator; objections to the admissibility of the expert evidence of Mr Hunt; challenges to decisions of the trial judge as to evidence of events that occurred after Anglo's year end accounts and also after the interim results were published; submissions on rulings by the trial judge and directions by him to the jury; a ground based on the acquittal of the co-accused; and other evidence issues. The court endeavours to deal with every ground of appeal.

7. Counsel for the appellants deserve credit for their assiduity in the interests of their clients, their industry and ingenuity in setting up novel bases of defence and the comprehensive submissions and oral arguments that they made in the trial court and on this appeal. This Court has concluded however that despite these herculean efforts by counsel and there were myriad issues raised, it is satisfied that the trial was satisfactory and the convictions safe and that the appeals against conviction must be dismissed.

8. This judgment sets out the Court's reasons for the decision. The issues are addressed as follows in order to cover in a thematic manner all the points raised by counsel in their submissions, whether they are common to both appellants or individual. There are of course many overlapping issues, as well as submissions that only apply to one case or the other. The order is: 1) the financial regulator; 2) the admissibility of the expert evidence of Mr Mark Hunt; 3) evidence of events subsequent to the 30th September 2008; 4) the trial judge's directions to the jury and other rulings; 5) the intent required for the offence charged; 6) the acquittal of the co-accused; 7) and issues concerning telecommunications evidence.

The Financial Regulator

Ground 11 John Bowe

The learned trial judge erred in law in holding that, against a documented and accepted background of transparent interaction with the Financial Regulator, there was no defence of Entrapment nor Officially Induced Error open to the appellant or his co-defendants.

Appeal Grounds Denis Casey

Ground 1
The learned trial judge erred in law and fact in ruling to exclude certain evidence in respect of the involvement of State authorities, in particular, the Financial Regulator, in the matters giving rise to the prosecution of the appellant. In doing so, the learned trial judge acted in a manner inconsistent with basic fairness.

Ground 3
The learned trial judge erred in law and fact in determining that the involvement of the Financial Regulator in the matters giving rise to the prosecution of the appellant did not afford him a defence. In doing so, the learned trial judge acted in a manner inconsistent with basic fairness.

Ground 4
The learned trial judge erred in law and fact in determining that the involvement of the Financial Regulator in the matters giving rise to the prosecution of the appellant did not afford him a defence, in particular (but not limited to) given the relevance to the appellant's state of mind of the Financial Regulator's statutory role and involvement in the said matters. In so determining, the learned trial judge acted in a manner inconsistent with basic fairness.

Ground 5
The learned trial judge erred in law and fact in determining that the involvement of the Financial Regulator in the matters giving rise to the prosecution of the appellant was only relevant in mitigation. In doing so, the learned trial judge acted in a manner inconsistent with basic fairness.

Ground 6
The learned trial judge erred in law in determining that the defence of entrapment by State authorities and, in particular, by the Financial Regulator, was not available to the appellant. In doing so, the learned trial judge acted in a manner inconsistent with basic fairness.

Ground 7
The learned trial judge erred in law in determining that the defences of officially-induced error and/or entrapment by estoppel due to the actions and/or defaults of State authorities and, in particular, by the Financial Regulator, were not available to the appellant. In doing so, the learned trial judge acted in a manner inconsistent with basic fairness.

9. A voir dire application by the prosecution to exclude evidence of the Green Jersey Agenda and the role of the Financial Regulator and other State authorities, on the grounds that it was irrelevant and could not provide a basis for any defence that might be open to the defendants culminated in a judgment of the trial judge that he delivered on the 9th February, 2016.

10. The trial judge held that evidence of the conduct of the Financial Regulator and State authorities generally did not furnish a defence to the accused, although it could assist in mitigation in the event of conviction. The judge ruled, however, that it was unrealistic from a practical point of view to try to exclude any evidence of such involvement in the events under consideration. The appellant, Mr Casey, cites this decision as evidence that the trial judge ruled the conduct of the State authorities as being relevant to the trial and protests that the judge nevertheless did not permit references to the actions of those authorities to be made in

speeches to the jury (see Ground 2 of Mr Casey's appeal). The Court does not consider this point to be valid. It was reasonable and realistic of the trial judge to take the view that he did, which was also in accordance with authority. It was not in any sense in conflict with his decision as to the admissibility of the evidence in question.

11. The appellant submitted that the judge erred in law in rejecting the evidence of interaction with the Financial Regulator as a defence to be considered by the jury. There was, he argued, documentary evidence to support that case and also evidence given in the voir dire by his co-accused Mr. Casey that the State authorities had instructed that the banks should work together. The bank had regular meetings with officials in the office of the Financial Regulator. On one such occasion, on 28th August 2008, the appellant and other bank personnel advised a senior official in the Regulator's office "that the summer was difficult from a deposit point of view for the bank…". The appellant is recorded as indicating to the Financial Regulator that "the bank will push metrics hard in the run up to their 30 September year end so that the external view is positive. He advised that the bank will seek to drive up customer deposit flows and may take some short term funds which is not ideal but necessary for the perception provided to the market." On 25th October 2008, another official requested more information in relation to the September transaction from IL&P and the bank, whose officers each explained the rationale and details of the transactions and the bank sent the Regulator a list containing the details of each tranche of the September transactions. Subsequent to the critical transfers between Anglo and ILP/ILA, on 28th October 2008, the appellant participated in a phone call with Ms. Donoghue of the Office of the Financial Regulator in relation to a number of issues, one of which was the September transaction, in which call Mr. Bowe described the purpose of the transaction as balance sheet management and that the motive was not to create liquidity, but rather was about avoiding an issue of confidence in the bank. It was submitted that he was given to understand that the Office of the Financial Regulator understood the purpose of the transaction and had no concerns nor required any further action from the bank on the matter.

12. On 22nd October 2008, the first draft of a report produced on behalf on the Financial Regulator which referred to the transaction as being "unusual and worthy of attention" was available to both the NTMA and the Department of Finance and directed for attention. An internal document of the Office of the Financial Regulator dealing specifically with the transactions and also referring to "potential market abuse issues" included the following:

"There's also information available that could amount to a defence against accusations of market abuse, specifically in relation to the knowledge of the Financial Regulator, Central Bank, but also more generally in relation to the role the Department of Finance, Central Bank and Financial Regulator encouraging institutions to cooperate with each other in extremely difficult markets where the very existence of the Irish system was in some doubt."

13. On 30th October 2008, (two days after Mr. Bowe had spoken with Ms. Donoghue of the Financial Regulator's office and explained the nature of the transaction to her) at a meeting between Denis Casey, the Financial Regulator and the Governor of the Central Bank when Mr. Casey confirmed IL&P's support for the bank at its year end, no issues or queries were raised at this meeting concerning the transactions.

Entrapment

14. The trial judge found to be credible Mr. Casey's evidence about the Green Jersey agenda that was initiated and promoted behind closed doors by the State authorities. The Regulator adopted a very active role in regulating financial institutions including reviewing their accounts prior to publication.

15. Mr. Bowe argued that the case law establishes that entrapment is a recognised defence in Irish law. There must be a factual foundation for the defence and here the Financial Regulator had induced and condoned the policy of cooperation which culminated in the execution of the transactions. The trial judge wrongly held that entrapment did not arise because the State Authorities (in particular the Regulator) did not have the intention to prosecute the appellants and misinterpreted Mills v. Director of Public Prosecutions [2015] IECA 305 in that regard. The evidence was that the Green Jersey Agenda of mutual support by Irish financial institutions was first suggested by the Financial Regulator. It was formulated against a background of unprecedented chaos in the financial markets and formed a basis for defences of Entrapment and/or Officially Induced Error to be considered by the jury.

16. Mr. Bowe's argument on the entrapment issues was put on a different basis than that proffered by Mr. Michael O'Higgins SC. Mr. Bowe submitted that officially induced error arose because the Regulator had an opportunity to intervene and never did. This could not give rise to officially induced error as the appellant did not rely on any official statements as to lawfulness of their actions.

17. The Director recognised that these legal doctrines are available in the United States and Canada when State officials lead a citizen into legal error and thereby the commission of an offence. In those circumstances the State official's behaviour makes prosecution unconscionable; it has nothing to do with the accused's mens rea as it falls outside of the mechanism of the defence. Even if the defence were a part of Irish law, the current case does not meet the threshold requirements.

18. In order to satisfy the test, the Appellant must have considered the legal consequences of their actions and sought legal advice. The erroneous legal advice must have been obtained from appropriate government officials who were involved in the administration of the law in question. It must have been objectively reasonable to rely on such advice and it must have been, in fact, relied upon.

19. In regard to entrapment, inter alia, the Director relied on the leading authority in this jurisdiction: Mills v. DPP. It dealt with the classic setting of a trap by undercover Gardaí.

20. The case did not come within any of the foregoing legal doctrines as:

(i) there was no evidence that the Financial Regulator knew about the September back to back transactions in advance of their taking place;

(ii) no such proposition was ever suggested or put to the Financial Regulator witnesses;

(iii) there was no question of the Financial Regulator having approved the transactions, or advised that they were lawful in advance of their execution as they did not know about the transactions until after they had been executed and

(iv) there was no evidence that the appellant (or any of the accused) took legal advice as to the legality of the transactions before they took place.

21. The appellant did not engage with the precise and stringent pre-conditions of the doctrines and/or sought simply to misapply them. There was no presumption in favour of finding officially induced error to the benefit of an accused person. He sought to rely on

post-30th September interactions with the Financial Regulator/Department of Finance and somehow deploy them retrospectively.

22. The Financial Regulator's attitude is irrelevant to the ingredients of the offence of conspiracy to defraud contrary to the common law. Evidence is only admissible in a trial if it is relevant to an issue in the case.

23. In his evidence on the voir dire hearing, Mr. Casey described a series of meetings with the Financial Regulator and his staff in which official concern was expressed about perception of the level of borrowing from the ECB. The Regulator and the Governor of the Central Bank discussed the need for Irish banks to provide mutual assistance according to a Green Jersey Agenda. A series of transactions took place between institutions in furtherance of the policy and to the knowledge of the authorities, up to the beginning of September 2008. He described how the transfers that are the subject of the charges came to be made. He said that it would not have happened but for the role of the Central Bank, the Financial Regulator and the Department of Finance. The amount of money involved meant that this transaction stood out. Mr. Casey referred to the internal document of the Financial Regulator quoted above which referred to potential market abuse issues and possible defences that might be available. The Regulator did not raise concerns subsequently in respect of the transfers from and to Anglo and the ILP entities. Mr. Casey said that he himself did not have any apprehensions that anybody would be misled by those measures because the Financial Regulator had to be aware of what had happened, he would scrutinise any report to the market and so would Anglo's board and auditors.

24. The Central Bank/Financial Regulator instigated the purchase by the banks of each other's commercial paper in April 2008, actively supervised ILP's balance sheet, insofar as the level of ECB borrowings was concerned, at its interim (half-year) reporting period in June 2008, and secretly orchestrated support by the banks for each others' bond issuances in a sequential manner subsequent to the introduction of the State Guarantee in September 2008. The authorities were also aware of the Anglo/ILP September transaction prior to the release of financial statements to the market. These events disclose a pattern of intervention and supervision which furnished a basis for the defence of entrapment and/or officially induced error. They are also relevant to the state of mind of the accused.

25. In the circumstances, Mr. Casey submitted that the trial judge made an erroneous ruling. While the Green Jersey Agenda was initiated, and indeed imposed by the State authorities, it was a matter for the individual institutions to decide how to implement it. The judge found Mr. Casey's evidence credible but he then failed to give effect to that finding. Mr. Casey had a legitimate expectation in the circumstances that the Regulator would have approved of the September transfers because of the history as described in evidence. In addition, Anglo had a legal obligation to present its accounts so as to show a true and fair view of its financial condition. The judge found that the authorities "were all over the problem of liquidity." He thought it inconceivable that the Regulator did not know of the events of March or June, or that the banks were engaged in balance sheet management.

26. Mr. Casey told the Gardaí that: "It was my honestly held belief that in September '08 that Anglo could not have approached ILP for support without the knowledge of the Financial Regulator." The defence of officially induced error was available to him, according to his submissions, in the particular circumstances. This "is a niche defence where it happens to be a state official that has induced one to act in a particular way." The authorities cited are listed above and will be considered in due course.

Officially Induced Error/Entrapment by Estoppel

27. The Director submitted that counsel for the appellant had agreed during this voir dire that the defence of "Officially Induced Error" was not part of Irish law and that it could be nothing more than "persuasive" for any party making a submission who wanted to rely on it. He said it was similar with the United States' doctrine. However, he went on to refer to the case of DPP v. Mills and what he called "entrapment simpliciter" and argued that: "[t]here are numerous statements to the effect that it would be unconscionable for a prosecution prosecutorial arm of the State would encourage its citizens into committing acts forbidden and then seek to prosecute them for doing so. It would be described as a misuse of power and an abuse of the process of the courts and that test, I would respectfully point out, is significantly lower than hypothetical tests that might apply here as applied in Canada and the United States."

28. The learned trial judge ruled on 9th February 2016, that the defence of entrapment was not open to the appellant. The issue was re-opened by the appellant on 9th May 2016.

29. Separate legal doctrines operate in the United States and Canada to deal with situations where State officials have led a citizen into legal error and thereby the commission of an offence. Under those doctrines, an accused person may, exceptionally, be entitled to an acquittal or a stay of prosecution because of the State's behaviour. This is an independent defence or issue quite separate from the issue of mens rea.

30. The respondent reiterates the submissions made to the Learned trial judge on the basis of the foregoing doctrines:

> (i) there are jurisdictions, not including this jurisdiction, in which it has been found that ignorance of the law brought about by advice from a State authority can, in certain circumstances, operate to make it unconscionable that a conviction should occur;
>
> (ii) these doctrines are separate and distinct from the mechanism of the offence itself;
>
> (iii) if a relevant State authority has given explicit legal advice in certain circumstances that a given course of action is lawful, then in the United States it may found a defence called entrapment by estoppel;
>
> (iv) there's an onus on the defence to call evidence and establish by evidence on the balance of probabilities, that a certain state of affairs existed which can lead to non conviction even though the offence is otherwise proven;
>
> (v) the circumstances in which that defence may be raised are very sharply defined, clear and must be shown to exist by the defence and it's not a matter of reasonable doubt/ not a matter of going to *mens rea*;
>
> (vi) in Canada prosecution may be stayed as a result of an officially induced error;
>
> (vii) this doctrine stands wholly apart from the ordinary proofs in the case and arises where mens rea has been established but operates to stay a prosecution where there was an explicit engagement where things were stated to have been lawful;
>
> (viii) the onus lies on the accused to establish the relevant legal prerequisites of the application; and

(ix) even if such doctrines were to be applied in Ireland, the stringent and specific preconditions of the doctrines could not be satisfied by the appellant on the evidence in the case.

Mills v DPP [2015] IECA 305

31. The appellant closed his argument on the voir dire requesting the learned trial judge to either withdraw the case from the jury on grounds of "unfairness" or alternatively, to direct the jury, if mens rea was made out, to find the appellant not guilty if they believed he was "carrying out the instructions of the regulator".

32. The respondent reiterates that it is of fundamental importance that there was no evidence of any such "instructions" during the trial and therefore no trap in which the appellants were ensnared.

The Law

Entrapment

33. *The People (DPP) v. Mbeme* (the Court of Criminal Appeal, 22nd February 2008, Unreported) was a case in which Gardaí, having intercepted a drugs package, proceeded to deliver it under the guise of postmen and shortly thereafter intercepted the accused when he attempted to drive-off with said package. The late Mr. Justice Hardiman cited *R v. Loosley* [2001] 4 All ER 897 with approval and couched the test in terms of whether or not the accused would have behaved the same way if "offered the opportunity by anybody else or at least anyone he didn't believe to be a policeman".

34. Entrapment in the context of policing was considered by this Court in Mills v. DPP. The Gardaí were engaged in an investigation to identify individuals engaged in the sale and supply of illicit drugs. Two undercover Gardaí approached people on the street at random seeking to buy a small consignment of drugs. One, a sixteen year old, made a telephone call, whereupon another person, the appellant, drove to the location where the Gardaí were positioned and sold them the drugs. One of the investigating Gardaí asked the appellant for his phone number, and then telephoned him the following day and ordered another "25 bag". That second transaction duly took place. Following a voir dire heard over two days, and in respect of which the trial judge ruled against the appellant, Mr Mills was on 18th December 2015, re-arraigned on the two counts to which he pleaded guilty. The appellant appealed to the Court of Appeal against conviction on the grounds, inter alia, that the trial judge failed to fulfil her obligations pursuant to s. 2 of the European Convention on Human Rights Act 2002 which required the judge to interpret the common law defence of entrapment in a manner compatible with the ECHR.

35. This Court upheld the conviction. While the Court was concerned by the lack of a formalised system for the authorisation and supervision of these undercover operations, this did not automatically engage the entrapment doctrine, but the informality of such operations increased the possibility of successfully pleading the defence of entrapment. Mahon J. said:

"What is wrong with providing a person with the opportunity to commit a crime which he is in the practice of committing anyway? The key is to ensure that such operations are appropriately authorised, controlled and supervised and that undercover operatives do not themselves precipitate criminal conduct that would not otherwise occur." [at para.64]

36. The court referred to the substantial body of case law from the Strasbourg court as well as *R v. Loosely and Nottingham City Council v. Amin* [2000] 1 WLR 1071. Mahon J. made no comment on whether or not these cases represent the Irish understanding and justification for the entrapment. They all emphasis the importance of law enforcement officials maintaining a "passive" involvement in the underlying criminality and the fairness requirement. As the ECtHR noted in *Furcht v. Germany* (App No. 54648/09, 23rd October 2014):

"When faced with a plea of police incitement, or entrapment, the Court will attempt to establish whether there has been such incitement or entrapment. Police incitement occurs where the officers involved do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution. The rationale behind the prohibition on police incitement is that it is the police's task to prevent and investigate crime and not to incite it." [*Furcht v. Germany* (App No. 54648/09, 23rd October 2014) at para.48]

Officially Induced Error

37. Officially induced error has its origin in Canadian jurisprudence. The constituent elements of this very rare principle were outlined in the Supreme Court of Canada decision in *R v. Jorgensen* [1995] 4 SCR 55 by Lamer CJ:

"In order for an accused to rely on an officially induced error as an excuse, he must show, after establishing he made an error of law (or of mixed law and fact), that he considered his legal position, consulted an appropriate official, obtained reasonable advice and relied on that advice in his actions… The advice relied on by the accused must also have been erroneous, but this fact does not need to be demonstrated by the accused." [R v. Jorgensen at para.28-35]

38. The seeking of advice must pre-date the committing of the act in question. Furthermore, it requires something other than a mere general quest for advice, but rather tailored to the accused's particular situation. Lamer CJ went on to clarify that under Canadian law a successful invocation of the defence will result in a stay on the proceedings. However, given the gravity of such a remedy, it could only be only available in "the clearest of cases" [at para.37-38].

39. R v. Jorgensen also clarified to whom this determination fell:

> "the question of whether officially induced error constitutes an excuse in law is a question of law or of mixed law and fact. While a jury may determine whether the accused is culpable, and hence whether this argument is necessary, it is for a judge to determine whether the precise conditions for this legal excuse are made out and if a stay should be entered…" [at paras.37-38].

40. The test and its requisite elements were repeated and applied in *Lévis (City) v. Tétreaul* [2006] 1 SCR 420 and R v. Pea [2008] 93 OR (3d) 67 (ONCA). The former case accepted Lamer CJ's formulation and added that objective reasonability referred not only to the advice itself, but the accused's reliance on said advice. LeBel J elaborated:

> "Various factors will be taken into consideration in the course of this assessment, including the efforts made by the

> accused to obtain information, the clarity or obscurity of the law, the position and role of the official who gave the information or opinion, and the clarity, definitiveness and reasonableness of the information or opinion." [Lévis (City) v. Tétreaul at para.27]

Entrapment by Estoppel

41. The US courts have recognised an analogous form of officially induced error known as "entrapment by estoppel". It is considered to fall under the broad federal doctrine of entrapment and thus is ground for an acquittal if proven.

42. The scope of the defence was described in *United States v. Weitzenhoff* [1993] 35 F.3d 1275 wherein the Ninth Circuit of the Federal Court of Appeals held:

> "Entrapment by estoppel applies when an authorized government official tells the defendant that certain conduct is legal and the defendant believes the official. United States v. Brebner, 951 F.2d 1017, 1024 (9th Cir.1991). To invoke the entrapment by estoppel defense, the defendant must show that he relied on the official's statement and that his reliance was reasonable in that a person sincerely desirous of obeying the law would have accepted the information as true and would not have been put on notice to make further inquiries. United States v. Lansing, 424 F.2d 225, 227 (9th Cir.1970)." [Emphasis added]

43. In other words, on some level, there must be the intent to prosecute and a trap laid even in a loose sense of the expression.

44. Entrapment does not involve ignorance of the law, but rather the luring of an actor into committing that which they know to be illegal. Officially induced error is distinct as it operates as a rare exception to the maxim that ignorance of the law is no excuse. It is immaterial that US courts have bizarrely referred to the defence as entrapment by estoppel.

Discussion

45. Mr. Casey's counsel argued that the trial judge was in error in determining that the involvement of the Financial Regulator in the matters giving rise to the prosecution did not afford Mr. Casey a defence and ruling to exclude evidence of such involvement. It is said that the Regulator's statutory role and involvement in those matters were relevant to the appellant's state of mind. The grounds say that they are not limited to Mr. Casey's state of mind but that is the only matter specifically mentioned. The argument on behalf of Mr. Casey in regard to the regulator's role is as follows:

> (i) The Financial Regulator was promoting a green agenda encouraging financial institutions to help each other to remain solvent.
>
> (ii) The Regulator knew of and tacitly approved the transactions of March, April and June, 2008 involving the transfer of assets and acquisition of each other's commercial paper.
>
> (iii) Mr. Casey did not seek the approval of the Financial Regulator for the September transactions but he believed that the Regulator would have approved or have had no objection to these movements of money.
>
> (iv) The Financial Regulator did not subsequently, when he was made aware of them raise any objections to the September transactions.
>
> (v) Mr. Casey acted as he did for a laudable purpose.

46. Mr. Bowe's grounds of appeal raise similar issues.

Entrapment

47. It seems clear that even on the strongest statement of Mr. Casey's position, there is no evidence of entrapment. There was no trap. There was no specific invitation or persuasion to do the particular acts. The fact that the Regulator was in general in favour of the Green Jersey Agenda, as described, whereby he wished for the institutions to help each other out to maintain solvency is not a basis for suggesting that entrapment could possibly arise in the circumstances. While the evidence was that a general policy of assistance was being encouraged that is nowhere near establishing entrapment. Indeed, neither is it of assistance to the defence that the Regulator was aware of the repo transactions of March and June, 2008 which are methods of improving a bank's balance sheet that are considered to be legitimate. Presumably, persons in the banking or accountancy professions is aware of these mechanisms for improving banks' balance sheets, so there is nothing fraudulent about them. This is in stark contrast with the transactions of late September, 2008 according to the Prosecution. But the point must be made that even if the Financial Regulator was fully aware of the repo transactions earlier in the year, that is a far cry from suggesting that he or his staff or authorities in general approved or would have approved of the September events. Neither is it legitimate to suggest that there is any basis in evidence, as given by Mr. Casey on the voir dire, for proposing that he could reasonably have believed that the Financial Regulator would have approved or would not have disapproved.

48. A belief that somebody else in authority in a supervisory and regulatory capacity would approve of what a person is doing is not evidence of entrapment. The trial judge was entirely correct, in my view, to identify the nature of entrapment and to draw the distinction between official involvement, which actually gives rise to the commission of a crime that would not otherwise have occurred and with the detection of crime using a method whereby a crime that would in any event have taken place is now done in the presence of a police officer or other official person who is on hand to achieve a prosecution. That is far from the position in this case and this potential ground of defence does not arise.

49. The position of Mr. Bowe in regard to entrapment is even weaker and must also fail on this ground.

Officially Induced Error/Entrapment by Estoppel

50. This is a jurisprudence that developed in Canada and there is an analogous legal principle based on estoppel in the United States. The trial judge did not make positive "findings" in relation to this matter but he did indicate a general disposition as to the testimony he had heard but was not going to rule on. His passing references to documents and to earlier different transactions (the fact that they were different was not in dispute) show that he was speaking in broad, general terms. An accused who is seeking to rely on this principle to stop the prosecution going ahead must establish that he expressly or by implication sought information as to the legality

of what he was doing and was provided with information that would have entitled him to reach a conclusion that his conduct was legal. That is missing in the present case. There is no suggestion and no basis for saying that Mr. Casey or Mr. Bowe actually sought any reassurance. Neither was there any information available to them which could give them the impression that this particular transaction was legitimate or lawful. It is unreasonable to suggest that the Financial Regulator could be taken to approve of this transaction and to confirm that it was not unlawful in circumstances that Mr. Casey and/or Mr. Bowe were entitled to rely upon. The Canadian cases are quite strict in their requirements and the American authorities are no less rigorous in the application of the defence.

51. Even if it did apply, it is not actually considered to be a defence, but rather a basis for stopping or postponing a trial, perhaps indefinitely. The purpose of a stay is to differentiate it from a directed finding of not guilty. An alternative way would be prohibition of the prosecution which is what would happen in this jurisdiction.

52. The specific conditions laid down in the Canadian courts are ill-fitted to these cases. If the Court were to consider the Canadian principle to exist in Irish law, the tests to be satisfied are:

(i) The accused must have considered the legal consequences of their actions and sought legal advice;

(ii) The legal advice must have been obtained from appropriate government officials who were involved in the administration of the law in question;

(iii) The legal advice must have been erroneous;

(iv) The legal advice must have been relied upon;

(v) The reliance must have been objectively reasonable.

53. Applying the facts to the present case, it is clear that the learned trial judge was not just entitled to find that the defence was not available, but was obliged to do so, on the evidence.

54. The circumstances in the present case are utterly remote from those in which the principle arose. The US jurisprudence is not anymore useful. The Court is satisfied that the trial judge was not in error as proposed and each of the appellant's grounds must be dismissed. The judge correctly identified the required intent.

55. In summary, while entrapment is a recognised basis of defence in Irish law, it does not arise in this case. Official Induced Error in Canadian jurisprudence or Entrapment by Estoppel in the United States, while not or not yet recognised in our law are also not available to either of the appellants because the required factual basis is not present; the facts fall short. By way of footnote, the Court has considered the defences as if all submissions and arguments were available to each defendant without distinction.

Mens Rea for the Offence of Conspiracy to Defraud

56. The respondent submits that the appellant conspired to defraud by dishonestly agreeing to take part in transactions which were designed to give a false and misleading impression to depositors, investors, lenders and customers of Anglo Irish Bank in such a way that their economic interests were imperilled, and that the intention to defraud was made out on 30th September 2008. The correct test was the appellant's state of mind was on 30th September and whether or not he intended in some way to mislead. Referring to the arguments that the statement by the learned trial judge that that the Appellant's viva voce evidence was 'believable', the Director contends that the mens rea for the offence of conspiracy to defraud cannot be negatived by evidence of the State authorities' attitude to the transactions, and that the appellant's submissions are premised on erroneous views of the mens rea as being some kind of general 'criminal intent' or knowledge that the behaviour was illegal. It is submitted that the fact that the appellant may have believed that what he was doing was honest or proper is irrelevant to the issues before the jury. It was for the jury to determine beyond a reasonable doubt whether the scheme was objectively dishonest and that his actions were intended to mislead.

57. It is therefore submitted that the definitions of dishonesty extracted from English case law, including the decision in *R v. Ghosh* [1982] QB 1053 are not a correct exposition of the law in this jurisdiction. Ghosh was never approved in any Irish authority relating to an offence of dishonesty and the decision was rejected in the specific context of conspiracy to defraud in Australia *(Peters v. The Queen* [1998] 192 CLR 493) and in Canada (Theroux [1993] 2 SCR 5). Furthermore, the decision in Ghosh turned on the provisions of the Theft Act 1968, which have no Irish equivalent. Furthermore, the appellant did not in fact ever raise a claim of right and therefore the issue of a Ghosh direction did not arise on the facts of his case.

58. Section 2 of the Criminal Justice (Theft and Fraud Offences) Act 2001 defines 'dishonesty' as the absence of a claim of right in good faith. A claim of right is not a general defence of mistake of law; rather it is a specific claim that the appellant believed that he had a lawful right to the property the subject of the offence charged. No such claim is put forward by the appellant.

59. It is submitted that generalised assertions that the State authorities' conduct was relevant to the jury's assessment of the mens rea for the offences, is not legally valid having regard to the precise nature of the mens rea requirements for the offence. Nothing the State authorities said or failed to say in this case could be relevant to the fraudulent intent and dishonesty ingredients required for the offence charged.

Discussion

60. The question of intent was debated before the trial judge in the course of a protracted hearing. There are differences in the approach of courts and legislators in this country and in England and Australia. The Law Reform Commission has addressed the matter. The issue is considered in this judgment in the section dealing with Mr. Bowe's appeal ground no. 16 and parts of ground no. 20. It is adequate here to summarise the Court's decision that it is sufficient for a successful prosecution to prove that the accused intentionally participated in an objectively dishonest scheme. Irrespective of whether or not the Financial Regulator was aware of, and in fact even if he had condoned what was done, that was irrelevant. It would not provide the accused with a defence and would not have rendered legal that which was illegal. While it may go towards mitigation, it cannot serve to eliminate criminal culpability. The Court is satisfied that the trial judge was correct in his charge to the jury on the mens rea for the common law offence of conspiracy to defraud. It is important to draw the distinction between an allegedly benevolent overall purpose and the particular intention for the commission of a crime.

61. The first and fundamental point is the long-established difference in criminal law between intention and motive. The former is

required as *mens rea* in the great majority of crimes including conspiracy to defraud but the latter is generally irrelevant. It is not a defence for an accused to plead that he committed the crime for a worthy reason. Robin Hood committed robbery; his motive for doing so was not relevant to guilt. The circumstances in which the offences took place may provide reasons for mitigation of penalty but not for escaping conviction. Motive may be relevant in a criminal trial to show that the accused had or did not have a reason to commit the crime but it does not provide a defence. The reason why the accused behaved in the way he did is generally and in this case irrelevant to his guilt. By contrast, his intention to carry out the act is essential for the prosecution to establish, that is, the *mens rea* for the *actus reus*.

62. The Court is satisfied that the trial judge was correct in ruling that the actions of the Financial Regulator were not relevant to the accused's guilt and that was correct

63. The mens rea of the crime was not affected by any actions or words or behaviour of the Regulator. The case depended on whether the jury was satisfied that Mr. Casey had the requisite intent to defraud at the time when he engaged in the transactions of September, 2008. What the Regulator thought about the matter is simply not known. Mr. Casey did not seek the opinion of the Regulator on the matter. The judge was correct to hold that the attitude of the Regulator was irrelevant to Mr. Casey's state of mind. First, there was no actual evidence to back up this claim of a belief or a reason for believing on the part of Mr. Casey. Secondly, the belief, even if it existed, did not provide any basis for the concept of entrapment to arise as a defence. Thirdly, in relation to officially induced error, there is an absence of essential elements for that principle to arise for consideration and there was no enquiry by Mr. Casey as to the lawfulness of the transactions into which he was about to enter.

Evidence of Mark Hunt FCA

Ground 19 (John Bowe)

The learned trial judge erred in admitting the accounting evidence of the prosecution expert, Mr. Mark Hunt which resulted in extreme prejudice to the appellant. Specifically he erred in law in –

• Admitting Mr. Hunt's evidence of opinion as to his view of the purpose of the deposits, which opinion served to undermine the admitted legal form thereof.

• Permitting Mr. Hunt to express an "expert" opinion as to whether the transaction lacked commercial substance. This was quintessentially a matter for the jury on the evidence adduced at trial and, accordingly, amounted to an impermissible encroachment on the jury's function.

• Admitting Mr. Hunt's opinion to the effect that these transactions amounted to interbank loans. This was in direct disregard of the established facts of the transactions.

• Admitting Mr. Hunt's evidence regarding his opinion as to the classification of the loans as interbank deposits which opinion ran contrary to the legal definition of an interbank deposit as set out in Section 53 of the Central Bank 1989 and reinforced by the Credit Institutions (Financial Stability) Act 2008.

• Admitting the testimony of Mr. Hunt which went beyond that which he could legitimately proffer – i.e. an expert opinion on the actual accounting treatment of the transactions.

• Admitting the testimony of Mr. Hunt in circumstances where his views as to the appropriateness of the transactions could have had no probative effect as to the intention of the Appellant in the context of the Conspiracy charge.

• Admitting the testimony of Mr. Hunt in circumstances where the analysis and opinion he proffered related solely to the actions of Anglo Irish Bank as a commercial entity and was not referable in any specific way to any identifiable action/s of the appellant.

• Admitting Mr. Hunt's evidence as to his opinion that the email sent by Ciaran Cunningham on 4 July 2008 to various recipients in Anglo Irish Bank, dealing with initiatives and setting out accounting standards, formed part of the Conspiracy and was evidence of advance planning as to how deposits would be misreported under the guise of customer deposits.

Ground 11 (Denis Casey)
The learned trial judge erred in law and acted in a manner inconsistent with basic fairness in permitting the prosecution to call expert evidence by Mr. Mark Hunt FCA.

Ground 12 (Denis Casey)
The learned trial judge erred in law and acted in a manner inconsistent with basic fairness in permitting the prosecution to call expert evidence by Mr. Mark Hunt, specifically, evidence arising from the document entitled "Statement of Mark Hunt FCA Relating to Anglo Irish Bank Corporation plc", dated the 7th of April 2016.

64. It is necessary first to say something about the evidence the witness gave. It was not in doubt that Mr. Hunt is a highly qualified expert witness. He described the transactions that took place in September, 2008 between Anglo and IL&P and the latter's subsidiary Irish Life Assurance. Anglo's Isle of Man branch received cash payments of approximately €1 billion from various sources. Anglo used this money and a further €200 million to put together a deposit which it sent to IL&P intending that it would come back from ILA as a non-bank customer deposit. IL&P thereupon sent the money back on behalf of ILA so that it fulfilled the requirement of coming from a non-bank customer. When it got its money back, Anglo then repeated the process with €1 billion a further six times. By the time the carousel stopped, a total of €7.2 billion customer deposits had been created out of Anglo's original €1 billion. Mr. Hunt was critical of these transactions. He said that there was no commercial purpose to them, that it was a series of circular transactions whereby the money went out from Anglo and came back.

65. Mr. Hunt considered whether there was economic substance to the transactions by reference to the position of each party in respect of its assets and its asset profile or its performance as it was affected as a result. Did it make a profit or a loss or was its risk increased or decreased by the transactions? He accepted that there was some risk due to the size and value of the transactions and that there was a credit risk attached to them which could possibly result in one party not being able to fulfil its obligations to the other. However, notwithstanding the unprecedented turmoil in the financial markets at the time, he considered such circumstances to be remote and that there were other features which from an analysis of economic substance were more important. In his view, cost was one such factor. He concluded that this did not arise for Anglo because the terms of the paired transactions were such that any cost was matched with exactly corresponding income. There was never a possibility at the inception of the transactions that either

party would make a loss, because as he asserted: the interest rates were the same, the maturity dates were the same, they were matched from the point of profit.

66. The second question Mr. Hunt addressed was whether or not the transaction changed the underlying assets and liabilities of either entity. He concluded there was no fundamental change in the asset and liability position, because the transactions were matched in every respect on the balance sheet. In his opinion, the risk profile of the assets and liabilities, because they were exactly matched, did not change in aggregate either, even though on the face of it the numbers grew. He described balance sheet management as a legitimate pursuit of a bank or any entity. Frequently banks enter agreements at the year end, where they swap one asset for another asset in order to change the profile of their assets and liabilities on the balance sheet. Nevertheless, in his opinion, the transactions in issue constituted "a very, very unusual series of transactions. It is not a series of transactions which is routinely entered into by any bank as part of its normal routine balance sheet management activity. These were very special transactions designed to achieve a particular outcome, and were not the sort of transactions that a bank or a financial institution would normally pursue at its year end.

67. Mr. Hunt discussed whether there were any constraints in terms of the ability to carry out the transactions in question "and I did this because in principle these transactions, these paired transactions could have gone on forever. And I say that and it's fairly dramatic, but subject to the time limits of being able to process the transactions through a settlement system, this could have carried on in 1 billion, or more than 1 billion chunks, until rather than 7.2 billion we had 14.4 billion or 140 billion, because there was no -- there were no constraints on doing it. And we can see that because the original target from the initiative with IL&P from Anglo's perspective was 3 billion and it eventually became 7.2 billion, with willing counterparties, two willing counterparties, it could have carried on to any number that wasn't particularly targeted".

68. Mr. Hunt gave evidence about the accounting rules for deposits, referring particularly to the international standards. He said that those rules did not apply in the case of a transaction that did not have any commercial purpose. He described the transfers of 29/30th September as coming into that category. It was necessary in proper accounting practice to notify persons reading the accounts of the nature of the transactions and that should be done by a note in the accounts.

69. Mr. Hunt's evidence dealt with accountancy matters but it was not confined to the technical rules that dictated the manner in which deposits are to be recorded. He also gave his opinion on the substance of the transactions that were being recorded and the impact that had on the accounting. Accountancy practice was relevant to the case but it was not a case about accounting. The essence of the transactions whereby the deposits came to be recorded as coming from a customer was also material in the prosecution case.

70. As it happened, before the trial commenced Mr. Hunt became seriously ill and it was considered unlikely that he would be in a position to give evidence. The prosecution chose to go ahead notwithstanding the unavailability of their expert witness. This represented a significant wholly fortuitous advantage to the accused. However, the trial was protracted and Mr. Hunt recovered sufficiently to be able to give evidence. This was a very welcome development for the prosecution because they were by then also concerned at the direction of the cross-examination by counsel for Mr. Bowe particularly. Prosecuting counsel, Mr. Paul O'Higgins SC, announced that Mr. Hunt would be giving evidence after all. Subsequently, the prosecution furnish the defence teams with Mr. Hunt's revised statement of evidence which was necessitated by the severance of the two counts of the indictment.

Submissions on behalf of Mr. Bowe

71. Mr. Hunt's opinion served to undermine the admitted legal form of the deposits. His opinion as to whether the transaction lacked commercial substance amounted to an impermissible encroachment on the jury's function. The late Mr. Justice Hardiman, in the case of *The People (Director of Public Prosecutions) v. Abdi* [2005] 1 ILRM 382 said that:

> "The role of an expert witness is not to supplant the tribunal of fact, be it judge or jury, but to inform that tribunal so that it may come to its own decision
>
> . . .
>
> Expert opinion should not be expressed in a form which suggests that the expert is trying to subvert the role of the finder of fact." [*DPP v. Abdi* at p.393]

72. The issue of commercial substance was a crucial element of the trial and there was ample evidence before the jury to allow them to form a view on it. The same criticism applies to Mr. Hunt's evidence in relation to credit risk and the absence of constraints on the process.

73. It was submitted that the trial judge erred in admitting Mr. Hunt's opinion to the effect that these transactions amounted to interbank loans in direct contradiction of the established facts of the transactions. Mr. Casey made a similar submission, but the prosecution pointed out that the trial judge had ruled against the admission of this evidence and Mr. Hunt did not give it.

74. Mr. Hunt could legitimately proffer an expert opinion on the actual accounting treatment of the transactions, but his views as to the appropriateness of the transactions were irrelevant, outside his remit as an expert and could have no probative effect as to the intention of the appellant in the context of the conspiracy charge, which was a matter exclusively for the jury.

75. The accounts were prepared by the finance department of Anglo Irish Bank, and signed off on by Ernst & Young and three directors of the bank. The prosecution did not call any witness from Ernst & Young to give evidence as to what examination they undertook, what documentation they considered, what information they sought or obtained and what led them ultimately to sign off on the transactions as being "technically sound". In the absence of any such testimony the jury was left with a one-sided version of the accounting treatment from Mr. Hunt.

76. The evidence of Mr. Hunt could not properly advance the case against the appellant in terms of the conspiracy charge as set out in the indictment. The mere fact that someone in the position of Mr. Hunt has a different view as to the appropriate accounting standards and the treatment of a transaction cannot and should not have any probative effect in advancing the prosecution case, in particular with regards to establishing a dishonest mens rea at the time the transactions were entered into. In the event, Mr. Hunt's evidence was highly prejudicial to the appellant, particularly in circumstances where the appellant had no function in the preparation of the accounts of the bank, on the evidence presented by the prosecution.

77. The testimony of Mr. Hunt related solely to the actions of Anglo Irish Bank as a commercial entity and was not referable in any

specific way to any identifiable actions of the appellant. He did not nor could he attribute any of the accounting treatment to the appellant, who was not a Director of the bank, was not in a position of authority to make decisions on behalf of the bank and was not an accountant in the finance department. Accordingly, it is submitted, Mr. Hunt's analysis of the bank's accounting treatment was extremely prejudicial to the appellant's defence and adversely impacted upon the jury's freestanding task to consider alleged dishonesty in the context of the conspiracy count he faced. He did not face any count regarding the accounting treatment.

78. The judge erred in admitting Mr. Hunt's opinion that the email sent by Ciaran Cunningham on 4th July 2008, to Mr. Peter Geissal and Mr.Colin Golden, dealing with initiatives and setting out accounting standards, formed part of the conspiracy and was evidence of advance planning as to how deposits would be misreported under the guise of customer deposits. Mr. Hunt's evidence in this regard was not relevant to his consideration of the treatment of the transactions in the accounts and was thus improperly before the jury.

79. In all the circumstances, therefore, the evidence of Mr. Hunt created an unfair prejudice against the appellant and had the associated risk of unjustifiably linking the Conspiracy charge he faced with the accounting treatment in which, on the prosecution case, he had not been involved. This, it is submitted, directly impacted in an adverse way on the jury's deliberations as to whether he had the requisite intent for the single count he face. The ensuing risk of an unfair trial directly resulted from this.

Submissions on behalf of Mr Casey

80. Mr Hunt's evidence was given on the basis of a revised report containing significant and important amendments to the original. Cross-examination of prosecution witnesses had been based on the contents of the original report. One of the principal consequences of amending Mr. Hunt's report was that the prosecution was calling him to, in effect, impeach some or all of the accountancy witness from Anglo that the prosecution itself had called.

81. Mr. Hunt's amended report contained the words: "… it is my opinion that the balances created on completion of the ILP/ILA Transactions should not have been recognised as Customer Accounts or Loans and Advances to Banks on Anglo's balance sheet and should have been netted off with appropriate explanatory disclosure in any relevant financial statements. The circumstances of the ILP/ILA Transaction are, in my opinion, those such rare circumstances described in IAS 1, where a true and fair over ride should be used".

82. At paragraph 2.16 of Mr. Hunt's revised report he stated: "Any potential exposure could have been reported by way of disclosure in Anglo's financial statements; for example, with disclosure relating to the credit risk and, in my opinion, is a far less important feature of the ILP/ILA Transaction than the fact that €7.2 billion of Anglo's Customer Accounts balance had materialised from a series of circular transactions with no commercial substance".

83. Prosecution counsel gave a misleading impression of the evidence that would be given by Mr. Hunt. Furthermore, his opinion as to the purpose of the deposits involved in the transaction giving rise to the prosecution served to undermine the evidence from other witnesses concerning the legal form of the said deposits.

84. Mr. Hunt's opinion as to whether the September, 2008 transaction lacked commercial substance was a matter to be decided by the jury. By asserting the view that there was no commercial substance and that the matter had to be disclosed in the accounts of Anglo, it was implicit that something irregular had taken place.

85. The trial judge failed to uphold his own ruling that Mr. Hunt was not permitted to give views as to the state of Anglo's bank account, in terms of fulfilling the transaction in question. Mr. Hunt's evidence that the transactions could have gone in perpetuity implicitly if not explicitly wrongly suggested that the transactions were to be carried out without any financial backing.

86. Mr. Hunt's evidence as to whether or not the transaction was appropriate or not could have no probative effect upon the intention of the Appellant in the context of the conspiracy charge he faced.

87. Mr. Hunt's report said that the ILP/ILA transactions were in substance an interbank transaction that had been structured to appear as though it were a customer deposit but the prosecution submits that Mr. Hunt did not actually give this evidence because of a ruling by the trial judge.

Prosecution Submissions

Mr. Bowe

88. The prosecution submitted that the court should analyse these grounds in the context that this appellant's position was that the accountancy treatment of the September 2008 transactions by Anglo and as certified by Anglo's auditors was correct and his counsel cross-examined on that basis. Prosecuting counsel explained at the trial that he was calling Mr. Hunt in order to counter the case made by the defence, particularly Mr. Bowe, that there was no other way for the accounts to be completed. A true and fair presentation required that these transactions be netted off with an explanatory note. It was not open to the appellant to object to Mr. Hunt's evidence on the basis that it was irrelevant when he was contending that the transactions were properly recorded.

89. The prosecution never disputed that ILA was not a licensed bank and Mr. Hunt expressly agreed with the Appellant that if an entity did not hold a banking licence it would be difficult to classify it as a bank. Mr. Hunt also did not dispute the definition of "inter-bank placement" or "customer deposit" in the Central Bank Act 1989 and/or the Credit Institutions (Financial Support) Act 2008.

90. The conspiracy to defraud count on the Indictment alleged that the "deposits from a non-bank entity to Anglo Irish Bank Corporation plc during the year ending 30 September 2008 were approximately 7.2 billion larger in amount than they really were". The respondent submitted that the rules required as a first principle that the accounts present a true and fair picture of the economic substance of the transactions not necessarily their legal form. The distinction was between form and substance.

91. Mr. Hunt explained that he examined the commercial substance of the transactions because such an examination was necessitated by the International Accountancy Standards to determine the correct accounting treatment. Mr. Hunt referred to IAS39 and IAS32 stating that:

> ". . . they only relate to financial instruments, financial positions, which have economic substance. Because if they don't have economic substance, those provisions in those standards don't apply, because you've moved back up the hierarchy to say we've got to have a set of accounts that show a true and fair view, which reflect economic substance. So, that's why I looked at whether there was economic substance."

92. Mr. Hunt did not say whether he considered certain things to be dishonest or honest or otherwise. At most, he said that in his view for accounting purposes he believed that this should not have been accounted for as a corporate deposit and he gave reasons why that was so. All of that evidence was admissible. The submission by the appellant that this evidence on commercial substance was an "impermissible encroachment on the jury's function" is incorrect. It was made clear by the learned trial judge that all Mr. Hunt could say was whether the accountancy treatment was wrong and that he was "not an expert on dishonesty".

93. The judge outlined a clear, lawful and correct basis for his conclusion that the topic concerned was amenable to expert evidence.

Interbank Loans

94. The appellant argues that the judge erred in admitting Mr. Hunt's opinion to the effect that these transactions amounted to interbank loans. It is submitted that on the close of Mr. Hunt's direct evidence on 14th April 2016, counsel for Mr. Casey and Mr. Fitzpatrick stated that they would be objecting to Mr. Hunt giving direct evidence that the transactions amounted to an interbank transaction. Mr. Hunt did not give this evidence and it was expressly ruled by the learned trial judge that he could not do so.

Email of Mr. Ciaran Cunningham

95. The appellant complains that the learned trial judge impermissibly allowed Mr. Hunt to give evidence as to why this email was circulated and the purpose of its content. Evidence of the planning of the initiatives described in the message was adduced over several days from a series of Anglo witnesses. Mr. Hunt commented on the particular exhibit dealing with the initiatives which had been outlined by a series of witnesses and were not in controversy.

96. Generally, the prosecution submitted that the Jury heard extensive evidence about the mechanics of the September transactions. Mr. Hunt, in his capacity as an expert accountancy witness, examined those mechanics/facts and gave his opinion on them. He gave evidence that the transactions were not accounted for properly and stated his reasons for that conclusion. He outlined, with the aid of his expertise, his opinion of how they should have been accounted for. He did not give any view to the Jury that the scheme was dishonest or defective. The prosecution had consistently maintained from the outset of the trial that the expert evidence of Mr. Hunt was relevant and admissible in relation to the conspiracy charge.

Response to Extra Matters Raised by Mr. Casey

97. This appellant's counsel cross-examined the Anglo accountancy witnesses as to the correctness of the accountancy treatment and in particular as to whether there was collateral, risk and set-off and whether the correct accountancy treatment of the transactions involved a disclosure note on the accounts.

98. The statement of Mark Hunt dated t4th February 2013, was served with the book of evidence on 17th June 2014. The appellant was indeed informed in advance of the trial date that Mr. Hunt was ill and would not be in a position to give evidence. However, the appellant was also informed that a replacement witness would be sought. During the trial, the appellant and his co-accused were informed that Mr. Hunt was in a position to travel to give evidence and that his report would be revised to take account of the rulings in the trial. The respondent disputed that there was any meaningful distinction between the two reports as alleged by the appellant. The initial report of Mr. Hunt at paragraph 7.69 says:

"I have set out the accounting hierarchy above and have specifically explained the principle of substance over form. In substance, the ILP/ILA transactions were an interbank placement contrived to be a customer account balance which had no impact on Anglo's financial position or its ability to generate profits, despite their legal form. Therefore, for these reasons, it is my opinion that the balances created on completion of the ILP/ILA transactions should not have been recognised as customer accounts or loans advanced to banks on Anglo's balance sheet, in Anglo's financial statements, and would not therefore have been included in Anglo's prelims. The circumstances of the ILP/ILA transactions are, in my opinion, those such rare circumstances described in IAS1, where a true and fair override should be used."

99. Counsel for the respondent accepted that he had made a mistake in relation to Mr. Hunt's evidence on 8th March 2016, during a separate voir dire when dealing with the relevance of the January/February 2009 accounts. However, the appellant had Mr. Hunt's original report since 2014, and there was no significant change in the second version. The Learned trial judge was correct when ruling that:

"Obviously Mr Hunt had a wider expanse to deal with in relation to his first report, he was also dealing with false accounting, but in the altered report or the amended report I think it is fairly consistent with his initial report."

100. In regard to the complaint that the learned trial judge erred in permitting expert evidence as to the commercial substance of the transactions, the submissions are the same as in Mr Bowe's case. Similarly, in respect of the submission on interbank loans.

101. The issue as to the legal form of the deposits is also dealt with above.

102. Mr. Hunt was entitled to comment on the facts in explaining how he came to his view that the accounting treatment of the figures was wrong. An expert is entitled to relate the facts on which his view is based. The appellant was entitled to cross-examine him and to elicit the information he required as to his state of knowledge at the time or any other feature of the report with which he took issue. The appellant, in fact, fully explored this accountancy evidence in cross-examination.

Discussion

103. The prosecution is entitled to decide how to present its case; that includes choosing witnesses expert and otherwise and how many, subject to the rules of admissibility and to the court's overall jurisdiction to prevent procedural oppression. This witness's evidence was notified in the book of evidence which had been served long in advance of the trial. He then became seriously ill and the prosecution informed the defence teams that he would not be able to testify. During the course of the trial, two developments occurred: defence counsel, particularly Mr. Bowe's, made the case that the transactions of 29th/30th September 2008 were legitimate and not wrongful and were properly recorded in Anglo's books; secondly, Mr. Hunt's health condition improved and he was now able to give evidence. He furnished an updated report which was sent to the defence solicitors by email just before he began his evidence.

104. The law on expert evidence is well established. The courts permit expert evidence in relation to all matters that are outside the scope of the knowledge and expertise of the finder of fact, whether judge or jury. The expert opinion evidence must be evidence

which gives the court the help it needs in forming its conclusions. The evidence is required to be necessary in the limited sense that it has to provide helpful information which is likely to be outside a judge or jury's knowledge and experience. Mr. Bowe's submissions said: "[t]his was a difficult and lengthy case with a mammoth amount of material and evidence for a jury to take on board".

105. Mr. Hunt's evidence and the objections to its admissibility have to be seen against the background of the case as a whole and the issues arising from the evidence and the defences that were put forward on behalf of the appellants. The charge was conspiracy to defraud. The fraud alleged was the pretence that there had been genuine customer deposits of €7.2 billion made with Anglo by ILA in the relevant period. A material point should be made at the outset. The fact that the deposits purporting to be coming from a non-bank source were recorded as such in Anglo's accounts was part of the fraud alleged and did not constitute a defence. Much of the objections to Mr. Hunt's evidence are predicated on the consideration that putting the deposits in the category intended was a matter of defence and that his disagreement with that, which he expressed in a number of ways, was not admissible to challenge the essential, allegedly fraudulent nature of the transactions.

106. Objection was taken that this evidence was inadmissible. It is said that the trial judge was wrong to admit it because it was contrary to basic fairness. No authority was cited for this proposition. The nature of the case and the evidence assembled to prove it made it obvious that expert accountancy evidence was relevant and admissible. It is difficult to imagine circumstances in which it would not be considered appropriate for the prosecution to engage such an expert and to proffer the evidence to the court. Similarly one would expect the accused in any such trial to consider whether expert evidence would assist. It is true that the prosecution had called Anglo employees as witnesses who had testified about accountancy matters but that did not rule out the expert evidence that Mr. Hunt could give. It did not make his testimony inadmissible.

107. It was claimed that changes between the first and second statements made by Mr Hunt made it unfair that he should testify because Counsel had cross-examined witnesses on a basis that would be undermined or compromised by the changes. Although differences in the two versions of the statement were pointed out to the court, no detail was furnished as to just how counsel's position had been affected. The claim was a general one. This was understandable because the changes in the second statement compared with the first were either insignificant or not capable of having a retrospective damaging effect as claimed.

108. Moreover, Mr. Hunt explained in his report the reason why he made changes to his statement:

> "I issued by my report under initial instructions on 4 February 2013. I subsequently received further instructions on 26 March 2016 following certain rulings which had been made in the trial. These revised instructions have required me to remove all reference in my original statement to the 2008 Annual Report of Anglo Irish Bank which was approved on 19 February 2009 and to remove all references to witness statements made by employees of Irish state agencies. I was also asked to remove from the body of my report references to other witness statements I had reviewed in the investigation phase of my initial work as these had already been produced in the trial. I have considered these revised instructions and the consequential amendments they have had on my statement and in my view they do not affect my opinions set out in my first statement on the matters that I continue to address in this supplemental statement. I have not reissued the Appendices and Exhibits to my original Statement on which I continue to rely."

109. It seems to the court that this objection is without foundation. The prosecution submission that the changes from the first report are insignificant is correct. The differences in the reports as cited in submissions are minor and obvious in the sense that the witness would have been entitled to give evidence on the basis of the notice furnished in the first report. It follows reasonably and logically from the other information and commentary he has provided in the report. He spelt out in the second an implication that was present in the first. It would have been legitimate for counsel to have drawn that inference either in examination of witnesses or in submission to the jury arising from Mr. Hunt's evidence. The slight differences between the two versions of Mr. Hunt's evidence do not accordingly form a valid basis of objection to the admission of his evidence.

110. It is said that the evidence given by Mr. Hunt was relevant to the other count in the indictment that was severed before this trial began. Prosecuting counsel denies that and indeed, a consideration of the statement and of Mr. Hunt's evidence makes clear what is stated above, which is that this evidence was relevant to the instant charge and would be so regarded in any such trial in a similar jurisdiction.

111. Counsel for Mr. Casey protested that prosecuting counsel had misstated the effect of Mr. Hunt's evidence on his client at the time when he was announcing that the expert would now after all be giving evidence. He did this by expressing reassurance that it would, if anything, assist Mr. Casey. The prosecutor accepted that he had stated as defence counsel maintained but said that he spoke in error at the time. He pointed out that Mr. Casey's defence team had had Mr. Hunt's first statement for a long period prior to the beginning of the trial and that it was a matter for them to assess the impact of the evidence. While it was unfortunate and regrettable that he had erroneously stated as he did, there was no basis on which that could be the foundation of a ground of appeal. The court is satisfied that this is correct. Counsel may be correct or not correct as to the effect of some evidence or a development during the trial but it is imposing too great a burden to impose liability in circumstances such as occurred in this case. There was ample opportunity for Mr. Casey's team to reconsider the situation and indeed it should have been clear to them that the expert evidence was going to bolster the case against their client. The court is satisfied that the trial judge handled this matter correctly.

112. Another complaint is that Mr. Hunt's evidence that in his opinion there was no commercial purpose to the transactions usurped the function of the jury. It was submitted that this question was for the jury alone to decide. This also is not a sound proposition. It was within Mr. Hunt's expertise to express a view on the nature of the transactions and whether they had any commercial purpose. The jury was not bound to accept that evidence or any evidence given either by Mr Hunt or any other witness. Its function was to decide whether any of the accused persons was or were guilty of conspiracy to defraud, as charged in the indictment.

113. The witness was cross-examined. On behalf of Mr. Bowe it was suggested to Mr. Hunt that the incoming money was properly recorded in Anglo's books as customer deposits. It was of course correct as the witness confirmed that incoming deposits from non-bank bodies would be shown as customer deposits. The scheme would not have worked otherwise. The purpose of the exercise was to recycle Anglo's €1 billion repeatedly to boost the appearance of customer deposits in Anglo's books. The operation of the scheme in the way it was planned to take shape did not have the effect of exonerating the participants. The transactions needed to have the appearance of customer deposits coming from a non-bank source in order to have the intended effect. They could not be recorded in Anglo's books with appropriate notifications as to what had actually happened and still be consistent with the purpose of the scheme.

114. The court is satisfied that Mr. Hunt did not contravene the judge's ruling by giving evidence about Anglo's accounts and rejects the argument that he went beyond and outside the ruling made by the trial judge as to the evidence he could give.

115. The fact that the Anglo accounts were prepared by personnel other than the appellant, Mr. Bowe, or that they were signed off by independent auditors did not make this expert's evidence irrelevant or inadmissible. Such circumstances are no doubt of potential relevance perhaps to contradict the views of the witness but that is a different consideration.

116. It was not necessary for the prosecution to show a direct connection between the expert evidence and the appellant, failing which it would be inadmissible. Evidence has to be relevant to the issues but not to every issue, subject in the case of an expert to the qualifications above stated. Besides, if the evidence fulfilled the conditions that are implicit in this objection, there might well be a basis for proposing that it encroached on the jury's function.

117. In regard to the email from Mr. Cunningham, Mr. Hunt was entitled to comment on this document which was circulated with considerations under the title 'Year End Initiatives – Accounting and Disclosure Considerations'. The document listed key considerations including netting of "repo/reverse repo transactions and offsetting related financial assets and financial liabilities". It referred to the international standards for accounting. The witness gave his view about the contents of this message, which are capable of referring to the kind of transactions that took place on 29th/30th September 2008. It does not follow that the message is unequivocally referable to those events but that is not required. This material was, according to the prosecution, relevant evidence on the charge faced by the accused persons and the expert witness was in a position to comment on it. Indeed, the quoted sections actually specify the accounting standard so it would appear to be beyond argument that the content of this particular document was within the area of expertise of Mr. Hunt.

118. Mr. Hunt's opinion as to whether the September 2008 transaction lacked commercial substance was a relevant matter to be decided by the jury. His view that there was no commercial substance and that the matter had to be disclosed in the accounts of Anglo was not an implicit statement that something irregular had taken place. The matter was clearly within his area of expertise but it did not follow that the jury was in any way bound to accept his evidence. Neither did it take over the jury's role. The jury's function was to decide whether the prosecution had proved beyond reasonable doubt that the accused or one or more of them were guilty of conspiracy to defraud; they could accept or reject the whole or part of the evidence of any witness, whether expert or otherwise. The evidence of this expert's opinion was admissible but of course not binding on the decision maker. The Court is satisfied that Mr. Hunt's evidence did not usurp or entrench upon the jury's function to decide whether the accused was or were guilty of the charge.

119. Mr. Hunt's evidence that the transactions could have continued indefinitely did not contravene a ruling as to references to the state of Anglo's bank account. The point the witness made was that there was no reason why the circular transfers had to stop at €7.2 billion because the process could have proceeded until any particular sum had been reached.

120. Overall, therefore, the general objections to this expert's evidence and the particular grounds advanced on behalf of the two appellants do not have merit and are rejected. In summary, the court is satisfied that Mr. Hunt's evidence was admissible, it did not encroach on the jury's function, the differences in his second report were not significant so as to affect the trial and the other grounds of objection are not valid.

Evidence as to Events subsequent to September 2008

Ground 17 (John Bowe)
The learned trial judge erred in admitting evidence of the accountancy treatment of the deposits after 30th September, 2008 as it was (a) factually irrelevant, (b) legally irrelevant and (c) prejudicial to the case against the appellant.

Ground 18 (John Bowe)
The learned trial judge erred in admitting evidence of the preliminary results of 3rd December, 2008 as such evidence was (a) factually irrelevant (b) legally irrelevant and (c) prejudicial to the case against the appellant.

121. The background to these grounds of appeal is to be found in the application at the start of the trial by the appellant and his co-accused Mr. McAteer to sever from the indictment charges of false accounting contrary to s. 10 of the Criminal Justice (Theft and Fraud Offences) Act, 2001. While the basis of the application for severance was that if all counts were dealt with together that there would be cross contamination of the evidence which would give rise to a serious risk of an unfair trial, in ruling on the issue the judge made clear that he was influenced to accede to the application by concerns to keep the trial within manageable dimensions for the benefit of the jury. He confirmed at various later stages of the trial that this had been his approach including, as we have seen earlier, when dealing with the application for the discharge of the jury following the evidence of Sergeant Gunn. At trial it was argued that the severance ruling had brought "a guillotine down on where the issues end". Despite the reference to the guillotine the appellant did not in fact approach the case on the basis that a wall was built on 30th September which could not be crossed, or that there was a deep divide between events pre and post that date which could not be bridged. Notwithstanding his general position about the significance of 30th September the appellant was anxious to introduce the fact that a senior partner in Ernst & Young, Mr. Vincent Bergin had considered the accountancy treatment of the issue and had concluded that funds were accurately and properly categorised as customer deposits and which should appear gross on the balance sheets. In those circumstances counsel for the appellant initially conceded that events post 30th September but up to and including 23rd October, 2008 was potentially of relevance. 23rd October, 2008 was the day on which Kevin Kelly, head of Financial Reporting in Anglo and Colin Golden, head of Group Finance in Anglo met with Mr. Bergin. In the course of an exchange between counsel for the appellant and the trial judge on 8th March, 2016 Mr. McGuinness indicated that he was happy to go up to 2nd December i.e. the day prior to the Preliminary Results of 3rd December, 2008. The appellant continues to argue that the judge erred in permitting evidence to be adduced not just in relation to the Preliminary Reports of 3rd December, 2008 but also the final accounts published in February, 2009. The appellant says that there is a real and appreciable risk that in permitting evidence of the February 2009 accounts to go to the jury that it would lead to an improper rationalising backwards from the full published accounts through to the preliminary accounts and prior to that back into the alleged conspiracy. If the jury was permitted to see the final picture in February, 2009 then it might form an adverse view on the December, 2008 picture and of the situation on and prior to 30th September, 2008. The appellant protested that the benefit of the severance ruling was being lost. At trial and on this appeal the DPP has argued that the evidence was admissible "as ordinary evidence" bearing on the mens rea as of 30th September, 2008.

122. The trial judge had a clear view on this issue at one stage posing to counsel for the appellant "would it not be living in total 'Alice in Wonderland' if the Preliminary Results were not admitted?" When he came to ruling on the issue the judge observed "In relation to this issue about the accounts of 3rd December, I think they are called interim accounts. I am with the prosecution. It seems to me that it would be illogical not to have them before the jury. Since the whole tenor of the case was that – the State's case at least is that certain parties were trying to achieve a corporate number and it would seem to me bizarre if the jury could not see was that achieved or not achieved and it seems that on the running of this case these accounts must go in. At another stage on 10th March, 2016, the judge observed:

"Sorry, but if you believe the evidence so far there is evidence in the case to say the chief reason for this scheme was to establish a corporate number on a particular date, because those were the final year returns. Would it not be placing the jury in blinkers to say that if they didn't see sight of at least interim returns to say that to some extent this object was achieved? There is a number of witnesses saying that what they were interested in is a strong corporate deposit number and are you saying to me the jury cannot look at, even look at, the interim – the interim accounts or the final accounts."

123. Later that day, addressing counsel for Mr. McAteer the judge said:

"Sorry, Mr. Gageby let's be clear here, we're not going to try this case in blinkers, the stated aim of all the parties in this case, I heard from Mr. Kane, all of them said we want a high corporate number and the idea that the jury shouldn't know that the high corporate number was actually in the interim accounts seems to me that certain parties want the jury to see this case in blinkers."

Discussion

124. In the Court's view the judge's firmness and his clarity in relation to this issue were entirely appropriate. The fact that there was originally a more extensive indictment and that certain counts were severed does not determine the issue of admissibility of evidence. When evidence was sought to be adduced at trial the only issue was whether it was admissible in relation to the counts that were before the jury. Evidence post 30th September and in particular evidence of the Preliminary Reports of 3rd December, 2008 were obviously relevant. As the judge made clear to counsel the jury was being told about a transaction entered into designed to show Anglo in a positive light, the prosecution would say a misleading positive light but there was no logical reason whatever why the jury should not be told in what actual light matters were presented to the public. The Court rejects this ground of appeal.

Ground 8 (Denis Casey)
125. The learned trial judge erred in law in determining that evidence concerning events subsequent to the publication of the preliminary results of Anglo Irish Bank Corporation p.l.c. on 3rd December, 2008 was not relevant to the state of mind of the appellant regarding the matters giving rise to the prosecution. In doing so the learned trial judge acted in a manner inconsistent with basic fairness.

Ground 9 (Denis Casey)
126. The ruling of the learned trial judge regarding events post 3rd December, 2008 was unsatisfactory and skewed by virtue of an assurance by the prosecution that the appellant did not require such evidence before the Court in that form when it was already being adduced in the evidence of Mr. Mark Hunt F.C.A. which met the requirements of the appellant. It emerged subsequently that such assurance was incorrect.

Ground 10 (Denis Casey)
127. The learned trial judge's prohibition on the appellant from adducing evidence of events post 3rd December, 2008 rendered the trial unfair by virtue of the following, (individually and/or cumulatively):

(a) the appellant was prohibited and prevented from putting the full picture of relevant events before the jury;

(b) the learned trial judge's ruling that such evidence would serve to blacken the defendants, William McAteer and John Bowe, in the eyes of the jury and therefore should be excluded was an error of law and was fundamentally unfair to the appellant.

(c) the appellant had no control over how the transaction giving rise to the prosecution would be accounted for in the financial statements of Anglo Irish Bank Corporation p.l.c. prepared between 30th September, 2008 and 3rd December, 2008 (inclusive);

(d) in the circumstances the appellant lacked the requisite or any intention to commit the offence with which he was charged, as he had no control over how the transaction giving rise to the prosecution would be accounted for in the financial statements of Anglo Irish Bank Corporation p.l.c., prepared between 30th September, 2008 and 3rd December, 2008 (inclusive);

(e) the learned trial judge's ruling was based, inter alia upon the premise that Irish Life & Permanent p.l.c. had no control over how Anglo Irish Bank Corporation p.l.c. accounted for the transaction giving rise to the prosecution (and therefore not being damaging to the appellant) but in circumstances where the learned trial judge later directed the jury in his charge to the effect that knowledge that the transaction would be wrongly accounted for was consistent with his guilt; and,

(f) the learned trial judge's ruling was inconsistent with the appellant's right to explore all relevant issues in the trial and was arbitrary and irrational.

128. The appellant contends that his state of mind at the time the September, 2008 transaction with Anglo was entered into was central to his defence of the case. He says that the judge in determining that events subsequent to the publication of the Preliminary Results of Anglo on 3rd December, 2008 was not relevant meant that the judge acted in a manner that was inconsistent with basic fairness. The judge is criticised for taking the view that admitting evidence of events post 3rd December, 2008 could "blacken" the Anglo defendants William McAteer and John Bowe and for relying on this as a reason for excluding the evidence. The judge is criticised too for failing to attach sufficient weight and for not fully appreciating the full implications of the fact that Mr. Casey had no control over how the transaction in question would be accounted for in the financial statements of Anglo.

129. What was described as a core element of the appellant's case was put by his counsel in these terms:

"A core element of our case is that the bank, that's Anglo Irish Bank, took a liberty in how they presented that. And it is a liberty to which they were not entitled to take, and it's a liberty which they are not entitled to visit on my client in this trial. At trial the appellant was anxious to put before the Court that there was documentation in existence that indicated that subsequent to the release of the Preliminary Results on 3rd December, 2008, Anglo was considering a range of funding disclosure options, specifically draft disclosure notes in various forms in relation to the September, 2008 transaction for inclusion in its annual report. This was a major theme on the appeal hearing and was one of the limited grounds that was fully orally argued."

130. The appellant, Mr. Casey was particularly anxious to put before the jury a document which set out four possible disclosure notes in draft form. The first of these in particular, it was said, would have explained the nature of the transactions to an intelligent and informed reader. The Director of Public Prosecutions took the position that while the issue was primarily a matter for dispute between the Anglo defendants and the IL&P defendants, her position was that events in December, into January – February, 2009 were so disconnected by intervening events from what was envisaged before 30th September that she could not seek to put forward evidence from that period as relevant. She contended that Anglo could not "call in quasi expert evidence by the back door asking the jury to infer from what Anglo actually did in January and February that there was any particular intent." The judge took the view that evidence of events post 18th December, 2008 could not assist the jury in coming to any conclusion on the state of mind of the accused on 30th September, 2008. Evidence post 18th December, 2008 would confer no advantage on the Anglo defendants while "blackening the Anglo accused".

131. Disputes about the relevance of evidence are relatively rare. Usually a question of relevance is accepted, at least implicitly and the battleground is whether the evidence is admissible or inadmissible. However, one cannot lose sight of the central significance of relevance. McGrath on Evidence deals with the issue as follows:

"A necessary pre-condition before an item of evidence can be admitted in either civil or criminal proceedings is that it is relevant to the issues in the proceedings. The onus is on the party tendering the evidence to establish its relevance and evidence which does not satisfy this prerequisite is absolutely inadmissible."

132. It follows therefore that where it is suggested that arguably irrelevant evidence has the potential to damage the interests of one of the parties in an unfair manner, as it was suggested this evidence had the capacity to "blacken" the Anglo defendants, that it is necessary for the judge to determine the issue of relevance and to exclude evidence that is irrelevant.

133. In the Court's view events post 18th December, the date of the resignation of Mr. Sean Fitzpatrick as Chairman were indeed at a distant remove from what went before. After that date there had been regime change and after that the difficulties in Anglo were becoming increasingly public. By the time the final accounts were published in February, 2009 there was already media focus on the transactions, including a significant article in the Sunday Business Post and IL&P had issued a public statement identifying itself as the other party to the transaction. It is the case that the appellant recognises the significance of the Sunday Business Post article and that thereafter the landscape was so changed that it would be difficult or impossible to draw any worthwhile conclusions but he says that he remains interested in the internal discussions that were going on in Anglo prior to the issue breaking in the media and he contends, that the fact that there were discussions in relation to different possible approaches to disclosure offers support to him when he says that at the time of the transaction it was his expectation that the transaction would be properly accounted for. However in the Court's view the deliberations of the new regime could not have offered any assistance to the jury, by this stage all had changed, changed utterly. In these circumstances once the issue of relevance was raised it is hard to see how the judge could possibly have decided otherwise. The limitations of the restriction should be noted. It was a restriction on putting in evidence that individuals in Anglo were post 18th December discussing and working on different approaches to disclosure and then arguing that what would emerge from their activities was what Mr. Casey had expected all along. There was nothing to prevent Mr. Casey from arguing that different approaches to disclosure were possible, that different forms of notes could be drafted and indeed as counsel for the prosecution conceded reading drafts of disclosure notes to the jury as illustrations of what could have been achieved.

134. It would have been open to Mr. Casey to put drafts including those that emerged from within Anglo to accountancy witnesses, including Mr. Hunt, as examples of what could have been achieved. The restriction was simply on pointing to what Anglo had done in changed circumstances and saying that helped towards a conclusion that this is what was intended all along. In any event the matters do not rest there because it is clear that the judge's ruling was circumvented if not ignored. Counsel for the appellant as well as counsel for Mr. Fitzpatrick and indeed Mr. Bowe all referred to evidence of events in December, January and February when cross examining Anglo accountancy witnesses. When the issue was raised by counsel for Mr. McAteer the judge commented "I was noticing the wandering by everybody, but nobody got up and said they had a problem with any wandering by anybody. Right?" There were many such examples but one taken from the cross examination of Ciaran Cunningham, head of Treasury Finance at Anglo by counsel on behalf of the appellant will suffice:

> "Q. And part of the fallout, if you like, from that was that the issued accounts had to be withdrawn and a new set of accounts issued with a new Chairman's statement because there was a new Chairman, and a new Chief Executive Officer's statement because there was a new CEO, isn't that right?
>
> A. I believe so, yes, I think that's …
>
> Q. Mr. O'Connor and I can't actually remember who the new Chief Executive was. But anyway, there were also some additional changes to the accounts that had to be made as well in terms of disclosure and so forth, isn't that right?
>
> A. Yes. There were discussions around disclosure, yes, from probably early January through to mid-February, yes.
>
> Q. And the net effect as far as the IL&P transaction is concerned is that there were new disclosure notes prepared for the publication on 19th February, isn't that right?
>
> A. There were, yes there were new disclosures prepared for that.
>
> Q. And they were giving far more detail about the transaction?
>
> A. Yes, giving transaction information, yes.
>
> Q. And on 13th February, Irish Life and Permanent issued a press release saying that the transaction was collateralised, isn't that right?
>
> A. I can't recall the date but I – yes there was a communication to that effect.
>
> Q. And as a result of that, the disclosure note, the existing disclosure note which was in existence and ready to go, was further enhanced by naming Irish Life and Permanent as the counterparty in respect of whom the transaction had been entered, isn't that right?
>
> A. Yes. Up until that point one of the concerns was around client confidentiality but once –

Q. Once they had named themselves there was obviously?

A. Yes.

Q. No embarrassment about naming them, isn't that right?

A. That's correct, yes."

135. In summary, the Court is of the view that these grounds of appeal, referred to in shorthand in the oral argument as "the notes point" lack merit and these grounds are rejected.

Jury Directions and Rulings

Ground 12 (i) (John Bowe)

The learned trial judge erred in failing to accede to the application for a direction at the close of the prosecution case and specifically in that he failed to hold:

> (i) That there was no evidence to suggest that the appellant was involved in negotiating, agreeing, instructing, authorising the September transactions or was engaged in executing them.
>
> (ii) There was no or no credible evidence to support the prosecution case that the deposits were 7.2 billion greater than they really were.

136. The appellant contends that there was no evidence that the appellant had an active involvement in the transactions or that he negotiated, agreed or gave instructions in relation to the transactions. On behalf of the appellant it is accepted that there was evidence which establishes that he was aware of the transactions, at least in a general sense, but it is said that the evidence did not go beyond this and it is also said that knowledge without more is insufficient. The appellant says that there was no evidence that he was ever involved in any relevant conversations with ILP personnel. The appellant says that there is material to be found in the phone recordings which indicates that Mr. Bowe was not fully conversant with some of the technical aspects of the transaction and that this goes a long way towards establishing that he was not a central actor.

137. In contrast the respondent says that there was ample evidence that the appellant was one of the group of Anglo officials dealing with the transactions. The appellant says that there was evidence putting him among the members of a Friday afternoon group who met to monitor and advance the initiatives. The respondent points to the appellant's position as de facto head of Treasury and says that officials such as Matt Cullen and Ciaran McArdle were involved in the nuts and bolts of the transactions were in a reporting relationship to him. In the course of her oral presentation of this ground Ms. Roisin Lacey, S.C., counsel for the appellant referred to evidence given by Mr. Matt Moran that he was present on an occasion when according to him Mr. Bowe reported to Mr. Drumm that the money had come through and asked Mr. Drumm to ring his opposite number and say thank you. Counsel says that Mr. Moran was a witness that had been granted immunity and that the fact of this conversation was challenged and disputed. While it may be that Mr. Moran was challenged in relation to his evidence on this point the fact that the conversation was challenged or disputed could not possibly provide a basis for a direction. In the ordinary way the consideration of the application for a direction required that the prosecution evidence be taken at its high water mark. Given the terms on which the application was made it was necessary to consider whether the evidence went to participation as distinct from knowledge or awareness. In replying to the application for a direction counsel for the prosecution, Mr. Paul O'Higgins S.C. referred the Court to the contents of a large number of telephone recordings and submitted that they were plainly capable of being taken by a jury as recording Mr. Bowe as someone who was acquiescing in, participating in and discussing the plan that was being put into action. As the application for a direction came towards a close there was an exchange between the trial judge and counsel for Mr. Bowe. This saw the judge saying:

"Now, Mr. McArdle is the mechanics man, as far as I can remember. His counterpart in ILP I think was Mr. Paul Kane and they pushed through the various orders and the paper orders. So, this was emanating from Treasury, this transaction, and now we have various phone calls with Mr. Bowe on the phone talking to the Chairman of the Board, the Chief Executive, the Chief Risk Officer, and is demonstrating knowledge and they're telling him in one case to keep going. Surely a jury – I'm not saying they have to accept – surely a jury could come to the conclusion that he was involved in this scheme?"

Counsel responded:

> "Well, in my submission, the evidence isn't there to allow it to go to the jury safely for this reason, that that would be fine if Mr. Bowe had been a, as it were party to the agreement but the wheel is set in motion by Mr. Drumm with Mr. Casey and Mr. Cullen. And there isn't in fact any evidence of Mr. Bowe doing anything other than in fact, as it were, passing on the instruction that Mr. Drumm and Mr. McAteer had given to him 'keep going with the transactions' because it had started without any, in fact, act. There is no evidence of any act of Mr. Bowe in relation to the period 22nd – 29th or before 26th when the transaction had started."

138. Then, the judge ruled on the application. He did so on these terms:-

"So, therefore, second point, I think in relation to whether I think the point being made initially by Mr. McGuinness was that only the people who agreed in relation to doing the scheme could be implicated in it. It seems to me that people who participated in it can also be implicated in it if the jury discern it to be a conspiracy. I think that goes without saying. The question is, is there enough evidence to allow Mr. Bowe's case to go to the jury?" As indicated by Mr. Paul O'Higgins, I must take the evidence at the height from the prosecution's point of view. I have had the benefit of the evidence I think of Mr. Cullen. I have also had the benefit of the evidence I think of the transcripts of phone calls where Mr. Bowe participated in relation to Mr. Fitzpatrick [Chairman and Former Chief Executive Officer of Anglo Irish Bank], others I think involving Mr. Drumm and looking at those transcripts and recalling the evidence particularly of Mr. Bowe, Mr. Cullen and particularly also of I think Mr. Matt Moran, a particular instance where he indicated he was in the office I think with Mr. Drumm, and Mr. Bowe arrived in and said the transactions were executed and he should thank Mr. Casey. I think there is plenty there for the jury to come to the conclusion that Mr. Bowe was involved in the scheme. I think there is plenty and there is more than adequate for a jury to come to that conclusion. Now, whether to do that is for the jury, and whether the jury can believe the evidence to a sufficient state is a matter for the jury but it seems to me that it would be wrong on my part to withdraw Mr. Bowe's case from the jury. The jury have ample evidence to consider the matter and it certainly, by a long stretch, I think, beats the threshold in this case. I think there was a doughty application on behalf of Mr. McGuinness but it seems to me that there is plenty of evidence for the jury to consider against Mr. Bowe."

Discussion

139. The Court agrees with the view of the trial judge that the jury had ample evidence in order to consider the matter and that the case at that stage as he put it "by a long stretch beat the threshold." The Court is perfectly happy that there was evidence which would allow the jury conclude that Mr. Bowe was a participant, that he was a player, and not merely an interested bystander. This sub-ground of appeal is rejected.

Ground 12 (ii) (John Bowe)
140. This ground is rooted in the language of the indictment. It will be recalled that the appellant was charged, that he conspired with others by engaging in transactions dishonestly to create the false and misleading impression that deposits from a non bank entity to Anglo Irish Bank Corporation p.l.c. during the year ending 30th September, 2008 were approximately 7.2 billion larger in amount than they really were. For the purpose of this argument the appellant says that whatever about the motivation behind the transactions, the fact was that they involved real deposits, deposits received from an entity which did not have a banking license and therefore had to be categorised as corporate or customer deposits. The appellant says that all of the accounting evidence in the case supported the view that what was in issue were real corporate deposits. Attention is drawn to the evidence of Ciaran Cunningham, Head of Financial Accounting within Group Finance. It is said that the evidence of Mr. Mark Hunt, the prosecution accountancy expert was to the same effect. Counsel says that the prosecution contention that deposits were made to appear greater than they really were was misplaced and misguided. For this purpose counsel accepts that a differently formulated indictment might have been possible but says that the prosecution went wrong in that the evidence was clear that the moneys received, i.e. the 7.2 billion were correctly described in the bank accounts as a customer deposit and could not have been described as anything else and in particular could not have been described ever as an interbank loan. Slightly surprisingly, much of the cross examination of Mr. Hunt by counsel for the appellant was designed to establish that the report prepared by Mr. Hunt could not change the intention of the parties. How anyone could ever have believed that a report prepared in 2013 or 2016 could have changed what happened in 2008 is not clear. The following exchange from 15th April, 2016 is instructive:

> "Q. But you see I have this difficulty understanding how if you accept that you can't change, and your opinion can't change the statutory classification of them, if it can't change the credit risk and if it can't change the parties' intention in relation to corporate deposits, how can you say that this – these shouldn't be regarded as customer deposits?
>
> A. Because I have looked at the entirety of the situation as I have been – as I have seen it and I have looked at the transactions as a series, I have looked at the design, the intent, the execution of these transactions and the risk, which is part of it, and in overall terms my view, is as I have set out in my statement, is there wasn't economic substance in these transactions. They were designed as a series of transactions to improve a single figure on a balance sheet for purposes that Anglo thought were to its advantage."

141. The judge dealt with the issue in the course of his ruling of 5th May 2016, as follows:

"Now the first point, the technical point, in relation to, I suppose, the corporate deposits and how they bear on the crime, now one of the basic duties of the jury will be to decide whether the scheme as it was executed was a dishonest scheme. It is for them to decide on the true nature of the deposits. Obviously Mr. Hunt's evidence was called to tell us how he thought these deposits should have been treated in the accounts. Obviously the jury can look at that but it is for their own good common sense to decide on the scheme in general. Now, obviously you may call the deposits, the 7.2 billion, corporate deposits. That is true, I think Mr. Hunt accepted that that is what Anglo called them and he had no great difficulties with that but it is for the jury to decide on the true nature of these deposits. It is for the jury to decide on the true nature of the scheme that brought 7.2 billion deposits into Anglo Irish Bank on the last day of their accountancy period and basically the jury would have to decide whether this scheme was dishonest or not. That is their duty and I think they will be well capable of doing that."

Discussion

142. This ground of appeal is posited on the suggestion that if it was possible to label the 7.2 billion as corporate deposits that should be the end of the case. That does not take account of the fact that the indictment speaks of deposits larger than they "really were". The judge was entitled to leave it to the jury to consider whether the transactions absent commercial substance could be regarded as real customer deposits. The terms on which the indictment was drafted required the jury to address the true nature of the deposits. In the Court's view the judge was correct to leave this issue to the jury and this ground of appeal is therefore rejected.

Ground 13 (John Bowe)
The learned trial judge erred in law in failing to accede to the application for a discharge of the jury following the evidence given by Sergeant Catherina Gunn before the jury on 3rd May, 2016 as to the existence of a false accounting charge pursuant to the provisions of s. 10 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which count had been severed from the indictment before the jury. Specifically in this regard he failed to have any or any proper regard to:

> (iii) the irreparable harm caused to the appellant and his right to a fair trial by the allusion to a further serious criminal offence which was not before the jury;
>
> (iv) the reference to it in this manner would have and did highlight to the jury the fact that he had been charged with a further serious offence.
>
> (v) the reference to that further offence was highly relevant in circumstances where the major plank of defences put forward by the third and fourth named accused rested on accountancy issues.
>
> (vi) The fact that the main tenor of the evidence of the expert called by the prosecution, Mr. Mark Hunt, was concerned with accounting treatment.
>
> (vii) The resulting prejudice caused to the appellant was such that it could not be cured in any way by the learned trial judge through the giving of warnings or directions as to do so would have highlighted this prejudice even more.
>
> (viii) In light of the aforesaid, the ruling of the trial judge in relation to severance was effectively undone.

143. As appears from the terms of this ground this issue arises out of evidence given on the 3rd May, 2016. On that occasion Sergeant Gunn, who is one of the investigating team was being cross examined by counsel for the third named accused, Dennis Casey, in relation to interviews that had been conducted with him. The cross examination included the following exchange:-

"Q. It wasn't. If I could continue on then overleaf, the top of page 6:

'No, but they did – if you are saying that they should have had it as a collateralised transaction, what purpose would that have served for Anglo'

Isn't that right?

A. Yes, that's right, yes.

Q. Again, just to point up the questioning, the emphasis is falling on Anglo's part: isn't that right?

A. The context of that question is because it is coinciding with their year end, so that's why - what purpose would it serve for Anglo? There's questions cut out of this so -

Q. I know that. I know that but?

A. In relation to this …

Q. Frequently there are questions where my client is constantly asked: what benefit would Anglo have got from this? What benefit would it have brought to them? And I am just emphasising a point which I have emphasised earlier. There are two parties to the transactions, and IL&P's objective and Anglo's objective may not be the same: isn't that so?

A. Yes, just in relation to this the context of this is that one of the count has been severed in relation to false accounting.

Q. Yes.

A. So just in relation to that, what did it serve, so.

Q. I understand that, which is not something my client has ever …?

A. Yes.

Q. Was ever the subject of?

A. No, no, because it coincides with certain year ends, so.

144. At the start of business the following morning, 4th May, 2016, counsel for Mr. Bowe sought the discharge of the jury. The application for a discharge was presented in the context of unhappiness on the part of Mr. Bowe about the extent to which accountancy issues were coming centre stage. The judge summarised the position of Mr. Bowe and his team as being that the remarks by Sergeant Gunn amounted to the straw that broke the camel's back. Counsel for the prosecution while conceding that what was said was unfortunate and ought not to have been said, submitted that nonetheless matters had to be kept in perspective. He contended that the remarks did not give rise to any significant risk that the trial would be an unfair one. He commented that even if the jury picked up on the remark about false accounting charges that they might think that a reference to Mr. Drumm or Mr. Fitzpatrick or anyone else. The judge ruled on the matter as follows:-

"Sergeant Gunn was been cross examined in relation to a statement and interviews by Mr. Casey. Sergeant Gunn was put in a particular difficult position when she was to answer questions in relation to various topics, and as far as I could see all the sergeant had done was to take down the interviews or take down the statements or recite the statement. Now, myself, I was listening and I couldn't for the life of me discern where the cross examination was going, and out of the blue, in my view, Sergeant Gunn made mention of the severance of account [sic.]. Now, I think she had very good reason to make that reference in the sense that she was trying to explain the sequence of questions and answers that she was dealing with. Now, the question is: has any of the defendants been prejudiced or prejudiced to a great degree by the utterance?

This has been a very, very long trial. Many topics have come and gone, I myself had forgotten about Mr. Gantley's re-examination about this important issue of the note, it has passed me by but it is in the case. The question is will the two defendants, Mr. Bowe and Mr. McAteer receive a fair trial from the jury. That is a fair trial, I mean, that they will concentrate on the counts before them and they will obey the instructions of the Court and they will only take into account the admissible evidence. In my view, in this case I accept the submissions by Mr. Paul O'Higgins that it is highly unlikely that the utterance of Sergeant Gunn will have any effect whatsoever. I would offer an opinion that by, I'd say, one o'clock today it will be well forgotten and they will be concentrating on Mr. Fitzpatrick's admissions and statements. The jury will be left in no doubt by this court and I have no doubt by the practitioners, what their duty is in deciding this case. And obviously I decided to sever the counts. I severed the counts not on the basis of any great prejudice in having them tried together but on a practical basis that it was easier for the jury to deal with the same counts against all defendants if they were, not on the basis that Mr. Bowe or Mr. McAteer would be unduly prejudiced if they were heard together. It was a practical basis and obviously in my view the evidence led in relation to the accountancy was to basically inform the jury in relation to the relevant facts. So I cannot see the prejudice. Obviously Mr. McGuinness has made his application and his application has been noted by this Court and more importantly by the DAR recording system. It will be there. I refuse the application."

145. The Court is in no doubt that the judge's approach was the correct one. Indeed, the Court questions whether what occurred could ever have justified an application for a discharge of the jury. The jury must have been aware at least in general terms that there had been other Anglo cases and would in the future be other Anglo cases and that accounting issues would arise. But this court just cannot accept that a passing reference to a false accounting count of a very non specific nature could possibly have damaged the position of the accused. Appellate courts have stated repeatedly that the discharge of a jury is something that should happen only as the very last resort and only in the most extreme circumstances. (Dawson v. The Irish Brokers Association [1998] IESC 39) This case is as far away from those extreme circumstances as it is possible to imagine. The Court has no hesitation whatever in dismissing this ground of appeal.

Grounds No 16 and 20(i),(ii),(iv), (ix) and (x) John Bowe

146. In his ground of appeal no 16 the first named appellant complains that the trial judge misdirected the jury as to the law with respect to the ingredients of the offence of conspiracy to defraud at common law, and the requisite intent that must be proven in order to sustain a conviction for that offence.

147. In particular, a complaint is made that the trial judge erred in law in directing the jury that –

> i. the offence was made out if, on an objective basis, the jury believed the scheme to be dishonest.
>
> ii. alternatively he erred in law in directing the jury that it did not need to consider or decide whether the prosecution had proved beyond a reasonable doubt that the appellant knew or believed the scheme to be dishonest.

148. The trial judge charged the jury as to the ingredients of the offence of conspiracy to defraud at common law on day 71 of the trial, the 17th of May 2016.

149. The first named appellant also makes a number of complaints about interrelated aspects of the trial judge's charge which counsel, Mr McGuinness S.C., sought to deal with in his submissions in conjunction with submission on ground no 16. These related matters are the subject of sub grounds (i),(ii),(iv), (ix) and (x) of ground no 20. Sub grounds (i),(ii),(iv), (ix) and (x) of ground no 20 are in the following terms:

The trial judge erred in his charge to the jury (and subsequently erred in failing to accede to requisitions raised on behalf of the appellant) in relation to the following -

> i. The trial judge erred in conflating the intent for Conspiracy with the intent to bring about a particular accounting result. In this regard, therefore, the Court improperly equated the manner in which the annual results were reported with an intention to defraud.
>
> ii. The trial judge erred in usurping the function of the jury by directing them as to his view that the manner in which the transactions were reported was dishonest and thus constituted a fraud. Accordingly, he effectively excluded the jury from embarking upon a proper consideration as to the appellant's intent at the time of the transaction - i.e. that it would be appropriately accounted for - a view honestly held and inconsistent with an intent to defraud.
>
> iv. The trial judge erred in law in failing to direct the jury that the meeting the appellant had with the Financial Regulator on 28 August 2008, and the telephone call between the appellant and Mary Elizabeth Donoghue of the Office of the Financial Regulator on 28 October 2008 were matters to which they should have regard in assessing whether the appellant had an intention to defraud. Specifically in this regard he failed to direct the jury that these communications could be consistent with an attitude of honesty and transparency, rather than the concealment of a criminal intent.
>
> ix. The trial judge erred in law in failing to direct the jury that the appellant's transparency with the Financial Regulator that the bank intended to engage in balance sheet management was consistent with an attitude of honesty and was inconsistent with the criminal intent necessary for the offence of Conspiracy.
>
> x. The trial judge erred in failing to make specific reference to the interviews and voluntary statement of the appellant which showed his honest belief in the legality of his actions and which were matters to which the jury could properly have regard in considering any criminal intent on his part.
>
> xi. The trial judge erred in failing to direct the jury that all transactions took place in the Treasury Department of Anglo Irish Bank and as such there was nothing unusual nor sinister about this transaction having occurred therein.

150. We propose to follow counsel's example and also deal with these matters in conjunction with the complaints comprising ground no. 16.

151. The manner in which the trial judge addressed the jury as to the ingredients of the offence of conspiracy to defraud at common law was influenced by his decision on an issue raised earlier in the case and which had been the subject of a lengthy voir dire.

152. Professors Finbarr McAuley & Paul McCutcheon in their work entitled "Criminal Liability – a Grammar" have (at p. 429) characterised the definition of this offence as "hydra headed", but go on to make the point that its incriminating features have been clearly and consistently delineated by the courts for at least two centuries.

153. Every criminal conspiracy involves at a minimum an agreement to do an unlawful act, alternatively to do a lawful act by unlawful means. In this case, the alleged conspiracy is "to defraud", and the view held for many years was that the common law meaning of "to defraud" is to deprive by deceit, which in turn necessitates definition of "deceit".

154. In *Re London and Globe Finance Corporation* [1903] 1 Ch 728 at 732 cited with approval in *R v Newton and Bennett*, [1913] 9 Cr App.R 146 and in *R v Bassey* [1931] 22 Cr App R 160, and in this jurisdiction by the Court of Criminal Appeal in *The People (Director of Public Prosecutions) v Ryan* (1986) 3 Frewen 107, Buckley J said:

> "To deceive is to induce a man to believe that a thing is true which is false and which the person practising the deceit knows or believes to be false. To defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action."

155. More recently, in the case of Scott v Metropolitan Police Commissioner [1975] A.C. 819, the House of Lords concluded that deceit was not in fact a necessary element in the common law crime of conspiracy to defraud and that it was sufficient for the prosecution to prove dishonesty. Viscount Dilhorne stated (at p 839 C) that:

> "…to defraud ordinarily means, in my opinion, to deprive a person dishonestly of something which is his or of something to which he is or would or might but for the perpetration of the fraud be entitled."

He added in conclusion (at p.840 F) that:

> "it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to

> which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some propriety right of his, suffices to constitute the offence of conspiracy to defraud."

Moreover, Lord Diplock said (at p 841 B):

"Dishonesty of any kind is enough."

156. Both the Irish High Court and the Supreme Court have endorsed Scott. In *Myles v Sreenan* [1999] 4 I.R. 294 Geoghegan J, in the High Court, stated (at p. 298) that:

> "The best definition of the common law offence of conspiracy to defraud is probably to be found in the English case of Scott v Metropolitan Police Commissioner."

The Scott definition was also cited with approval by Keane C.J., who gave the leading judgment in the Supreme Court in the case of the *Attorney General v. Oldridge* [2000] 4 I.R. 593

157. For the purposes of the present prosecution, it was common case, or at least it was not controversial, that the *actus reus* of the offence of conspiracy to defraud at common law comprises being party to an agreement to do an unlawful act, alternatively to do a lawful act by unlawful means, which involves some form of dishonest dealing with the potential to cause prejudice or detriment to the proprietary rights of another or others.

158. The trial judge in his charge instanced "potential investors, potential users or potential interested parties in relation to Anglo Irish Bank" as persons who might potentially suffer prejudice or detriment as a result of the scheme relied upon by the prosecution as constituting the conspiracy, and there was no objection to this.

159. The *voir dire* was concerned primarily with an application by the prosecution to exclude certain evidence and certain material from the jury, including evidence relating to the so-called "Green Jersey Agenda", and interactions with, and involvement by, the Financial Regulator, on the grounds that it was irrelevant to the trial and any defences that might be open to the defendants. Whether or not the material in question might be relevant depended on one's view as to the ingredients of the common law offence of conspiracy to defraud, and in particular the mens rea of the offence of conspiracy to defraud at common law. While everyone was agreed that the requisite intent was the intent to defraud, and that the intended means by which the fraudulent purpose is to be achieved must be "dishonest", there was disagreement as to what "dishonesty" involved. The prosecution contended that it was to be equated with the absence of a claim of legal right made in good faith which was the traditional understanding of the concept, whereas the defence maintained that the court should follow the rejection of that approach by the courts of England and Wales in a line of jurisprudence that began with R v Feely [1973] Q.B. 530 and which culminated in the decision in *R v Ghosh* [1982] Q.B. 1053 which represents the current law in that jurisdiction.

160. The background to the Feely/Ghosh line of jurisprudence, which it has to be said was not expressly concerned with the common law offence of conspiracy to defraud, but rather with certain statutory offences arising under the (English) Theft Act 1968, was that the Theft Act had substituted a test of dishonesty for the requirement that had formerly existed under the Larceny Act 1916 (which continued in force in our own jurisdiction until 2001) that, in the case of certain offences arising under that Act, the act must have been done fraudulently and without a claim of right made in good faith. However, "dishonesty" was not explicitly defined in the English legislation and, as one commentator (Elliot, Dishonesty in Theft: A Dispensable Concept [1982] Crim L.R.395, cited in the Irish Law Reform Commission's Report on The Law Relating to Dishonesty (LRC 43 – 1992) put it: "The judges, unable to leave the subject alone, had made a rod for their own backs"

161. The culmination of this was the decision in R v Ghosh in which it was decided that for a finding of dishonesty there should be affirmative answers to two questions:

> (1) Was what was done dishonest according to the ordinary standards of reasonable and honest people?
>
> (2) Must the accused have realised that what he was doing was dishonest according to those standards?

162. In a passage from Ghosh on which counsel for the first named appellant has placed reliance, dishonesty in s.1 of the Theft Act 1968 is described as "a state of mind" (at p 1063 F). The Ghosh approach therefore appears to be predicated on the idea that dishonesty, at least for the purposes of the Theft Act 1968, is a state of mind, rather than a value judgment with respect to conduct. Even if that is correct, it begs the question as to whether the dishonesty required to be proven for the purposes of establishing the common law offence of conspiracy to defraud is necessarily the same. Does it relate to the accused's state of mind, or to how the course of conduct in which the accused participated would be characterised by the ordinary man on the Luas? The issue is whether it is sufficient for a conviction that the prosecution should prove merely that the accused intended to do the act or participate in the scheme in question and that the relevant act or scheme would be judged by the standards or ordinary reasonable men to be dishonest (which is the respondent's position); or is it the case that the prosecution must go further and prove that the accused must have appreciated that his act or the scheme in question would be viewed objectively as dishonest at the time of intentionally doing the act, or participating in the scheme in question, before he could be deemed to have acted dishonestly i.e with intent to defraud (which is the first named appellant's position)?

163. The Feely/Ghosh approach was severely criticised by the Supreme Court in Victoria, Australia in a case of R v Salvo [1980] V.R. 401 which was opened to the court below at some length, and also to us at the appeal hearing. The Victorian legislation had substantially reproduced the Theft Act provisions. The Irish Law Reform Commission, commenting on the Salvo criticisms, stated succinctly:

"We agree. To by-pass the judge and leave the definition of fundamental legal concepts to the jury would be an unwarranted exercise in misguided populism. There must be as many different potential definitions of dishonesty as there are differences in age, social status, nationality, moral outlook and nature. Various such as 'being at variance with straightforward or honourable dealing', 'incurring moral obloquy' or the familiar, 'without claim of right' usually arise in discussion. There is no guarantee either that judges will agree on a definition. The law must be clearly defined for the judges who will in turn, define it for juries."

164. The Irish Law Reform Commission recommended that in any reform of the law relating to dishonesty in Ireland "that dishonesty should be defined in terms of the absence of a claim of legal right."

165. It may be inferred that the Irish Law Reform Commission's said recommendation was a major influencing factor in the decision by

the Oireachtas, when replacing the Larceny Act 1916 with the Criminal Justice (Theft and Fraud Offences) Act 2001 (the Act of 2001), to define "dishonestly" in s.2 of that Act as meaning "without a claim of right made in good faith."

166. We are not concerned in this case with a statutory offence created under the Act of 2001 or any other Act. Rather we are concerned with a long standing common law offence. Nevertheless certainty in the law is an important value, and it can be readily appreciated why it is not in general desirable that a term should have one meaning at common law, and another for the purposes of a particular statute, although such a situation is legally possible. In that regard, counsel for the first named appellant contends that the Feely/Ghosh jurisprudence has adopted the natural and ordinary meaning of "dishonesty", whereas that term now has a special legal meaning i.e., it is a legal term of art, when used in the context of offences created by the Act of 2001.

167. In the *voir dire* in this case it was argued on behalf of the first named appellant, whose argument was adopted by his co-accused, that the trial judge should, when instructing the jury with respect to the *mens rea* of the offence of conspiracy to defraud, adopt the definition of dishonesty promoted in the Feely/Ghosh line of jurisprudence in the courts of England and Wales, and eschew the traditional understanding of the concept as involving the absence of a claim of right made in good faith, notwithstanding that the Oireachtas had only very recently recommitted itself to the traditional understanding for the purposes of statutory offences arising under the Act of 2001.

168. The importance of this to the defence case was that if the Feely / Ghosh concept of dishonesty was the applicable one, the jury would have to be satisfied beyond reasonable doubt not just that what was done was done intentionally by the accused and was objectively dishonest according to the standards of reasonable persons, but also that the accused subjectively had understood or appreciated it to be so. If that requirement of subjective understanding or appreciation had to be satisfied then the jury were entitled to have regard to and to take into account in the course of its deliberations the entire background to the transactions, including the manner in which the deposits at issue were to be characterised according to normal accounting rules, and the ostensible openness concerning what was being done exhibited in the course of dealings between the accused and others in the Bank for whom he worked on the one hand, and relevant State authorities, and in particular the Financial Regulator, on the other hand. If the defence were right on the issue of *mens rea*, then the evidence at issue in the voir dire should not be excluded as irrelevant

169. The prosecution's position was that it was well established that all that was required was that the prosecution should be able to show that the accused had intentionally participated at some level in the impugned scheme and that that scheme was objectively dishonest. Regardless of whether or not the Financial Regulator was aware of, and in fact even if he had condoned, what was done, it was irrelevant. It would not provide the accused with a defence and would not have rendered legal that which was illegal.

170. In ruling on the *voir dire* on day 15 (9th February 2016), the trial judge did not expressly indicate which of the two contended for positions with respect to the requisite *mens rea* for the common law offence of conspiracy to defraud he in fact favoured, beyond making it clear that he felt that any encouragement from, or involvement by, the Financial Regulator or the Central Bank could not provide the defendants with a legal defence and that it could only be relevant to mitigation. Rather, he refused the prosecution's application to exclude the evidence at issue on essentially pragmatic grounds, stating:

> "I've come to the conclusion against the prosecutor on those three aspects of the case. I think it may lengthen the case, it may not. It may at times confuse the jury, it probably will. But can the jury be directed properly at the end and their confusion let's say lifted? I've concluded it can. I also come to a practical view that with all of the people involved that the regulator's involvement will seep out no matter the best guard dog approach of [counsel for the prosecution]. And I've come to the conclusion that basically it's best to face it from the start and deal with it. And I've come to the conclusion that the only help that the regulator's involvement can give to the defendants in law is it can mitigate, but it affords them no defence. But I have come to a conclusion that on a practical basis that it wouldn't be practically wise to try to curtail the evidence and for that reason I am against the prosecution.
>
> But I am warning the defendants that those are my views on the law, and obviously people will ask me at the end of the trial to deal with issues and I will listen to them and if I'm persuaded I'm persuaded. But I've listened to a lot of legal submissions from all the counsel for five or six days. And obviously I'm not binding myself to any application that will be made near the end, but I have listened as best I can and I've made the decision and that's all I can say on the matter. But my firm conclusion of the law is that the regulator's involvement is a matter of mitigation not defence in the matter. And that matter may come up near the end, but that's my view of the matter. Thank you."

171. Predictably, the issue as to the required mens rea was re-ventilated at the end of the case when the judge charged the jury in the manner indicated earlier and requisitions were raised. Curiously, however, there was no express reference at the requisitions stage to the Ghosh understanding of the meaning of "dishonesty", or for that matter the traditional understanding that it imports the absence of a claim of right made in good faith.

172. The trial judge, having told the jury that

> "before you can convict any of the defendants, you must be satisfied beyond reasonable doubt that they authorised the scheme or were involved in the execution of the scheme and at the time when they so authorised or executed, they intended that the scheme would be accounted for in a grossed up, that means not netted, grossed up, unvarnished way. When I say unvarnished I mean, no note, explanatory note. So, the test I'm putting in front of you is that before you can convict any of these men of the offence that they're charged with, you must be satisfied beyond reasonable doubt that they authorised the scheme, were involved in the execution of the scheme and at the time when they were so authorised or executed the scheme they intended that the or the proceeds of the scheme, the 7.2 billion, would be accounted for and reported in an unvarnished way, that's my way of saying without an explanatory note, because if there was an explanatory note, even if they were grossed up, transparency beats dishonesty.. If you're telling somebody what you're doing explicitly it cannot be dishonest, I'm telling you"

was requisitioned with respect to this aspect of his charge by counsel for the first named appellant. Counsel submitted:

> "Judge, I'm concerned that at this stage the trial of the accused whom I represent, Mr Bowe, has been misdirected away from considering the indicted conspiracy of the 1st of March to the 30th of September into being a trial on the accountancy side of it, which (a) is outside the terms of the indictment and, (b) which the Court has now explicitly linked with the intent to bring about that accountancy end and in my submission what the Court should do in relation to Mr Bowe is to direct the jury that all of the evidence relating to the accountancy of it and the inclusion therefore of the figures in it be disregarded by them in considering the case against Mr Bowe."

173. The trial judge declined to accede to these requisitions beyond informing the jury, which he duly did, that Mr Bowe "did not participate in the creation of the Anglo accounts".

174. We are satisfied that the trial judge did not fall into error in the manner in which he approached his charge to the jury on the issue of the mens rea for the common law offence of conspiracy to defraud. All of the jurisprudence relating specifically to this offence seems to us to indicate that it is sufficient for a conviction that the prosecution should prove merely that the accused intended to do the impugned act or to participate in the impugned scheme in circumstances where the relevant act or scheme would attract the value judgment, judged by the standards of ordinary reasonable men, that it was dishonest. Accordingly, we are not disposed to uphold the first named appellant's ground of appeal No 16.

175. The Court readily understands why it would have suited the defence case if the trial judge could have been persuaded to adopt the Ghosh approach. However, the trial judge would have had no legitimate basis for doing so. The Theft Act 1968 is not law in this country. In the context of conspiracy to defraud the concept of "dishonesty" provides no more than a modern analogue for the language of older case law which referred to conduct which was "wrongful and fraudulent." While the natural and ordinary meaning of "dishonesty" may indeed sometimes import both a state of mind and a value judgment as to conduct, the offence of conspiracy to defraud is long standing and has never been understood as incorporating a specific mens rea of subjective dishonest intent as opposed to a general mens rea requiring intentional participation in whatever act or scheme is said to constitute the conspiracy in circumstances where that act or scheme would be regarded, objectively, as being dishonest. It is the conduct which must be dishonest. The motivation of the relevant actor is irrelevant to liability. Accordingly, "by dishonesty" has never been regarded in the context of the offence under consideration as referring to an individual's state of mind, but rather as referring to an objective characterization of, or value judgment with respect to, the impugned conduct.

176. It follows from this that all of the subsidiary complaints made in sub grounds (i),(ii),(iv), (ix) and (x) of ground no 20 must also be rejected.

Ground 20 (iii)
The learned trial judge erred in law in failing to direct the jury that, in the context of whether the deposits were real or created, the argument was advanced by the [first named] appellant that a created deposit is still a real deposit, in terms of fact, money and in law.

177. The basis of this complaint is as follows. It was advanced on behalf of the first named appellant during the course of the trial was that whilst the deposits in controversy were unusual in terms of size nevertheless despite being created through negotiation with IL&P and ILA, they were still capable of being characterized as real deposits in terms of fact and money and consequently in legal nature.

178. It had been conceded in evidence by Mr Gerry Burns (a trader on the banks corporate desk) that the mechanics of booking these deposits on the Anglo Irish Bank's recording systems was the same as in the case of any other deposit. It had also been acknowledged by Michael Darcy (a trader on the euro desk in the bank) that he "saw nothing inappropriate in the instruction that Mr McArdle [gave him] on the day."

179. The first named appellant's position is therefore that as a matter of conceded fact these transactions and the deposits which comprised them were processed and recorded in exactly the same manner by those charged to do so within the bank as any other deposit or transaction not the subject matter of prosecution, and the jury was addressed by counsel for this appellant on that basis. Senior Counsel for the first named appellant submitted to the jury (inter alia) that:

the fact that you agree that a deposit will be made doesn't make it any less real as a deposit. It's a bit like saying, you know, that an IVF baby is a different sort of baby than one naturally conceived. You can go about making things in different ways, and the fact that people agree to make a deposit doesn't make it any less real in any sense or affect its character either. A baby is a baby is a baby. A deposit is a deposit is a deposit"

180. The first named appellant maintains that that submission was soundly anchored in law in as much as the 'glossary' to Regulation 10 of SI 411/2008, providing for the Credit Institutions (Financial Support) Scheme, 2008 defines corporate deposits as "deposits with a credit institution by corporate entity" and defines interbank deposits as "deposits made with a credit institution by another credit institution. Such deposits can include certificates of deposit, as well as cash." He also relies on the definition of an interbank deposit as further referenced in Section 53 of the Central Bank Act, 1989 which speaks of "[a] deposit by an entity with a banking licence with another entity that has a banking licence."

181. Based on these definitions it was the first named appellant's case that the booking and characterisation of the transactions, and the recording of same as corporate deposits was utterly justifiable in fact and in law.

182. During the course of his charge to the jury the trial judge addressed the respective contentions of both prosecution and defence on this issue. Pointing out to the jury that "before you can go on to consider convicting any of these men you must come to the conclusion beyond reasonable doubt that this is a dishonest scheme and indeed it was a conspiracy to defraud, in the abstract, without concerning the involvement of any of these men", he went on to state:

> "Now, for you to come to that conclusion, you're going to have to be satisfied beyond reasonable doubt that the actual 7.2 billion corporate deposits that we're discussing there weren't real corporate deposits. This was a made up scheme to artificially create corporate deposits. That's bluntly what the State are saying to you".

183. The trial judge then proceeded to summarise the arguments and counterarguments of the protagonists on this issue. He said to the jury (*inter alia*) in that regard:

> "Now, all the defendants in their own way have made the point, and you should consider it, you should look at the form of the deposits. They say to you well, all the monies came from a non bank entity and therefore they're corporate deposits. In legal terms it's called form over substance, that basically since they were corporate deposits and they came from a non bank entity they should be counted as such. Now, they make the point that there was a certain amount of risk involved, that basically in case of liquidation now, there's that there could be consequences that were adverse to any of the parties and they say by that alone there's a certain amount of substance to the transactions. That's a matter for you but you have to consider the question from what you know, would normal banks create normally create transactions just to create risk? Usually banks create transactions for a purpose. Usually banks want your deposits for it gives them liquidity. That's a matter for you.

> Now, it's obvious why Anglo wanted the money, or the corporate deposits, because as a very high level it was perceived the corporate number was everything. It gave the impression of health. To some degree it gave the impression of liquidity. It also gave the impression it also helped their deposits to loan ratio, which is an important aspect of, I believe. And you've had it opened to you, the notes and the speeches made to some degree on the but they're all these matters are for yourself and you have to take into account all that the defendant says to a greater or lesser degree, particularly Mr McGuinness has was eloquent in relation to this. These were corporate deposits because they came from a non bank entity to a bank entity and you should ignore to a great degree how they were created, what prompted ILA to send them, ignore that all together. That's what they're saying to you in relation to the assets aspect of the case. They're saying to you that basically since they're called corporate deposits, they are corporate deposits.
>
> Now, the State, on the other hand, are saying to you no, hold on there, you must look at the substance of it, how they were created, the effect of them. I mean, no liquidity, no profit, no economic no economic purpose except to increase the corporate deposits to the balance sheet and they're saying that's dishonest. They're saying that scheme is dishonest and it was there to mislead the interested market. Now, I put you heard all of that yourselves. You have listened to everybody."

184. The first named appellant's complaint is that the manner in which the trial judge constructed this part of his charge by referencing only part of the argument put forward by this appellant had the effect of diluting his case on this point and may have led the jury to discount it.

185. A specific requisition was raised by counsel on behalf of the first named appellant in the following terms;

> "MR McGUINNESS: Next, Judge, on the issue of the scheme as the Court has referred to it, you told the jury that they had to decide whether they were real or created deposits. Now, in my submission, and the Court knows this obviously from the submission I made to the jury, a created deposit is the same as a deposit and I'm not asking the Court to endorse that, other than to say that the argument was advanced that it is still a real deposit, in fact, in money and in law and that's one of the crucial arguments made on behalf of the defence.
>
> JUDGE: Well, I said I think I put to the jury that you were saying that you rely on the form that they were real deposits, corporate deposits because they'd come from a non banking entity.
>
> MR McGUINNESS: Yes, but the Court's direction carried the implication that a created deposit is an unreal deposit and I in my submission, to properly put Mr Bowe's defence, one should say and, Judge, you should say that this was an argument advanced, that it's still, in fact, in money and in law a real deposit."

186. The trial judge did not accede to this requisition, and the first named appellant now complains that, in failing to do so, he did not place before the jury a pertinent aspect of this appellant's case. It was submitted there was a very real risk that the jury could have drawn inferences adverse to the first named appellant by virtue of this omission.

187. In response counsel for the respondent says that merely that the charge on this aspect of the case was entirely fair.

Discussion

188. We agree that the charge was fair in that respect and are not disposed to uphold the complaint now being made. The jury was left in no doubt that the defence were relying on the form of the deposits i.e., that they came within the legal definition of corporate deposits and therefore were corporate deposits. Equally, however, it was made clear to the jury that the prosecution case was that they should look behind the form to the substance of the transaction, and that the prosecution were contending that they were artificially created corporate deposits rather than real corporate deposits , and that they were created for the purpose of presenting, as it was put, "a good corporate number" on the balance sheet of Anglo Irish Bank.

189. There was no failure to adequately put the defence case on this issue. The trial judge is required to fairly summarize the case on behalf of both the prosecution and the defence. However, he is not required to rehearse every line and nuance of the case on each side, or of the evidence offered in support of it. We are satisfied that an adequate and fair summary of the defence position with respect to the nature and form of the deposits in controversy was given to the jury. Accordingly we dismiss this ground of appeal.

Ground 20 (v)
The learned trial judge erred in law in failing to direct the jury that prejudicial remarks made by the [first named] appellant's co-accused and/or by counsel for the co-accused (to wit, insinuations as to the integrity of Anglo Irish Bank and its damaged reputation as a corporate entity) were matters unrelated to the [first named] appellant and unfairly impacted on his right to a fair trial which right, accordingly, was not vindicated by the trial judge.

190. The essential complaint underpinning this ground is that commentary by senior counsel for this appellant's co-accused in IL&P, (and specifically Mr Casey), in closing submission to the jury, were of such a prejudicial nature that the trial judge should have specifically directed the jury that these were a) directed to the bank in general and b) entirely unrelated to the first named appellant, either by reference to anything he had done or said. In particular, any such adverse commentary relating to the accounting treatment should have been specifically referenced by the Judge as being completely irrelevant to the appellant herein, in relation to whom the evidence had not pointed to any direct involvement by him in the accounting process.

191. Amongst the impugned comments was a suggestion in senior counsel for the second named appellant's closing that before Anglo Irish Bank found itself "in the wars", as he put it, "Denis Casey had no basis to think that he was dealing with people who weren't extremely accomplished and extremely professional and who were brimming with integrity" (emphasis added). Counsel for the first named appellant says that the clear implication of this was that his client (i.e. not simply the bank as a corporate entity separate and distinct) was a man lacking in moral rectitude and probity in his professional dealings.

192. Complaint is also made about a later reference in the same closing address to there being no evidence "that Mr Casey foresaw any skulduggery on Anglo's part". Counsel for the first named appellant contends that the only reasonable interpretation of this commentary was that (a) it was being urged on the jury that an unscrupulous and an underhanded scheme had as a matter of fact been undertaken by the bank and (b) by implication – and by virtue of his position in the dock as an ex-employee of Anglo – that such alleged chicanery must be laid at the door of the first named appellant.

193. Counsel for the second named appellant had continued:

> "They may be in a difficult situation and they may be under pressure, but Mr Casey is entitled to say: "We're under pressure over here, too, you know, and we're doing what we can within the rules, but we're acting honestly and accurately in how we report these things and we're actually expecting you to comply with the same standard." That's not unreasonable at all. If in a moment you foresaw that they might not do that and they might be tempted and they might respond to temptation and cheat the system, no more than when your son succumbs to the temptation of spending 20 quid on a few beers, it doesn't make you party to his offence."

194. It is complained on behalf of the first named appellant that the explicit reference to "cheat the system" was a phrase of such vividness and amounted to such a denouncement of the actions of Anglo and those associated with it (such as the first named appellant) that it could only have been designed to improperly prejudice the jury against the appellant and, critically, influence them in their decision as to the nature of the scheme.

195. Complaint is also made about yet another remark in the same speech which posed the rhetorical question:

"Was this a plan which Anglo had cooked up but the ILP were innocent dupes, innocent dupes of Anglo's plan to boost its corporate deposits by engaging in these transactions." Well, that last phrase in particular, I respectfully suggest, is capable of causing mischief because it almost answers itself, 'Yes'".

196. Before the trial judge embarked on his charge counsel for the appellant sought to appeal to him to redress the balance and to mitigate the prejudicial effects of co-accused's closing remarks and in particular requested an assurance that "the unfair prejudice levelled against Anglo as a whole is something that the Court will deal with in the context of my client's complete lack of involvement in the accountancy side of this." The trial judge responded: "Absolutely".

197. There was then the following further exchange:

> "JUDGE: What I'll be what I'll be saying to the jury, if I is what [the] direct evidence is against your client. Now, I've told the jury, and I'll tell them again, that what we say, I say, what you say, what Mr O'Higgins says, what Ms Ní Raifeartaigh has said, Mr Grehan has said, is not evidence. They will have to concentrate on the evidence and I will put to them and try to tell them as best I can what is the evidence against Mr Bowe. Now, I have been I think I have been fairly fair allowing everybody to make every application, but at this stage I think I've an obligation to give a fairly lucid charge to this jury and I want to start my charge in the matter.
>
> MR McGUINNESS: Yes.
>
> JUDGE: And if I if you're not happy with what I will say to the jury come back to me. I will look at it then and I will deal with him after requisitions if there are requisitions in the matter.
>
> MR McGUINNESS: Well, I of course hear the Court and I understand the Court's intentions, but I'm anxious that the Court would understand that the onslaught yesterday on Anglo, as such, that the jury should be directed that none of that is relevant to considering Mr Bowe's state of mind, Mr Bowe's actions, Mr Bowe's intent, particularly in the light of the fact that he wasn't involved in the accounting, he took no part in the preparation of the audit notes, he's not a member of the audit committee, he doesn't sit on the board, he didn't sign the accounts.
>
> JUDGE: True.
>
> MR McGUINNESS: And that therefore none of none of that, let alone the prejudice shown in the onslaught, can be evidence against him."

198. The trial judge proceeded to give his charge in the course of which he told the jury:

"…Now, at this point I'll just some harsh words, if you want to call them that, were aimed at Anglo by Mr O'Higgins and Mr Grehan yesterday. Now, the harsh words were intended to help their clients, not in any way to damn Mr McAteer and Mr Grehan and you should not take into account what let's say what both counsel said is not evidence. You have to take into account only the evidence. Mr all barristers appearing before you have their own agendas and that doesn't that's not insidious or it's not meant to sound insidious. Their agenda is to help their own client, that's their professional duty and that's what they were doing."

199. Further, the trial judge concluded his charge by remarking:

> "Obviously there's been speeches made, take them into account if you like them, or if you think they're useful, if not disregard them. But you must be fair to the defendants and obviously, as I indicated, prejudice plays no part in this process. They're entitled to a trial without prejudice and also a trial without mercy. You're trial to they're entitled to a fair, impartial trial in the case. Thank you, I'll let you go now."

200. Counsel for the first named appellant contends that the trial judge's charge was wholly inadequate in redressing the balance and diluting the potential prejudice attaching to the appellant. The characterisation of the prejudicial remarks as amounting to no more than harsh words was wholly erroneous and misguided. Such characterization failed to adequately consider, address, and redress the intrinsic prejudicial nature of the allegations and pronouncements of counsel for the co accused. Additionally, the trial judge did not take the further step of warning the jury that characterizations pronounced by Counsel (such as 'skulduggery' or 'cheat the system') were matters solely and exclusively for determination by the jury. He further submitted that the trial judge's view that the words used were not designed to 'damn' the Anglo defendants was wholly unsustainable. Their import could not have been more specific nor more damning and the trial judge's attempt to render them more anodyne was wholly inadequate. Moreover, we are asked to note that, while it is conceded it probably arose through inadvertence, the trial judge did not specifically reference the first named appellant in his attempt to deal with the issue of prejudice.

201. Counsel for the first named appellant requisitioned the trial judge in the following terms:

> "The next matter, Judge, arises from the issue I was intending to raise this morning, the Court has the duty to, as it were, protect my right to a fair trial and to ensure that I am not improperly convicted by the jury and by the jury having regard to evidence or statements which don't relate to him and between Mr Grehan and my friend there were suggestions that the ILP defendants were set up, that they were duped, that they were misled, that Anglo hijacked the transaction, that the auditor was deliberately misled, that there was skulduggery in Anglo, that they couldn't resist the temptation to

cheat the system and all of this is in the context of the dealings with the official in finance from Mr Cunningham onwards when dealing with the accounts and dealing with the auditor and in my submission the Court ought to explicitly protect my client's position from remarks such as that made by the two ILP counsel and it's made more serious it's made more serious by the general remarks that were made about Anglo as a corporate entity, questioning its integrity because Mr O'Higgins went on to portray or suggest that nobody nobody then knew what Anglo was really like, the issue about the directors' loans, the section 60 issue and it was clearly intended to and capable of inflaming prejudice against Mr Bowe when, in fact, none of those issues, both the remarks and the general opprobrium is in any way related to anything that Mr Bowe did and, in my submission, the Court should give a specific direction to protect him from those matters which are prejudicial and unrelated to him as a matter of evidence."

202. Despite this forceful requisition the trial judge declined to revisit the matter.

203. It is conceded on behalf of the first named appellant that defence counsel in making a closing speech is not only entitled but also obligated to be robust in the defence of his client. However, it is submitted, such a permissible stance is distinguishable from an unlawful encroachment into the role and function of the jury. It was submitted that in the instant case the remarks, both individually and cumulatively, transgressed the bounds of propriety and were so fundamentally adverse to the interests of the first named appellant that they ran counter to his right to a fair trial. In all probability by virtue of those remarks he was damned in the eyes of the jury even before they commenced their deliberations. Such unequivocal disparagement was both unprovoked and unnecessary in the defence of the co-accused. It was even more so when there was no opportunity for come back by counsel for the first named appellant who had at this stage already addressed the jury. Accordingly, it was imperative that the trial judge should engage actively in diffusing its prejudicial import, and his failure to adequately do so was a fundamental error rendering the trial unsatisfactory and the conviction unsafe.

204. In response, counsel for the respondent has submitted that comments unfavourable to each or any of the co-accused must be expected in a joint trial, that they do not make a joint trial unfair and the alternative of ordering separate trials has the potential to work a more serious injustice, a point identified by Kenny J in *The People (A.G.) v. Murtagh* [1966] IR 361 at 363.

Discussion

205. It is well-established in law that counsel on both sides, but particularly defence counsel, must be afforded considerable latitude in how they conduct their closing addresses. It is an adversarial system and counsel is, after all, engaged in a process of advocacy. There are of course limits to what may be said and where some aspect of a closing address is unfair, or where the overall tenor of a closing address is unfair, it is the function of the trial judge to seek to address any such unfairness and to restore the balance in the course of his/her charge. The threshold for intervention is, we would suggest, a moderately high one. The matter complained of must be manifestly unfair, and realistically have the potential to prejudice the jury against the accused concerned if it is not adequately addressed.

206. Some level of prejudicial commentary by one's opponent or co-accused is to be expected in any adversarial contest. As Blackstone's Criminal Practice (2000 ed at D-13) makes clear prosecuting counsel should avoid emotive language on account of his role as a minister for justice who ought not to strive over-zealously for a conviction. However, counsel for a co-accused is not required to show the same level of restraint, though there must obviously be some limits. As to where the line lies will depend on the circumstances of the individual case and it is a matter for the trial judge as to whether, and to what extent, prejudicial commentary might require to be addressed in any subsequent charge to the jury.

207. As regards other kinds of prejudicial commentary, defence counsel again has considerable latitude. It is instructive that both Blackstone, (op cit at D15-9) , and Archbold, Criminal Pleading, Evidence and Practice (2006 ed at 4-365) make it clear that the trial judge has no power to prevent or restrict defence counsel from commenting adversely in robust terms on matters such as the failure of a co-accused to give evidence. However if counsel's comments are more than just prejudicial, and are unfair, the trial judge can deal with them in his summing up, perhaps drawing the jury's attention to the affected defendant's right not to give evidence.

208. We disagree that the trial judge in the present erred fundamentally in how he dealt with the prejudicial remarks by counsel for the co-accused, and that the trial was unsatisfactory and the conviction unsafe for the reason alleged. We do not consider that in the overall context of this trial the language used by counsel for the co-accused was inappropriately emotive. Where it comes from a co-accused it represents one of the inevitable hazards of a joint trial and given the dynamic of this trial, the extensive evidence adduced and the run of the case, it was unlikely that the jury would have been surprised to have heard counsel for the second named appellant speak in robust and perjorative terms of Anglo Irish Bank and its officers (which of course included the first named appellant), or that he should seek to shift the blame on to Anglo Irish Bank and its officers. We are not satisfied that counsel for the second named appellant's characterisations would have had the profound effect contended for, namely that they went beyond any legitimate attempt to persuade by advocacy, and instead operated to usurp the jury's function.

209. We consider that the trial judge's approach was fundamentally correct, namely to emphasise to the jury that counsel's comments were not evidence and that the determination of the facts of the case was exclusively a matter for them. We also consider that his formula of words wherein he characterised counsel for the second named appellant's remarks about Anglo Irish Bank and its officers as "harsh", was an adequate description in terms of the point that he was making, namely that the jury should only act on the evidence that they had heard, and not on anything contained in counsels's speeches, and we reject the suggestion that it was an attempt by the trial judge to make the remarks complained appear more anodyne than they were in fact.

210. In the circumstances we also dismiss this ground of appeal.

Ground 20 (vi)
The learned trial judge erred in law in failing to direct the jury that in light of the documentation relied upon by the prosecution as to funding initiatives it was an incontrovertible fact that the [first named] appellant had responsibility exclusively for initiatives other than those the subject matter of the transactions with IL&P.

211. This complaint arises in circumstances where the prosecution relied upon, as circumstantial evidence in support of its case, testimony from a number of witnesses relating to funding initiatives pursued by officials in Anglo Irish Bank at different times. A funding initiative spreadsheet (exhibit DGE 57.9) was produced to exemplify the format and scope of such initiatives. Whilst the initiatives with IL&P were referenced in the spreadsheet, at no stage over the period of time with which the prosecution was concerned was that initiative ever directly linked to or connected with the first named appellant. On the contrary, the evidence was that the persons within the bank who were directly charged with furthering this initiative were Matt Cullen and Ciaran McArdle.

212. The respondent correctly points out that the trial judge did tell the jury in the course of his charge that the "owners" of the relevant initiatives were Matt Cullen and Ciaran McArdle. Despite this the trial judge was requisitioned on the basis that:

> "…the Court ought to, as a consequence of Mr Bowe's being allocated other responsibility, to direct the jury to consider that in the light when considering the issue of whether he is, in fact, actively participating in the execution of the ILP deals."

Discussion

213. This requisition was refused. The respondent maintains that it was correctly refused on the basis that there was no need to specifically remind them that this appellant didn't have particular responsibility in this respect; there had been no suggestion that he did. The fact that he was responsible for other initiatives did not, and could not, affect the evidence of his involvement with the IL&P transactions. A trial judge is not obliged to remind a jury of every item of evidence in his summing up of the facts.

214. We entirely agree with the respondent's submission and dismiss this ground of appeal.

Ground 20 (vii) & (viii)
The learned trial judge erred in law in failing to direct the jury that the telephone calls between David Drumm and the appellant were initiated by David Drumm primarily to discuss affairs of the bank unrelated to the IL&P transactions. Further the trial judge incorrectly characterised the discussions in the telephone call as being "comprehensive" when in fact the opposite was demonstrated - to wit, they displayed the first named appellant's lack of accurate detail as to the transactions."

The learned trial judge erred in law in relation to his comments concerning the telephone call between the appellant and Sean Fitzpatrick on 30 September 2008 wherein the latter expressed congratulations. It was a misdirection to convey to the jury that this expression of congratulations was solely related to the transactions the subject matter of the prosecution as opposed to any alternative interpretation."

215. These two complaints may conveniently be dealt with together. The evidence was that there were a series of telephone calls between David Drumm and the first named appellant during the period 19 – 29 September 2008. Moreover, the evidence established that without exception each of these calls was initiated by David Drumm.

216. The trial judge, in charging the jury in relation to these calls, stated;-

> "Now, I'm not going to go through them, but there a series of phone conversations between Mr Bowe and Mr Drumm around this time. They'll be in your transcripts and you should go through them and there's evidence of comprehensive discussions about the transactions and there's discussions about what they thought and where the transactions were going and I think there was mentions of funnies and rinky dinks and all of that. You'll remember that, they're very colourful phrases and they are recordings of conversations between Mr Bowe and the chief executives of Anglo Irish Bank." (emphasis added)

217. Counsel for the first named appellant maintains that an analysis of a selection of some of the telephone calls contained in the series reveals that the characterisation by the trial judge of the phonecalls constituting "comprehensive discussions about the transactions" is not made out. The trial judge was requisitioned on this aspect of his charge as follows:

> "they were calls initiated by Mr Drumm to discuss other matters, other affairs of the bank and were not, on their face, made to discuss the IL&P matters in any central way and, in my submission, the description that the Court has given to the discussions as being comprehensive, the jury ought to be referred to the alternative interpretation which is, in fact, that they did not show Mr Bowe as having actual accurate hands on knowledge of the transactions details as he was discussing them with Mr Drumm and that that's an interpretation that the Court ought to leave to the jury, rather than, as it were, a compendious description of them as comprehensive."

218. It was further submitted that in his characterisation of the calls as 'comprehensive' the trial judge erroneously encroached on what was a central part of the function of the jury – it was for them to consider the nature and content of the calls as it related to the role they believed the first named appellant had to play. In particular, the trial judge's description may very well have directly impacted on the jury's deliberation, in terms of wrongly influencing them, as to the state of knowledge possessed by the first named appellant. His state of knowledge and his intent were directly connected to his alleged criminality. Accordingly, it was submitted, the trial judge erred in superimposing on the jury his own belief as to the nature of a portion of evidence which the prosecution had put before the jury and upon which they relied as evidencing the first named appellants criminality.

219. In response to this complaint, counsel for the respondent has invited this Court to consider the content of the calls at issue, which we have done. He points out that the calls had been heard by the jury, the contents had been summarised and there is no requirement that a trial judge comment on every matter of evidence. The jury in this case had the transcripts of the calls in question when deliberating. They were in the best possible position to consider this evidence. They had been warned to decide the case on the evidence and not on any other person's view of the evidence, including the views (if any were expressed) of trial judge himself. The discussions clearly ranged around different issues but equally clearly the two men discussed the transactions the subject matter of the indictment. While the first named appellant submits that he was not as familiar with the details as others may have been and that he did not have "hands on" knowledge of the transactions, such detailed knowledge was not required. The calls revealed general knowledge of the transactions, their purpose and the fact that they would take place. The context of the transactions was also clear. In this way, it is appropriate to describe the appellant's knowledge as being comprehensive. Further, even if the suggestion that the discussions were comprehensive was a matter of fact and interpretation, the jury was in the best possible position to assess the discussions.

Discussion

220. We agree with the submission made by counsel for the respondent. While the the adjective "comprehensive", used by the trial judge to characterise the scope of the discussions about the controversial transactions, might have been infelicitously chosen, and might have more accurately been substituted by another word such as "considerable", it cannot be gainsaid that the controversial transactions were discussed in some detail in the course of the phonecalls at issue. The characterisation was offered in the context of an invitation to the jury to consider the transcripts for themselves, and against a background where, as counsel for the respondent points out, they had been repeatedly told in opening and closing speeches, and most importantly by the trial judge himself in the

course of his charge, that they were required to decide the case on the evidence and not on any other person's view of the evidence, including the views (if any were expressed) of the trial judge himself.

221. We are satisfied that this isolated and infelicitous misuse of an adjective could not have had the far reaching effects contended for by counsel for the first named appellant, namely causing the jury to be wrongly influenced as to the state of knowledge possessed by the first named appellant, and having the trial judge's own belief as to the nature of a portion of evidence superimposed on them. The jury was properly instructed as the its role as the sole arbiter of matters of fact, and as to their obligation to decide the facts on the evidence and the evidence alone. Moreover it is clear from the judge's invitation to them to consider the transcripts for themselves in detail that their autonomy in that regard was being fully respected, and that that would have been clear to them.

222. We therefore also reject this complaint.

223. The secondary complaint under this heading which relates to the evidence of telephone calls, concerns evidence of a telephone call between the first named appellant and Sean Fitzpatrick on the 30th of September 2008.

224. The trial judge in summing up to the jury referred to this telephone call in the following way:

> "There's also a phone call between John Bowe and Sean Fitzpatrick, now the former chairman of the bank and basically they'd gone into the general situations. The monies from Permo were mentioned and it seems the monies from Permo were distinguished from ordinary deposits that or other deposits that came in after the guarantee and it seems that he was congratulated by Mr Fitzpatrick for his efforts"

225. Counsel for the first named appellant contends that the focus by the trial judge on the congratulatory sentiments expressed by Mr Fitzpatrick appears to have been misplaced. It is urged upon this Court that the transcript of that call makes clear that the content thereof, together with the expressed appreciation, related to the positive flows in customer funding against a background of the Government Guarantee and a sizable increase of deposits on the retail side. It was against that positive turn in the financial market (looked at in light of the whole year) that the terms "well done" and "absolutely brilliant" were being used.

226. In his closing, counsel for the first named appellant had comprehensively addressed the jury as to the substance of the call and what he contended was the reasonable interpretation of the words employed by the ex-chairman, stating:

> "Now that's an extraordinary day of trading, in anyone's book, on the day that the government decided to step in and save the banks, so congratulations on that sort of day, that sort of year, that sort of end period is not in any way sinister, in my submission."

227. It was submitted that the trial judge's direction to the jury that "it seems that he was congratulated by Mr Fitzpatrick for his efforts" fundamentally misrepresented the nature of the commendation and effectively set at nought the submission as set out above, made by counsel for the appellant, as to the true basis for Mr Fitzpatrick's praise.

228. The trial judge was requisitioned and asked to clarify to the jury that there were a number of possible inferences in relation to what the congratulations were for. The requisition was not acceded to and was not in fact alluded to at all by the trial judge. It is unclear if this was deliberate or, as is perhaps more likely, that it was simply overlooked by the trial judge who it has to be said was faced, unsurprisingly having regard to the length of the trial and the amount of evidence heard, with having to address a very large number of requisitions raised on a whole variety of issues at the end of his charge.

229. Responding to this complaint, counsel for the respondent has submitted that the interpretation placed on the call by the trial judge was one that was open to the jury, the jury had the full transcript of the call and the suggestion made by counsel in his closing address and repeated in submissions, that the congratulations related to the day's trading and was related to the bank guarantee, is not a logical one.

230. Counsel for the respondent has further reiterated a submission he made to the trial judge, namely that:

> "[I]n relation to the phone calls, there are many comments which could be made one way or another about the phone calls and counsel have commented one way or another about the phone calls, for example the issues such as the journal entries, many, many other things but the jury have the phone calls and will take what they will from them."

231. While a trial judge is entitled to comment on the evidence in a criminal case, he should not usurp the jury's function in terms of the resolution of a contested issue of fact. The trial judge clearly indicated a view as to how he believed the conversation at issue ought to be interpreted. As counsel for the respondent has pointed out, the trial judge's interpretation was one that the jury could, if the judge had not commented, have independently arrived at on the evidence. However, it would have been open to the jury to take an alternative view of it.

232. We consider that it would have been better if the trial judge had not commented, and consider that he was in error in doing so. Be that as it may, the error relates to but a small piece of a very large jigsaw and we are satisfied, having regard to the significant body of other compelling evidence in the case, and the general run of the case, that notwithstanding such error the overall trial was not rendered unsatisfactory because of it and we do not consider that any injustice would have been caused even if the jury had been inclined, as a result of the trial judge's intervention, to favour his interpretation of the evidence on this really quite minor point of detail. We therefore also reject this complaint.

233. Having rejected the complaints underpinning Grounds 20 (vii) and (viii), respectively, we must dismiss the appeal based on those grounds.

Ground 20 (xi)
The learned trial judge erred in failing to direct the jury that all transactions took place in the Treasury Department of Anglo Irish Bank and as such there was nothing unusual nor sinister about this transaction having occurred therein.

234. This complaint refers to a failure by the trial judge to accede to a requisition in the following terms:

> "MR McGUINNESS: Just one final matter, Judge, when the Court was describing where these deals had taken place, you said the transactions had taken place in treasury and all dealing transactions take place in treasury. So, there's nothing unusual about the fact that these transactions took place in treasury in any way, sense or shape."

Discussion

235. As counsel for the respondent has pointed out, the members of the Jury heard extensive evidence over 72 days in relation to the Treasury Department of Anglo Irish Bank, and in particular heard evidence from Matt Cullen and Ciaran McArdle who in fact explained in detail the working of the Treasury section of the Bank. Their evidence was fairly reviewed by the trial judge in the course of his charge. While the written submissions on behalf of the first named appellant refer to the evidence of Michael D'Arcy, and the trial judge did not specifically remind the jury of Michael D'Arcy's evidence, he had little, if anything, to add to the evidence of the witnesses from the Treasury section whose evidence was reviewed concerning the working of the Treasury section. We reiterate again that a trial judge is not obliged to remind a jury of every item of evidence in his summing up of the facts.

236. In the circumstances we dismiss in limine the appeal on Ground 20 (xi).

Ground 14 (Denis Casey)
Failing to discharge the jury on foot of the prosecution closing address.

The learned trial judge erred in law by not discharging the jury on foot of the prosecution closing address. Specifically, but not limited to the following, the learned trial judge erred in law by not discharging the jury in circumstances where:

> (g) he did not permit the appellant to put before the jury the text of notes drafted by Anglo Irish Bank Corporation p.l.c. for inclusion in the bank's financial statements in respect of the transactions which gave rise to the prosecution;
>
> (h) however, the learned trial judge permitted the prosecution to state in its closing address that no such note could ever have come about for inclusion in the financial statements concerning the transaction; and

nonetheless the learned trial judge permitted the prosecution to state in its closing address that a note published in the financial statements of Anglo Irish Bank Corporation p.l.c. concerning the said transaction was only published after the transaction came into the public domain due to media reports.

237. This ground of appeal rehearses arguments that were advanced in support of grounds 8, 9 and 10 and refer back to the ruling of the trial judge on 9th March, 2016 restricting the use that could be made by the appellant of evidence of events post 3rd December, 2016.

238. At one point in her closing speech, counsel for the prosecution Ms. Úna Ní Raifeartaigh S.C. when dealing with the interviews that the appellant had with An Garda Síochána commented as follows:

> 'It is now a matter of record that Anglo Irish Bank deliberately chose to misrepresent the September, 2008 transaction as a non-collateralised transaction in order to validate.'
>
> "There seems to be a reference in February, 2008, you have heard at this stage Sean Fitzpatrick had resigned on 18th December, so just a quick timeline: on 3rd December the Anglo Preliminary Results are published which are PHB18 in which the 51.4 billion keeps being referred to as a 'highlight', a good thing: 'look how healthy we are.' Then Sean Fitzpatrick resigns on 18th December, then obviously public scrutiny starts to focus in on Anglo and there is this disagreement breaking out over the transaction being collateralised, non-collateralised and then you heard in cross examination, I think from the IL&P people that there was a finalised set of accounts published for Anglo in February, 2008 [sic.], which did have a note which explained what had happened. But of course at this stage effectively the cat was out of the bag. But that is the time line, so I think there is reference there to 'they deliberately chose to misrepresent'."

Following the conclusion of the prosecution speech counsel for the appellant made an application for the discharge of the jury. The judge was reminded that the case had been made on behalf of the appellant that it was necessary to have access to the draft notes and that he should be permitted to put these notes before the jury. This, it was suggested, was necessary in order to demonstrate to the jury that the process of producing a note relating to the transaction, which the appellant had anticipated would occur in fact commenced. It was submitted that the difficulty of the situation was exacerbated because the prosecution had closed its case on precisely the basis that the defence was prohibited from addressing.

239. While the application was couched as one for a discharge it appears that the defence would have been content had the prosecution readdressed the jury and told them that a number of disclosure notes had in fact been drafted.

240. The appellant had a second grievance in relation to the prosecution closing speech. At one stage prosecution counsel said,

"You could almost describe it as ping-pong between two counterparties because you've the money going from an account but Anglo's account with the Nostro account to the Central Bank over to the IL&P account and then it comes back with the words 'on behalf of ILA'. I don't know if – you can use whatever analogy you want, but if we can picture perhaps Anglo on the one side of the tennis table net hitting one billion over, batting it over the IL&P and ILP and ILA are standing together on the other side and ILP takes it, passes it to ILA and they ping-pong it back. Now I am perhaps making it a little bit over crude and no doubt I'll be criticised for that, but it is interesting that the people actually doing the transaction describe it in pretty crude terms themselves so I don't think that's in fact – it is in fact a misrepresent? [sic] And this is the point I am highlighting … it is not important from the point of view of the prosecution and we don't assert it is the same ping-pong ball as it were. We don't say it was the billion. I think when you're moving cash around, it's not possible to say it's the same billion. But what we say is important is that ILA was never going to be in the position to do this unless it got the money from Anglo first and that's the important point."

241. The judge ruled on the application for a discharge as follows:—

> "I am looking at the case and from the point of view of the intention of the parties as of 30th September. Obviously, the intention of the parties can be deduced from their later actions; that goes without saying. But the question is: can Mr. Casey's intention as of 30th and before be deduced or inferred from the action of Anglo as of the end of December – early '09? I am not sure it can be. The question will be put bluntly to the jury by this Court that if the jury reasonably believes that Mr. Casey and Mr. Fitzpatrick expected an explanatory note of some kind that would explain the transactions, let's say, in the books they would be entitled to an acquittal. It's as simple as that. It'll be put to them in a bluntly forceful way by me that basically, if the jury can accept or can reasonably believe that Mr. Casey and Mr. Fitzpatrick – or, for

that matter, Mr. Gageby's client or Mr. McGuinness's client – believed that there was going to be an explanatory note explaining what happened here, then all four of them would be entitled to acquittals. The basic tenor of the State's case is that all four of them intended to the contrary. They intended 7.2 billion to be there with no explanatory note whatsoever because it is the State's case the explanatory note would have destroyed the intent of the scheme. So, therefore, the jury will have the options before them and it will be explained to the jury what the State needs to prove in this case. I don't think a readdress by Ms. Ní Raifeartaigh in this case would be at all helpful or necessary in the case."

Discussion

242. In the Court's view the judge was entirely correct to rule as he did. The speech by prosecution counsel provided no basis whatever for a discharge of the jury. The prosecution case was clear from the beginning and was consistent throughout that the exercise that was undertaken, if it was to produce the results required concealment, disguise and deception. Counsel was entitled to make that point in her closing address and to make it with some force. Likewise her ping-pong analogy, she accepted might be seen by some as overly crude but nobody could have believed that she was addressing the detailed technical structures involved but rather was seeking to paint a visual picture of the essential nature of the transaction. The Court sees nothing objectionable in how she approached her task. This Court is clear that there was no basis for discharging the jury and this ground of appeal is rejected.

Ground 15 (Denis Casey)
The failure of the learned trial judge to recharge the jury in response to requisitions raised on behalf of the appellant is inconsistent with a fair trial.

243. Given the length of the trial, and the fact that the trial was particularly hard fought with every possible point taken, the requisitions were quite restrained. While some of them were directed towards the general portion of the charge, seeking stronger treatment of the presumption of innocence, the uses that could be made of memoranda of interviews conducted with Gardaí, the need to draw the inference most favourable to the accused when more than one inference was open and so on, it does appear that the real thrust of the requisitions was designed to achieve a restatement and a re-emphasis of the defence case. So, the first substantial point made by Mr. Michael O'Higgins, SC, on behalf of Mr. Casey, was that when the judge began to deal with the IL&P involvement in transactions with Anglo, including the transactions that gave rise to these prosecutions, that the judge should have reminded the jury that the IL&P involvement was in pursuit of the Green Jersey agenda. When counsel raised the issue the judge immediately intervened but only got so far as to say "I think I" before counsel interjected to say, "You did elsewhere say that but I wonder would you consider linking that." This drew the response from the judge "I think I told the jury that this started off with a meeting with Brian [sic] Hurley." This resulted in counsel acknowledging "in fairness you did."

244. At that point counsel turned his attention to another topic, reminding the judge that counsel had opened his closing address to the jury by confirming that his client had sanctioned a transaction of 7.2 billion but that he had been at pains to stress that what was agreed and what was implemented was not the same thing. There was then an exchange as follows:—

> "Judge Well I think it couldn't be put much clearer, your point of view that basically that Anglo, in the way it treated it, would do the right thing.
>
> Counsel Alright, Okay.
>
> Judge And I think there is only so much a jury can take in.
>
> Counsel No, very good Judge. I am just working through my list. [The transcript attributes this remark to Mr. Diarmaid McGuinness SC for Mr. Bowe but this is likely to be in error.]"

Counsel moved on to another topic. His remarks bear quotation:—

> "Next, Judge, you then said that the State case, and I think you mentioned you very, very well caught their sentiment that it was like a beacon, like the Papal Cross and no complaint about that. You gave equally good examples of our own case that I wouldn't complain about but I would ask you, Judge, just to ask – to consider reminding the jury that insofar as the State say that any kind of reporting would have destroyed the purpose of the transaction, just to remind them that we introduced into the case Note 34 from the 2008 accounts, where 25% of the deposits were collateralised and this is highlighted in the notes.
>
> Then, Judge, I am nearly finished, you mentioned the reference to the Financial Regulator and a poodle and I have to say, Judge, the poodle is actually quite a ferocious beast with a great hunting history and absolutely dogged in its catching its prey but I think when you mentioned poodle you were thinking rather"

The exchange continued:—

> "Judge And the second most intelligent dog and the collie.
>
> Mr. O'Higgins A very intelligent dog but I suspect when you were using the word you were thinking of the lap poodle, the miniature that grew up in Victorian times and sat on women's laps and really, Judge, what I am just saying with regard to that is I would ask you to consider directing the jury that, in fact, the evidence shows that my client was very attentive to the demands of the regulator, whether it was the ECB or the Guilds and penultimately, Judge, I have no problem obviously with you telling the jury that the facts are for them, but only if each fact is proved beyond a reasonable doubt."

245. Counsel for the DPP dealt with the requisitions that had been made by Mr. O'Higgins on behalf of Mr. Casey as follows:—

> "The Court had very comprehensively dealt with the presumption of innocence and I can fully appreciate that it would be helpful from Mr. Michael O'Higgins' point of view if you did it again at the end of the charge, having done it, but again I'd submit that it would unbalance the charge and is entirely adequate as it is. The Court hasn't mentioned the words "Green Jersey" but as it pointed out, it stated at some length how Mr. Hurley was the person who kicked this off and a transaction versus the transaction, I think the Court dealt at great length and indeed pointed out I think specifically that the evidence was virtually coercive, that the transaction which Mr. Casey and Mr. Fitzpatrick had in mind was a collateralised, no risk transaction and, in my respectful submission, it would only be confusing to the jury to say more

about that. I agree with him, and I think this Court has already agreed that insofar as the words "against them" were used in relation to the interviews that that is an appropriate thing to say.

Note 34 in my respectful submission, falls into the category of detailed comment which again would merely unbalance the charge and why, if this Note 34, well one not want 36 and if they're being put in why would one not wish to say, well, of course, they're 'repose', they have to go in and even if they didn't there's real value."

Discussion

246. This Court has already observed that the requisitions were quite restrained and indeed a perusal of the transcript would suggest that following exchanges between defence counsel and the trial judge that a measure of consensus emerged. However, for the avoidance of doubt, to the extent that any points have remained live the Court is quite satisfied that the judge had dealt with his review of the evidence in a manner that was thorough, but more than that was also fair and balanced and the Court is satisfied in particular that the case being made by the IL&P defendants, more specifically the case being made by Mr. Casey, was put fully before the jury.

247. In any review of the evidence, but particularly where the case is a lengthy and complex one the judge has to be selective in what he has to say and has to avoid overloading the jury. The likelihood is that there will be points of detail omitted which one side or other would have preferred to see included, but unless the material excluded unbalances the charge neither side can dictate to the trial judge what he or she should or should not include, nor can either side compel the judge to make a second speech in support of that side. In this case, the Court is in no doubt that overall the Judge's charge struck a correct tone and the Court does not believe that he erred in refusing to accede to a number of the requisitions that were made to him. This ground of appeal is therefore rejected.

Ground 22 John Bowe
The court is not satisfied that there is any validity in the general complaint made on Mr Bowe's behalf in ground 22 as to the trial judge's refusal to recharge the jury in relation to the period following the transactions of late September and the communications between the Financial Regulator and the involvement of Mr Bowe. The jury had the evidence and had heard the speeches of counsel for the defence. It was a matter for decision by the trial judge and no injustice could have come about as a result.

Acquittal of Co-Accused

Ground 16 Denis Casey
The verdict of the jury in convicting the appellant was perverse and / or inconsistent, having regard to the verdict of the jury in acquitting the appellant's co-accused, Mr. Peter Fitzpatrick.

Ground 17 Denis Casey
The learned trial judge erred in law in refusing the appellant's application following the acquittal of his co-accused. Mr. Peter Fitzpatrick, that the jury be recalled and directed that:

> a) The case being brought against both accused was the same and that although the appellant was group chief executive of Irish Life & Permanent pic, at the material time, the evidence indicated he had less contact on a day-to-day basis with trading floors or with people engaged in individual transactions; and
>
> b) The fact that he held the title of group chief executive of Irish life & Permanent pic at the material time should not be a fact that in any way should count against him.

Ground 18 Denis Casey
The trial judge erred in law in failing to discharge the jury, having refused the appellant's application following the acquittal by the jury of his co-accused. Mr. Peter Fitzpatrick.

248. For convenience it is proposed to deal with these three grounds together as they all relate to different facets of the same issue, namely concern about the safety of the conviction of the second named appellant in circumstances where his co-accused from IL&P, Mr Peter Fitzpatrick, was acquitted by the jury.

249. After the jury delivered its verdict in respect of Mr Fitzpatrick, and in circumstances where they had not yet brought in a verdict in respect of the second named appellant, and had failed to do so in short order after they had acquitted Mr Fitzpatrick, a concern developed on the part of the second named appellant's legal team that the jury might possibly convict the second named appellant notwithstanding that they had acquitted Mr Fitzpatrick, and that they might do so on the basis that the second named appellant had been the Group CEO of IL&P at the material time, whereas Mr Fitzpatrick had been a lower ranking official in that company. The apprehension was that the jury might be of the view because the appellant had been Group CEO of IL&P at the material time, somehow or other a higher onus might be placed upon him. Such an issue might arise if a matter relating to civil liability was before the court and there was a concern that the jury should be told that the rules relating to vicarious liability that apply in civil proceedings have no application in a criminal trial.

250. An application was therefore made to the trial judge in the following terms:

"Judge, we do have concerns. In my respectful submission, you couldn't haven't put a sheet of paper between the two co-accused from the Irish Life & Permanent side, and it's very difficult in any respectful submission to conceive how a different verdict could be rendered in respect of each accused. The evidence, in my respectful submission, is the same. The case that was made against them was the same. The issues which the jury have to determine are, respectfully, the same and we do not know, that is by necessity, the jury system exactly how the verdict was reached. We do have a slight we do have a concern that perhaps the jury might be of the view that because my client is group chief executive, that somehow or other that might place a higher onus upon him, perhaps if one were dealing with something in it civil liability there might be something in that in terms of the buck resting there, but we do have a concern, Judge. This has been a complicated case, a complex case. And in terms of articulating our concern as to what might be done about it, it's difficult, and in my respectful submission, I would ask that you would recall the jury, I could ask that you would remind the jury that the case that was being brought against both men was the same, that there isn't, to use that phrase, a sheet of paper between them, and that all though my client is group chief executive, in fact I think the evidence indicated he had less contact on the day to day basis with trading floors or people engaged in individual transactions. The fact that he holds such title shouldn't be a fact that in any way should count against him."

251. Counsel for the respondent opposed the application saying that he took issue with the central contention and submitting that what counsel for the second named appellant was seeking in reality was a direction to acquit, and that such a step would be contrary to precedent and logic. Counsel for the second named appellant then submitted in rejoinder:

> "Well, the point I'm making, Judge, which I note has not been rebutted, [is that] the case that was made against them was identical. And there's nothing in any client's case that stands above or beyond the case that was made against the accused that has been acquitted. I'm asking you to bring that to the attention of the jury. I don't think it's unreasonable in all the circumstances. You will appreciate that if a verdict an adverse verdict is brought in against my client, the number one ground of appeal is that it would be perverse in accordance with the acquittal of the other man. The prosecution are not making the case there's any difference between the two of them."

252. The trial judge acknowledged that: "...obviously there are similarities between the cases, between both Mr Fitzpatrick's case and Mr Casey's case, but there is also in the case a lot of interviews and statements". He expressed the view that the jury might look at the statements and come to a view on credibility in relation to certain statements or others, and added: "that's not for me". He refused the application stating:

> "But to address Mr O' Higgins's - being Mr O'Higgins on behalf of Mr Casey - central submission that I should readdress the jury and point out to them to that just because Mr Casey was the CEO or the group CEO, that shouldn't make a I will not do that at that stage. I think the jury have a fair idea and they listen[ed] conscientiously to everything that's been said. And I'm at this stage going to allow the jurors to deliberate in their own way and come to the decision in their own way. Now, obviously I do not know what decision they're going to make. And obviously when the decision is made then people will have to look at the consequences of that decision. I'm not sure that they're not just deliberating in a very very logical way and now we're dealing with Mr Casey's case, I don't know, but I'm prepared to allow this jury to do that. And at that stage I will not intrude upon their deliberations. I think there has been I think they know what they have to do and I think they know their duty. So, I'm refusing your application, Mr O'Higgins."

253. Arising from the court's decision, the second named appellant's counsel applied to discharge the jury. That application was also refused. The trial judge also refused a renewed application relating to the acquittal of Mr. Fitzpatrick on 7 June 2016.

254. Subsequently a verdict of guilty was returned in respect of the second named appellant.

255. It has been submitted on behalf of the second named appellant that the verdict of the jury in convicting him was perverse and/or inconsistent, having regard to the verdict of the jury in acquitting his co-accused, Mr. Fitzpatrick, given that the case made against the second named appellant was in all material respects the same as that made against Mr. Fitzpatrick. In support of the contention that the same case was made against both defendants it was submitted to this Court on the hearing of the appeal that in her closing speech, prosecuting counsel, on numerous occasions, sought to emphasise that the charge against both defendants arose from the same transaction. The Court was referred to several extracts from the prosecution's closing speech as examples of the many instances where the same case was put before the jury regarding both IL&P accused. Reliance is also placed on the fact that counsel for the prosecution repeatedly referred in her closing speech to the "IL&P accused" collectively and made no attempt to distinguish as between the two defendants.

256. In addition to maintaining that the verdict was perverse, it is also contended on behalf of the second named appellant that the trial judge erred in law in refusing the second named appellant's application following the acquittal of his co-accused, Mr. Fitzpatrick, that the jury be recalled and directed that the case being brought against both accused was the same and that although Mr Casey was group chief executive of Irish Life & Permanent plc, at the material time, the evidence indicated he had less contact on a day-to-day basis with trading floors or with people engaged in individual transactions; and the fact that he held the title of group chief executive of Irish life & Permanent plc at the material time should not be a fact that in any way should count against him.

257. It is further contended that the trial judge erred in law in failing to discharge the jury, having refused the earlier application to re-charge the jury.

258. At the oral hearing of this appeal counsel for the second named appellant conceded that:

> "…the number of cases where two accused go on trial and one is acquitted and the other is convicted, even where the evidence is similar - where one could make a legitimate complaint about that - it's small. And the reason for that is that there are two trials being conducted for administrative purposes together. But they are separate cases, and the jury is assessing each one separately and might well take a view that one portion of the evidence implicates another more than the other or vice versa. There might well be an explanation which is accepted in one case and not accepted in another, and there might be a good underlying reason for that distinction."

259. However, he submitted, "this is one of the small numbers of cases where it's extremely difficult to say how could it be one and one rather than that other very evocative phrase: 'All duck or no dinner'? And, in my respectful submission, if you look at this there are grounds for concern."

260. In response to the second named appellant's submission, counsel for the respondent denies that the verdict of the jury was perverse and against the weight of the evidence as alleged by the second named appellant.

261. It was submitted in the first instance that if the trial judge was correct in finding at Direction stage that there was a sufficient case to go to the jury in respect of the second named appellant, this evidence remains sufficient to convict him at any later point. While the second named appellant may have hoped that the acquittal of Peter Fitzpatrick might be a precursor to his acquittal, there was no requirement that this be so.

262. The respondent disputes the submission by counsel for the second named appellant that there was a constant eliding of the two IL&P accused, both by the trial judge and by the respondent. It is submitted that this is not in accordance with the evidence, the trial judge's charge and the closing speech of counsel for the prosecution. The trial judge had instructed the jury in clear terms that:

"Now, then if you can come to that conclusion that this was a dishonest scheme beyond reasonable doubt, then you move on to the involvement of the four defendants in the scheme. I think the test, and I'm telling you you should apply it in this case, before you can convict any of the defendants, you must be satisfied beyond reasonable doubt that they authorised the scheme or were involved in the execution of the scheme and at the time when they so authorised or executed, they intended that the scheme would be accounted for in a grossed up, that means not netted, grossed up, unvarnished way. When I say unvarnished I mean, no note,

explanatory note."

263. Further, having explained to the jury that they had to consider any evidence that Mr. Fitzpatrick and the second named appellant had never intended the Anglo accounts to include these deposits without a note, the trial judge had gone on to say that:

> "Even if you say no, on balance, I don't believe that, that doesn't make sense to me, then that's not the end of the matter. You must take a further step and you must disbelieve the explanation advanced for Mr Casey and Mr Fitzpatrick beyond reasonable doubt, because the explanation they give to you is an explanation consistent with innocence."

264. Counsel for the respondent has submitted that the verdict of the jury clearly indicated that, while they had a reasonable doubt as regards the explanation given by Mr. Fitzpatrick, they had no such doubt regarding this appellant's involvement with the scheme.

265. In the court below counsel for the respondent also addressed in separate detail the interviews and statement of the second named appellant and the interviews with and statement of Mr. Fitzpatrick. In relation to the latter she stated in closing the case for the prosecution that:

> "Now, if I could just turn, with the same arguments, an eye to, finally, Mr Fitzpatrick's interviews, because it's slightly different from the way Mr Casey deals with the same issue. And again, I want to focus on the same issue which is what he says about the -- what he anticipated, what he thought the transactions were going to do for Anglo."

266. It was further submitted on the appeal that the evidence against the two accused was not identical. There was evidence of their separate roles in the company, their particular knowledge of the day to day operations of the bank and the email and telephone contact at a senior level between executives of Anglo Irish Bank and the Appellant/Mr. Fitzpatrick. This Court was referred in particular to the evidence Mr. Paul Kane (the dealer at IL&P) and his interaction with Mr. Fitzpatrick with regard to set-off and the risk to IL&P. The jury had heard the transcript of the telephone call (PVK 57) between Paul Kane and Peter Fitzpatrick on the 25th September 2008 as regards the transaction documentation/risk/'netting out' and whether ILA would be protected. There was no similar evidence to the benefit of the second named appellant.

267. The respondent has submitted that it was for the jury to determine whether or not the evidence supported the conclusion that the second named appellant authorised the transactions knowing that, for them to be effective, they had to be reported in the accounts in a way that was misleading. Similarly, and separately, it was for the jury to determine whether or not the evidence supported the conclusion that Mr. Fitzpatrick authorised the transactions knowing that, for them to be effective, they had to be reported in the accounts in a way that was misleading.

268. Counsel for the respondent submitted that it is perfectly possible that the jury may have acquitted Mr. Peter Fitzpatrick out of personal sympathy for him, or out of an interpretation of some aspect of the evidence, in particular the statements of the parties concerned, on which they took a view which lead them to acquit. The only relevant issue is whether there was evidence on the basis of which the second named appellant could have been convicted. If there was, this remained so after the acquittal of Peter Fitzpatrick just as there had been before it.

269. In oral submissions before us counsel for the respondent referred to The People (Director of Public Prosecutions) v. Davis [1993] 2 I.R.1 in support of his contention that it would have been inappropriate for the trial judge to intervene in the jury's deliberations by giving the additional instruction sought by counsel for the second named appellant. He contends that had such an instruction been given it would be tantamount to instructing the jury to also find Mr Casey not guilty. While a judge has power in a criminal trial to direct the jury to find an accused not guilty upon an application made on R v Galbraith [1981] 1 WLR 1039 grounds, there is no power to so intervene once the case has gone to the jury. The Davis case, which admittedly had very different facts to those in the present case, in that it concerned a direction by the trial judge to a jury, when they returned with a question during their deliberations, to find the accused in a murder case guilty of at least manslaughter, confirmed that the constitutional right to trial by jury had, as a fundamental and absolutely essential characteristic, the right of the jury to deliver a verdict once the issue had been committed to them. That case established that there is a constitutional prohibition on a trial judge directing a jury to enter a verdict of guilty. However, the effect of counsel for the prosecution's submission is that it is a two way street. The right to have the jury deliver a verdict, once the issue has been committed to them, inures to both the prosecution and the defence and not just the defence. Logically, if that is so, a trial judge is also prohibited in such circumstances from instructing the jury to acquit. The case by then is at a stage beyond that at which a directed acquittal might have been sought and granted.

270. Counsel for the respondent added:

> "From the prosecution's point of view there's a good side to Davis as well as a bad side that a jury may do things for reasons which nobody can fathom but unless there is a some demonstrable logical necessary flaw in the technical account then the fact that they may have been sympathetic to a particular person in particular circumstances is of no account if the evidence is such that the case could properly go to the jury as, in my respectful submission, it plainly could by direction. But also this is a case in which there immensely extensive statements running to tens and dozens of pages -- I think Mr Casey made one statement which was very lengthy and five interviews that involved his denying knowledge of any significant kind of the March transactions, even though at the time the March transactions were carried out they were carried out by Mr Gantly, who at the time was travelling with Mr Casey on the road show in the United States. The jury was entitled to consider whether they thought that it was plausible that Mr Casey wouldn't really know what was going on in relation to all of that. The jury had evidence before them that whereas Mr Fitzpatrick was doing things within the ILP of which they could take a particular view one way or another that Mr Casey was the man who was meeting the Anglo counterparts. He was the man who okayed, it appears in a conversation with Mr Gantly …"
>
> …
>
> "So the relevant material is CLG8 from Dave Gantly to Denis Casey:
>
> 'Denis, we discussed briefly the Anglo proposals on the 15th of September. We discussed briefly the Anglo proposal for the year end and they want to place … up to 5 billion with us and we would route this back through ILIM to bolster their corporate deposits. Did you discuss this with David today? I'm suggesting to them that we do 10 times €500 million deals where they place cash with us for set term and ILIM place the amount for one day less. This removes intraday settlement credit risk for us.'

There was evidence in relation to fucking Denis approving the 6 billion and so on.

There's also evidence that Mr Casey -- this sent from Mr Gantly to Mr Casey, there is evidence from Mr Casey that he -- sorry, there's a claim by Mr Casey in his interviews much later that he thought these might be repos. In fact the evidence in the case was that no one ever told him anything about repos and that the only thing he was ever told about these deals was that it was cash for cash. Put simply, their roles were different in relation to matter. One of them was that Denis Casey was chief executive but it wasn't the only role.

The jury could also have taken the view that Mr Fitzpatrick was franker than Mr Casey from the beginning in his interviews. Mr Casey claimed not to know very much about what went on and tendered from the interviews to blame Mr Fitzpatrick for what had happened, although eventually admitting on the 3rd of May that he had authorised what took place. These are views the jury may have taken. They are measures which the jury could do."

Discussion

271. We are satisfied in all the circumstances that it was a legitimate exercise of the trial judge's discretion not to interrupt their deliberations for the purpose of giving them the further instructions commended by counsel for the second named appellant. The jury had been clearly told that they had to consider the case of each accused separately, and the mere fact that they had addressed the case against Mr Fitzpartick before that of Mr Casey did not provide valid grounds to apprehend that they were minded to approach the case against Mr Casey differently simply because he was the Group CEO of IL&P. It is unnecessary in the circumstances to express any view on the submission by the respondent based on the The People (Director of Public Prosecutions) v. Davis.

272. We are further satisfied that the jury's conviction of the second named appellant neither perverse nor against the weight of the evidence. The trial judge had decided at the direction stage that there was sufficient evidence on which a jury properly charged could convict. That situation had not changed. It is not possible to determine the precise basis on which they acquitted Mr Fitzpatrick. We are, however, satisfied that there is substance in the respondent's contention that while the case against both IL&P defendants had much in common, there were also differences which could have provided a basis for the discrimination shown by the jury.

273. It is also possible that the verdict in respect of Mr Fitzpatrick was motivated by sympathy. However, in the absence of any evidence to indicate that that was the case, and in circumstances where a legitimate basis for possible differentiation in treatment also existed, the court is not prepared to act on what is mere speculation that the jury were not faithful to their oaths in Mr Fitzpatrick's case. Moreover, even if that were the case it would not serve per se to impugn their conviction of the second named appellant.

274. We therefore dismiss the appeal based on grounds 16, 17 and 18 of the second named appellant's Notice of Appeal.

Telecommunication Evidence

Ground 3 (John Bowe)
The learned trial judge erred in failing to hold that the effect of s. 52(6)(a)(ii) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 was such that any material containing information which had been supplied by the appellant was inadmissible as part of the prosecution case against him.

Ground 8 (John Bowe)
The learned trial judge erred in admitting evidence of the recordings of telephone calls, including telephone calls of the appellant, in the absence of any or any proper proof by the prosecution that such calls were lawfully recorded.

Ground 9 (John Bowe)
The learned trial judge erred in admitting evidence of the recordings of telephone conversations which were disclosed by Anglo Irish Bank in violation of the prohibition contained in s. 98 of the Postal and Telecommunication Services Act, 1983 as amended by the Interception of Postal Packets and Communication Messages (Regulation) Act, 1993.

275. The background to this ground of appeal is that the Garda Bureau of Fraud Investigation applied to a judge of the District Court for orders pursuant to s. 52 of the Criminal Justice (Theft and Fraud Offences) Act, 2001 for the purposes of uplifting material from Anglo Irish Bank. At trial there were challenges to the warrants and also a contention that even if the orders were in fact lawfully issued that the judge erred in admitting material which was uplifted in purported reliance on them but which was in fact outside the scope of the orders. There were grounds devoted to these issues in the notice of appeal but those grounds were expressly not relied upon by counsel for John Bowe, the first named appellant. The written submissions in support of this ground had referred to funding spreadsheets to which the appellant was said to have contributed and also to the records of phone calls in which the first named appellant was a participant. However, in the course of his oral presentation counsel indicated that the ground was now confined to the record of phone calls. Counsel for the first named appellant grounds this argument in the provisions of s. 52(6)(a) of the Criminal Justice (Theft and Fraud Offences) Act, 2001 which provides:

"Information contained in a document which was produced to a member of the Garda Síochána, or to which such a member was given access, in accordance with an order under this section shall be admissible in any criminal proceedings as evidence of any fact therein of which direct oral evidence would be admissible unless the information—

(ii) is privileged from disclosure in such proceedings,

(iii) was supplied by a person who would not be compellable to give evidence at the instance of the prosecution"

276. The first named appellant stresses that the section is concerned with information and that the information contained in the records of the phone calls, both the audio recordings and the transcripts subsequently created were based on information supplied by his client as a participant in those calls. The appellant contends that the recording of telephone calls breached the provisions of the Interception of Postal Packets and Communication Messages (Regulation) Act, 1993, falling within the definition of "interception" there. It is pointed out that by virtue of the provisions of s. 98 of the Postal and Telecommunications Services Act, 1983, as amended by s. 13 of the Interception of Postal Packets and Communication Messages (Regulation) Act, 1993 an unauthorised interception is an offence. This factor it is said brings the issue beyond the ordinary parameters of unlawfully obtained evidence. The Director of Public Prosecutions makes a number of points. First, she says that the records of the phone calls are real evidence and admissible as such. Secondly, the Director says that it was long the practice of Anglo, as indeed it was of other banks to record calls made from the Treasury Department. She says that as a very senior Treasury official Mr. Bowe must have been aware of this and

must have consented to it. She said that for that reason the case is entirely different to the Waterford Garda Station case, the Circuit Court case of DPP v. Burke, Hickey, McEnery and Kissane presided over by Judge Leonie Reynolds in Waterford Circuit Court in July, 2011, to which reference was made by Hardiman J. in the course of his dissenting judgment in the [2015] IESC 31.

277. Following voir dire and legal submissions the trial judge ruled on this matter on 28th January, 2016. He did so as follows:

> "In relation to the phone calls it seems to me the chief submission made by Mr. McGuinness [senior counsel for John Bowe] is that the calls, the external calls if you want to call them that are subject to the Telecommunications Act and the recordings constitute an intercept. Now it seems that an intercept for the purpose of those Acts are phone calls which are recorded, and neither or none of the parties' involvement of phone calls have consented to the making – to the making of the recordings. And therefore, if that is the case, what Anglo or the Company was doing was illegal. Now, obviously if either of the parties consented, the recording or taping or whatever way you describe it is not illegal. So therefore, before I can decide that these are not intercepts, I must be satisfied beyond a reasonable doubt that indeed Mr. Bowe did consent to the recording of these phone calls when he was working with Anglo. Obviously, I have to take into account the evidence given already in the case by Mr. Cullen, I think and another party. And certainly he gave evidence of the reason why phone calls should be recorded, because these in all cases in relation to the banking business, businesses being done and people need to know what was actually said. Deals can be done, agreements reached, compromises reached and monies involved. And one thing I think banks take seriously is money, and it seems it would be inconceivable to me from the evidence I have heard and the general context of the case that Mr. Bowe did not know that everything he said on the phone was being recorded. I find no great difficulty in being satisfied beyond a reasonable doubt that indeed Mr. Bowe had consented to that situation. It seems that every dealing room in the world and every dealing room in this country for decades has been recorded. And therefore I think that the submissions made by Mr. McGuinness has no great weight. I think Mr. Bowe undoubtedly did consent to that situation and therefore I find that there was no intercept in this case and therefore those Acts do not apply to the phone calls. So therefore I find the phone calls were properly recorded. And it seems to me they fall in – fell into the custody of Anglo Irish Bank and following that IBRC. And it seems orders were made against those – those companies and it seems all of this material was given to the Guards. The Guards did what they did, they looked through it, they used various systems to look through it and those calls have been produced and will be adduced or sought to be adduced in evidence.
>
> Now, I think the – they are real evidence, in my view it seems to be inconceivable if a phone recording was not real evidence as would be a CCTV footage. So they can be admitted, I see no great difficulty at all in admitting all of the phone calls involved, except I would say if there is private phone calls from Mr. Bowe to family members and such like. Obviously, I think I would have to have a look at those again, and decide upon that, those issues."

Discussion

278. In the view of the Court the conclusion by the trial judge that Mr. Bowe had consented to the practice of recording phone calls was one that was entirely open to him and indeed any other conclusion was inconceivable. Mr. Bowe was a long term banker, a very senior figure in the Treasury Department and must have been aware of the long-established practice within the Bank. The Court has no hesitation in rejecting this ground of appeal.

279. The Court is of that view notwithstanding the point made on behalf of Mr. Bowe that he was not a trader, was not active on the trading floor but rather had his own office with a direct line. The judge's ruling, involving as it did findings of fact, is not one which can be interfered with.

Conclusion

The court has taken into account all of the grounds of appeal and arguments concerning the convictions of the appellants. This judgment seeks to address each point raised by the appellants in a sequential thematic manner. It is nevertheless possible that because of overlapping of the grounds of appeal and arguments some ground has not been expressly mentioned. The court is however satisfied that it has considered every issue and if there is a failure to deal expressly with any particular ground that does not mean it has not been taken into account.

This lengthy and complex trial ultimately turned on issues for the jury that were properly identified by the trial judge. He exercised his function carefully and correctly. This court finds no fault with his rulings and directions. The jury came to conclusions that were open to them to find. The court is satisfied that the convictions of the appellants are safe and satisfactory.

The appeals against conviction must accordingly be dismissed. The court will hear counsel on the outstanding issue of severity of sentence.