SEAN FITZPATRICK FULL RULING

JUDGE JOHN AYLMER:
May 23rd 2017

Now, it would give rise to further unfairness to Mr FitzPatrick if I didn't state at the outset that tomorrow I intend to direct the jury to acquit him on all counts on the indictment for the following reasons: This is a renewed application by the defence invoking the Court's jurisdiction to stop the trial on the basis that the accused has been denied his constitutional right to a fair trial in due course of law referred to as a "POC application" after the case in that name. It is suggested that this ought to be done by directing the jury to acquit on all counts. There is also before me an application to direct the jury to acquit the accused on the basis that the prosecution has not established a sufficient case to go to the jury on the application of the more familiar Galbraith principles.

The investigation by the Office of the Director of Corporate Enforcement which gave rise to these charges commenced shortly after the resignation of the accused from his role in Anglo Irish Bank in December of 2008. A solicitor employed in that office as a legal adviser was designated to run the investigation. Unfortunately, he had no previous experience relevant to the proper investigation of indictable offences. As a consequence of that inexperience, he has admitted in evidence before me and before the jury that he made many fundamental errors in the investigation and which form the basis of the POC application. As a result, the investigation fell far short of the standard impartial, unbiased and thorough investigation in which the paramount duty was to seek out and preserve all evidence which was or might potentially be relevant to innocence as well as guilt, which is guaranteed under the constitution in this jurisdiction. The most fundamental error was the manner in which the ODCE went about taking witness statements from the two main prosecution witnesses, Mr Kevin Kelly and Mr Vincent Bergin of EY, who were the statutory auditors for Anglo Irish Bank during the relevant periods. Initially, they intended to follow the usual protocol by sending members of An Garda Síochána attached to the ODCE to take statements from witnesses. However, they quickly lost sight of that objective and instead embarked upon obtaining their statements of evidence through A&L Goodbody, solicitors, who were solicitors for EY.

The ODCE was acutely conscious that EY themselves were, or were about to be, investigated by their professional regulator as regards the adequacy of the statutory audits which they carried out of Anglo Irish Bank and they were at risk of being sued and were ultimately sued by IBRC, the successor to the interests of Anglo Irish Bank and the Irish Nationwide Building Society. They were concerned that in those circumstances they might not cooperate with the ODCE investigation. In order to ensure cooperation, they were at pains to reassure EY, through their solicitors, that they had no interest in investigating the adequacy of the audit, which was not their function, but that of CARB. As a consequence, the ODCE completely lost sight of the need to identify, with reference to the provisions of section 197 and section 242 of the Companies Act 1990, which I'll refer to as "the Act", the nature and extent of the evidence relevant to both guilt and innocence which needed to be obtained and preserved. This failure has had negative consequences for both sides of the case which I shall identify in due course.

A lengthy process ensued whereby over a period of about two years, the statements of Mr Bergin and Mr Kelly were prepared by A&L Goodbody much in the manner of the careful drafting of affidavits by solicitors and counsel in a civil action. Many drafts of the witnesses' statements were prepared by the solicitors before Mr Bergin and Mr Kelly ever said anything. The extent to which this had occurred only became apparent subsequent to the collapse of the first trial of this matter after further disclosure by EY. After the drafts had initially been prepared by A&L Goodbody,there was extensive consultation and negotiation between the ODCE and A&L Goodbody as to what ought to be included in the statements of the two witnesses by way of telephone conversations, email communications and meetings. What emerged eventually as the statements of the

witnesses included in the book of evidence had been drafted for them in their entirety by others, they being solicitors with A&L Goodbody, a barrister instructed by them, with an intensively negotiated input from the ODCE as to what they wanted the statements to contain. There was also cross-contamination between Mr Bergin and Mr Kelly as to what went into their respective statements.

The statement-making process was further compromised by the ODCE adopting an inappropriately biased and partisan approach in that it is apparent from their internal communications that they were trying to build or construct a case, rather than to investigate the case independently and impartially. In this regard, I refer to notes recording officers within the ODCE team stating that they wanted to allege misrepresentation, referring to themselves as "building a case", issuing warnings not to mention to EY and their representatives the auditing standards which recommend that in seeking a letter of representation from management, they should discuss with them what needs to go into the letters and warn them that they might be guilty of committing a criminal offence if they misstate anything in them, with specific reference to section 197 of the Companies Act 1990 in Ireland. There were suggestions that questions ought not to be asked, the answers to which might be "unhelpful" to the case being made by the ODCE.

It was conceded by the prosecution that there was a very high degree of suggestion or coaching and contamination by others and cross-contamination in the preparation of the statements. Notwithstanding these issues, after a lengthy voir dire, I ruled that the evidence of Mr Bergin and Mr Kelly was admissible and that the issues of the prohibited coaching, contamination and cross-contamination were capable of being dealt with by appropriate warnings in that regard to the jury in due course. However, this is an issue which was reserved to be considered along with all of the other issues raised at the outset of the trial in the preliminary POC application, when that application was renewed at the end of the prosecution case, as it is now.

Having heard the substantive evidence of Mr Bergin and Mr Kelly before the jury and the prosecution case as a whole, the issue of coaching, contamination and cross-contamination emerges as one of grave concern, it only having become apparent from the cross-examination of these witnesses before the jury just how little involvement they had in obtaining the letters of representation, the subject matter of the 21 section 197 charges, something which might have been much more apparent to the prosecution and to the defence had their statements been taken in the usual and proper manner in a criminal investigation. That might have prompted the investigator to identify those within the EY audit team for each of the relevant six years who were in fact involved in obtaining the letters of representation and director certificates to take statements from them in relation to that process, and from those within Anglo Irish Bank with whom they discussed the content of the letters and directors' certificates, and what was agreed ought to be included in them. They would also have gathered all documentary evidence, electronic or otherwise, as was available on the direction of those witnesses relevant to that process.

If that was done, evidence both real and testimonial would have been gathered in relation to the following issues: (1) the extent to which the audit team were actually aware of Mr FitzPatrick's borrowings and their refinancing approach year end, in circumstances where there is evidence of the quarterly large exposure returns having been on the EY audit file in which each of the three quarterly returns in advance of the year end the full extent of Mr FitzPatrick's borrowings were disclosed. A very large number of banking staff within Anglo Irish Bank were fully aware of the refinancing process and there was no secret made of it within the bank at least below board level. There was also evidence of an unidentified member of the audit team happening upon credit balances in Mr FitzPatrick's loan accounts in November 2004,consequent upon refinancing with Irish Nationwide and in which the audit team member has noted, "Per Cyril Boyd, the named borrowers above hold facilities in which Irish Nationwide sub-participates. The credit balances above represent this sub-participation. The legal obligation is that the bank discloses the net position and per Cyril Boyd all appropriate disclosures and legal obligations have been fulfilled." Exhibit EYR6 refers; (2) the extent to which there was a discussion with management as required by the auditing standards of the meaning and effect of section 43 subsection 5 of the Companies Act 1990, otherwise known as the "bank exemption" and the solution devised by Mr Boyd as regards multiple-party loans in cases where a bank director had a fractional liability. All of the evidence suggests that

the terms of the letters of representation and the contents of directors' certificates were prepared by bank staff other than Mr FitzPatrick for him to sign; (3) the extent to which audit team members accepted the legitimacy of Mr Boyd's refinancing device at year end and agreed, tacitly or otherwise, that disclosure of directors' loans at year end can be confined to the net liability of directors at year end, whether that be in the year end annual statements of account, letters of representation or directors'certificates, all of which are interrelated and interdependent. And, fourthly, what requirements were actually made by the auditors under the provisions of section 197 of the Companies Act 1990, if any. Investigation of all of the foregoing would have produced evidence which was highly relevant to the issue under investigation, namely whether or not the accused was guilty or innocent of criminal offences contrary to section 197 and section 242 of the Companies Act 1990. It simply wasn't done.

The shortcomings in the investigation were compounded by the investigators engaging in the prohibited process of having the statements of Mr Bergin and Mr Kelly scripted, coached, contaminated by the views of others, including the ODCE and cross-contaminated in every significant detail and from start to finish. In so doing, they adopted an assumption that the audit team did not know about the extent of Mr FitzPatrick's loans and an assumption that the auditors had required the information in the letters of representation and in particular, the aggregate total of directors' loans during the year, in addition to that at the year end, the subject of counts 1 to 5 on the indictment and within the meaning of section 197 of the Companies Act 1990, rather than investigating whether or not the audit team did know about the refinancing, whether the audit team had in fact required anything under that section or invoked it at all.

The ODCE and the solicitors for the auditors scripted the evidence of Mr Bergin and Mr Kelly, in which they constructed a case premised on the foregoing assumptions and based upon what the auditors would have done if they had known about the refinancing of Mr FitzPatrick's loans at the year end. That was done in circumstances where the primary duty of the solicitors for the auditors was to protect their interests in circumstances where they were under investigation by CARB, their professional regulatory body, and being sued by the IBRC. The ODCE exploited the auditors' sensitivities in this regard by using them to encourage cooperation with their investigation and what was produced was testimony, in which the auditors asserted that they did not know about the refinancing, that with hindsight it would have been important for them to know about the year-end financing, not because they believed that there was anything illegal about it, but because they would have wanted to investigate it further and consider whether or not the year-end financing was an issue of significance to the audit and how it ought to be treated in the accounts.

While the jury have not had the benefit of the evidence which Mr Bergin gave to the CARB investigation on the 9th of December 2010, the Court was given a transcript of it to consider in the course of the voir dire and in which he stated that the disclosures in relation to loans in the letters of representation and the annual accounts complied with accounting standards and company law and that there was no extra audit work undertaken in 2008 after the issues came under scrutiny, to ensure compliance with the company law or auditing standards and that it was solely a management decision to amend the accounts for that year.

When I originally deemed Mr Bergin's evidence admissible, I note that I was impressed with the extent to which, as far back as September 2010, he was able to resist efforts by the ODCE to have him state that letters issued annually by Anglo Irish Bank to INBS on the occasion of the refinancing by them of Mr FitzPatrick'sloans, in which it was confirmed that Mr FitzPatrick's assets previously held by Anglo as security against his loans were henceforth to be held in trust for INBS,amounted to the giving of security by Anglo Irish Bank over its assets for the benefit of a director within the meaning of section 43(10) of the Companies Act 1990. When I consider how untenable the proposition is, both as a matter of law and as a matter of fact, perhaps I should not have been. I find it quite an extraordinary feature of this case that notwithstanding Mr Bergin's insistence since September 2010 and in his statement of evidence that the said letters did not amount to the provision of security by Anglo, six of the 12 charges originally preferred against Mr FitzPatrick in 2012 were based on that proposition. They were only withdrawn by the prosecution at the beginning of this application on the 3rd of May 2017 on the basis that Mr Bergin had given evidence on day 89 of the trial, that's the 27th of February 2017, in accordance with his

original statement that the letters did not amount to the provision of security. That evidence came as no surprise five years after the charges were preferred.

Similar efforts were made by the ODCE to persuade Mr Bergin to say that the annual reversal of the refinancing by INBS amounted to a post-balance sheet event which necessitated the revision of the figures included in the financial statements or the inclusion of a note thereto, within the meaning of counts 7 to 11 inclusive in the indictment. He refused to sign up to that proposition also, but only by indicating that he had no comment. Mr Kelly was not asked for his view on that proposition and neither were the expert forensic accountant or expert auditor instructed by the prosecution, leaving the prosecution with no evidence to support it. That Mr Bergin refused to sign up to the proposition is not surprising given that it is wholly inconsistent with the evidence which he gave to CARB on the 9th of December 2010 to which I have already referred. Had Mr Bergin been equally forthright with the ODCE, it is clear that his evidence would have been that the reversal of the refinancing did not amount to such a post-balance sheet event necessitating a revision of the figures or a note thereto. If he had said as much in his evidence before the jury, the prosecution would have been obliged to drop the charges relating to alleged post-balance sheet event, that's counts 7 to 11 inclusive, in the like manner in which they were obliged to concede the charges alleging non-disclosure of security, that's counts 16 to 21 inclusive. The proposition was never investigated further after Mr Bergin refused to sign up to it. When Mr FitzPatrick was first charged in 2012 in relation to this matter, the charges did not include any allegation based on this proposition. Those charges were added to the indictment some years later.

What is perhaps most alarming is that it was only in cross-examination of Mr Kelly and Mr Bergin before the jury that it emerged that their requirements as to what was included in the letters of representation were limited to disclosure of the year end position in relation to directors' loans, as conceded by the prosecution in submissions in this application on the 15th of May 2017. Had their statements not been drafted for them and had they not been coached, their position in that regard might have been apparent. This has particular significance in relation to counts 1 to 5 in the indictment which are the only outstanding counts relating to offences with which the accused was originally charged in 2012. In the course of the investigation, the ODCE viewed the inclusion of references to the position as to the balance of directors' loans during the year as fortuitous in the context of their endeavours to build a case of misrepresentation and their view of the bank exemption in relation to disclosure of the balance of loans to directors during the year contained in section 43(5) as a loophole. Had the defence cross-examination of Mr Bergin and Mr Kelly been less skilful and failed to expose the truth about their lack of involvement in obtaining the letters of representation and that their requirements were confined to the year-end position in relation to directors' loans, no amount of warnings by the Court to the jury of the dangers arising from the fact that the evidence of these witnesses had been coached from start to finish could have compensated for the pernicious effect that that process had on the testimony of those witnesses.

There is then the extraordinary occurrence of the shredding by the lead investigator of a number of documents relevant to the investigation. We do not know what might have been in those documents. The evidence establishes that they were similar to the 16 other documents in relation to which the investigator was in the course of preparing a schedule for disclosure to the Director of Public Prosecutions. The worrying feature of the evidence which I have heard is that notwithstanding the investigator's insistence that he did not know the shredded documents to contain anything of particular relevance to the defence, there must be a doubt as to why he singled them out for destruction while at the same time preparing a schedule of disclosure for the other 16 documents. The Court retains a significant doubt which the Court considers to be of substance that those shredded documents may in fact have contained material which might have been of assistance to the defence or damaging to the prosecution.

There's also the question of missing evidence. The director's certificate signed by Mr FitzPatrick in relation to his loans and which it is established were furnished along with the letters of representation have been lost for the years 2002, 2003 and 2004. Accordingly, the prosecution are unable to establish the precise extent and detail of disclosure actually made to the auditors in relation to his loans with Anglo Irish Bank for those years. Counts 14 and 15 on the indictment allege non-disclosure of loan accounts for the years 2006 and 2007 respectively. The

evidence establishes that Mr FitzPatrick had interests in savings accounts for those years and that there was no investigation as to whether the bank had set off savings in such accounts against the loan accounts the subject matter of those charges. This is a simple incident of a failure to investigate evidence of innocence as well as guilt.

The disclosure process in this case was also far from satisfactory and did not inspire confidence by reason of the protracted nature of the disclosure, contradictory stances taken in relation to privilege and relevance, tardiness and lack of robustness, the latter high lit by the very late discovery of an electronic email behind a radiator in the office of the ODCE after the collapse of the first trial, in which one of the legal advisers warned another in the email about all of the frailties in the investigative process which had become the focus of the first trial before Judge Ring and throughout this trial before me.

Now, the prosecution correctly asserts that if the consequences of the failures by the ODCE to investigate, to which I've already referred, are that the prosecution have failed to adduce evidence in relation to certain ingredients of the offences, the Court should not stop the trial on the grounds of unfairness, but simply direct the jury to acquit on any such charges. However, if the failure to investigate gives rise to a real risk of an unfair trial of the accused which cannot be rectified by warnings in the charge to the jury, the accused should be acquitted by direction. Now, that being so,before I consider whether the Court must adopt the extraordinary measure of stopping the trial on grounds of unfairness which cannot be rectified by warnings to the jury, I must first deal with the more ordinary application for a direction applying the Galbraith principles.

It was not possible for the defence or the Court to determine exactly what the prosecution case was from the opening of the case and it was not until the 10th of February 2017 I think that's day 78 of the trial and just before Mr Kelly and Mr Bergin gave their evidence before the jury, that the prosecution finally committed in that regard. And as regards counts 1 to 5 on the indictment, it was clarified that the prosecution contended that because the letters of representation for each of the years the subject of these counts included a reference to the position as regards directors'loans during the year there was a misrepresentation. Notwithstanding the absence of any reference to in section 197 to section 193 of the Act, I shall accept for the purpose of this analysis the prosecution's contention that the information or explanation which an auditor is "entitled so to require" within the meaning of section 197(2) of the Act is defined in section 193 subsection (3) as, "Such information and explanations that are within their knowledge or can be procured by them as he thinks necessary for the performance of the duties of the auditors." Now, the evidence of Mr Bergin and Mr Kelly is clear that as auditors they did not think that information or explanations as to loans to directors during the year was necessary for the performance of their duties as auditors and they did not require it. Accordingly, there is no evidence before the jury that the impugned information as to the balance of directors' loans during the year within the letters of representation was information which was required by the auditors, or information which they thought necessary for the performance of their duties as auditors and which they were thus entitled to require within the meaning of the legislation. That being so, applying the first limb of the Galbraith test, the jury must be directed to acquit the accused on counts 1 to 5 inclusive on the indictment.

However, in fairness to the accused, I must add that even if Mr Kelly and Mr Bergin gave contrary evidence as expected by the prosecution, given the total lack of investigation as to how the letters of representation came into being in terms which included a reference to the situation during the year, whether this was entirely accidental or otherwise, the failure to seek out the evidence of those on the audit team actually involved in procuring them, the coaching, contamination and cross-contamination of Mr Kelly and Mr Bergin's evidence, the partisan and biased nature of the investigation and the shredding of documents by the lead investigator, I would have been satisfied that there was a real risk of an unfair trial, incapable of being rectified by directions to the jury and I would have directed them to acquit on that basis also. As I have already indicated, the effect of the coaching is the issue of greatest concern to me and I have already indicated why I think warnings to the jury would be inadequate in this case.

That disposes of all of the counts with which Mr FitzPatrick was originally charged in 2012, the prosecution having already conceded counts 16 through to 21 inclusive relating to the allegation that there was a failure to disclosure the provision of security by the bank in relation to a director's loan. The balance of the charges are counts which were added to the indictment post investigation. Count 6, in relation to post-balance sheet events, count 6 has already been conceded by the prosecution. As regards count 7 to 11, I've already identified that Mr Bergin refused to sign up to the proposition advanced by the ODCE that the reversal of the refinancing post year end amounted to a post-balance sheet event which necessitated the revision of the figures included in the financial statements or the inclusion of a note thereto. As a consequence, there is no evidence before the jury to support that proposition. I do not accept the prosecution's contention that the ordinary men and women of the jury are qualified to reach a conclusion on that issue in the absence of an expert's evidence of at least an accountant. It is not an issue analogous to whether something is true or false or misleading or deceptive, in relation to which I excluded the expert evidence of Mr Grummitt, the specialist auditor whose evidence would have introduced the concept of "a true and fair view" as understood in the accounting standards. It requires the specialist judgment of someone qualified in accounting to deal with the post-balance sheet event issue. I'm encouraged in that view, having had the benefit of the transcript of evidence which Mr Bergin gave to the CARB inquiry on the 9th of December 2010, to which I have already referred, which was entirely inconsistent with the proposition that the reversal of the refinancing constituted a post-balance sheet event necessitating the revision of the figures included in the financial statements or the inclusion of a note thereto. Accordingly the Court must direct the jury to acquit the accused in relation to those counts.

However, again in fairness to the accused, I should say that if Mr Bergin and/or Mr Kelly had stated that they considered the reversal of the refinancing to be a post-balance sheet event necessitating the revision of the figures included in the financial statements or the inclusion of a note thereto, I would have felt bound to stop the trial in relation to those counts also in the absence of any investigation of the matters which I've already identified surrounding the obtaining of the letters of representation by the members of the audit team, who actually did so in discussion with Anglo Irish Bank staff, the destruction of documentary evidence by the lead investigator and the extraordinary extent to which their evidence had been coached.

Now, to deal with the following counts, it's necessary to address the definition of "amount outstanding" within the meaning of section 43 subsection 5 of the Act. And this relates to counts 14 and 15 and counts 22 through to 27 inclusive, all of which depend on the proper interpretation of the words "amount outstanding" in that section. That term is defined in subsection 10 of section 43 as meaning, "The amount of the outstanding liabilities of the person for whom the transaction, arrangement or agreement in question was made." I accept the interpretation of that section contended for on behalf of the accused, which is in effect, that it is the overall liability or the net liability of a director to the bank that must be disclosed, and that any set off of credit balances against debit balances by the bank must be taken into account. There is certainly nothing in subsection 10 which is inconsistent with that interpretation and for the purposes of these proceedings, it must be interpreted strictly as a statute in favour of the accused where such an interpretation is open. On the evidence of Mr Cyril Boyd and Mr Lar Bradshaw adduced on behalf of the prosecution, it is clear that that it is also the interpretation upon which the bank operated. The evidence also establishes that the standard terms and conditions of Anglo's loans, to which Mr FitzPatrick was subject, provided the bank with the widest possible contractual right of set-off, consistent with a very wide right of set-off vested in a bank under common law. Accordingly, for counts 14 and 15 to be allowed to the jury, the thrust of which is Mr FitzPatrick had an interest which were simply not disclosed at all, there would have to be evidence from which the jury could be satisfied beyond a reasonable doubt that there were no savings accounts in which Mr FitzPatrick had an interest, which might have been set off against his liability to the bank in respect of the allegedly undisclosed accounts. While there is evidence of such savings accounts existing, they were excluded from the analysis carried out by Mr Dearman, on the basis that there was no indication of any movement of funds between those accounts and loan accounts or matching accounts. Such movement between those accounts and loan accounts or matching such movement between the accounts is not necessary to establish whether or not there was a set-off. Accordingly, the jury must be directed to acquit on counts 14 and 15 also.

As regards counts 22 to 27, it has been confirmed on behalf of the prosecution that the contention underlying those charges is that even where a director's loan has been matched by lodging in a matching account a credit balance equal to the liability on the loan, with the use of funds transferred either from funds borrowed from INBS or from funds in another savings account, the debt in the loan account remains an amount outstanding within the meaning of section 43(5). As I have already indicated, that proposition is inconsistent with the proper interpretation of section 43(10) of the Act. Accordingly, the jury must be directed to acquit the accused on those counts also.

That being so, it's not necessary for me to rule upon any of the many other issues raised on behalf of the accused or the prosecution. However, I should remark that I have particular sympathy for the submission on behalf of the accused that if a person is to incur a potential criminal liability for making any false, misleading or deceptive statement under section 197 of the Act, or under any other penal provision, he should be warned of that potential liability before he makes a statement, and there should be evidence of such a warning. And that proposition is strongly supported by the judgment of Ms Justice Laffoy in DPP (Sheehan) v. Galligan and Daly, unreported High Court, 2nd of November 1995.