WHITE COLLAR CRIME – THE TRIAL PROCESS
PROPOSALS FOR REFORM

1. INTRODUCTION

1.1 In the current economic climate, there is a public demand for the prosecution of so called '*white collar criminals'*. Intense frustration has been expressed by commentators and the public over the seeming inability of the State to bring prosecutions against those who, through their misfeasance as directors or other senior managers of large companies and banks, are perceived to have visited untold damage on the Irish economy and people. There is a perception that '*white collar criminals get away with it*' and that, whereas the prosecuting authorities have little difficulty in bringing to justice the perpetrators of ordinary crime, the same vigour is not applied to holding white collar criminals accountable for their misdeeds.

1.2 In my view there is no reluctance on the part of the State Authorities to bring white collar criminals to justice. There has, however, been a failure on the part of the Oireachtas to update our Criminal Laws and Procedures so as to provide for the fair and efficient prosecution of such cases. Concern or outrage has not been matched by the practical work of reforming the criminal process in order to modernise the way in which such cases are first investigated and thereafter prosecuted.

1.3 As lawyers and prosecutors we have perhaps not pressed for the necessary radical changes in the way that these cases are investigated, brought before and prosecuted in the Criminal Courts. There needs to be a recognition among practitioners that, if we are to deal with white collar crime and the understandable frustration being expressed in the general population, it cannot be '*business as usual'* and there will have to be real change in this regard.

1.5 There should be a root and branch reform of those areas of the criminal justice system which are not '*fit for purpose'* for the proper prosecution of white collar crime. In carrying out such reform this State will have the benefit of the lessons which have been learned and the progress which has been achieved in other common law jurisdictions. Within a relatively short period of time, it should be possible to put into place legal mechanisms which provide for the fair and efficient prosecution of white collar crime in this State.

1.6 In carrying out these reforms the central objective should be to ensure that the trial of such offences will focus on the real issues between the parties in the case. The trial procedures should be reformed so that trials of serious fraud offences do not become a form of trial by ordeal for the accused, the prosecution and above all the Jury.

1.7 Although we have of course much to learn from other jurisdictions with experience of such cases such as the United Kingdom and the United States, we cannot uncritically follow the procedures which have been adopted in those jurisdictions. Whilst on the one hand impressed by the speed with which the United States Criminal Justice system operates and the apparent determination of prosecutors that persons of all rank in society be held accountable for their crimes, as witnessed for example by the successful prosecutions of Conrad Black and Bernie Maddox, lawyers in Ireland would not wish to follow the unnecessarily humiliating process recently on view in the full glare of a tabloid feeding frenzy following the arrest and charge of the former head of the IMF, Mr. Dominique Strauss-Kahn. In this regard one should remember the comments of

Mr. Justice Hardiman in several decisions of the Court of Criminal Appeal where he deprecated the practice of bringing prisoners into Court handcuffed and the attendant humiliation resulting from such practice. The key to success is surely to adapt what is best from other systems and reject what is an affront to our sense of justice.

1.8 This paper does not address the question of whether the law, or indeed the Constitution, should be amended to allow for non Jury trial in cases of serious fraud. There is of course a genuine belief on the part of a number of leading players in the Criminal Justice system that the effective prosecution of serious fraud requires such change. Such a view may be understandable given our knowledge of the experience in the neighbouring jurisdiction in infamous cases such as the ***Blue Arrow*** trial.

1.9 Interestingly, however, no other common law jurisdiction has abandoned the Jury as the normal finder of fact in serious fraud cases. It is my opinion that a Jury remains the best arbiter of whether or not a fellow citizen has committed a fraud and indeed questions of dishonestly, which lie at the root of fraud offences, are ones which are ideally determined by Juries. It should be possible to address many of the perceived difficulties for Juries dealing with such cases by legislating for substantial reforms in the pre-trial and trial process.

1.10 Set out below are six proposed areas of reform which would change the investigation and prosecution of these cases. Reforms of the kind discussed below have been adopted, in differing forms, in other common law jurisdictions. A number of the matters discussed are also provided for in the recently published Criminal Justice Bill, 2011.

1.11 The six areas of reform are:-

(a) The introduction of a requirement that persons co-operate with investigators of serious fraud offences in defined circumstances;

(b) The introduction of statutory pre-trial or preparatory hearings in cases of serious fraud, where a Judge can issue binding directions as to the progress of the case and make binding rulings on legal issues;

(c) Provision for the serving of Prosecution Statements and Defence Statements;

(d) Statutory regulation of the circumstances in which immunity may be granted to persons who provide material assistance to investigators in cases of serious fraud;

(e) Reform of the rule of Hearsay in relation to Documentary Evidence; and

(f) Legislation dealing with Third Party Criminal Disclosure

2. GENERAL LEGAL REQUIREMENT OF CO-OPERATION

2.1 There is of course no general duty on a citizen to co-operate with the Gardaí or others charged with investigating crime. At common law, whilst a member of An Garda Síochána or any other investigator enjoys the same freedom as any private citizen to ask questions of another while investigating a criminal offence, the citizen is under no obligation to answer these questions or to otherwise co-operate with the investigation.

There has of course been significant legislative encroachment on this '*right to be left alone'* over the years[1] .

2.2 An immediate issue which arises in this context is how such a provision might interact with the privilege against self incrimination or the right to silence which are protected under the European Convention on Human Rights and the Constitution. There can be little doubt that a carefully drafted provision compelling certain persons to provide information or documents to those investigating serious offences of fraud would be a permissible restriction on the right to silence or privilege against self incrimination.

2.3 Where information is obtained from an individual as a result of the exercise by the authorities of powers of compulsion, it is unlikely that such information could be used in any criminal prosecution of that person. The approach of the Irish Courts to date on this issue has tended to focus on voluntariness. Any statement obtained from an accused person which is not proven to have been made voluntarily is not admissible in a criminal trial. In ***Re National Irish Bank***[2] the Supreme Court held that powers of compulsion granted to inspectors appointed to investigate companies were proportionate, and therefore constitutional, in the light of the public interests at stake. The Court, per Barrington J., did not need to go any further in that particular case but commented that any later effort to introduce the compelled evidence at the trial of a person who provided it would have to be excluded if found not to have been obtained voluntarily.

2.3 Indeed the Oireachtas has provided for so called '*use immunity'* in various Acts where a requirement has been imposed on persons to give evidence or produce documents which might result in their self incrimination. The most well known example is the legislation governing the Tribunals of Inquiry Acts. Testimony or documents given before a Tribunal, which frequently could result in a person incriminating him or her self, is subject to a statutory provision to the effect that the statement or admission made by a person before a Tribunal '*shall not be admissible in evidence in any criminal proceedings against him'* unless those proceedings are for an offence committed against the Tribunal.[3]

2.4 The approach in the European Court of Human Rights to the restriction of the privilege against self incrimination and the right to silence tends to focus more on '*respecting the will of an accused to remain silent'*.[4] In the case of ***Weh v. Austria***[5] the European Court emphasised that the privilege is against ***self*** incrimination. In that case Mr. Weh had been fined for failing to give accurate information in relation to the identity of a person driving his car at the time in which it was involved in an accident. His claim that the requirement under Austrian law that he disclose this information violated his privilege against self incrimination was rejected by the European Court as being a violation of Article 6 (1) primarily on the ground that the information was not being sought in respect of forthcoming proceedings against Mr. Weh himself.

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[1] E.g. Criminal Justice Act, 1984, the Road Traffic Acts, the Offences Against the State (Amendment) Act, the Competition Act 2002, Section 52 of the Criminal Justice (Theft and Fraud Offences) Act, 2001
[2] [1999] 3 IR 145
[3] *Section 5 of the Tribunals of Inquiry (Evidence) (Amendment) Act, 1979*
[4] *Saunders v. United Kingdom [1997] 23 EHRR 313*
[5] *[2005] EHRR 891,*

2.5 As already mentioned above there are already a number of situations where there has been substantial legislative encroachment on the right of the citizen not to co-operate with a criminal investigation. In relation to fraud offences, the provisions of Part 7 [Sections 48 to 51] of the ***Criminal Justice (Theft and Fraud Offences) Act, 2001*** are of particular interest.

2.6 Section 48 is the search warrant provision and is widely drafted. It provides for the issuing by a District Court Judge of a search warrant where he or she is satisfied that '*there are reasonable grounds for suspecting that evidence of, or relating to the commission of, an offence for which this Section applies is to be found in any place'.* The Section goes on at sub-sections (3) and (4) to give extensive powers to the Gardai to search and seize material found in the course of any such search. The Gardai, for example, are given the power to seize and retain a computer or '*other storage medium'* in which a record is kept. Section 48 (5) also gives a member of an Garda Síochána acting on foot of such a search warrant the power to operate a computer at a place being searched and, perhaps more importantly, in this context, require a person who appears to have lawful access to information on a computer to, for example, give him the pass word necessary to operate the computer and to assist him in operating the computer.

2.7 It is however Section 52 of the Act, which does not appear to date to have been the subject of consideration by the Superior Courts, which is of interest here. This provision allows a District Court Judge to order the production by a named person of *'evidential material'*. The District Judge may order a person to produce such material to a member of An Garda Síochána where there are reasonable grounds to suspect that this material constitutes evidence of or relates to the commission of an offence under the Act punishable by a term of imprisonment of more than five years. The Section thereafter contains provisions similar to those in Section 48 providing for the giving of assistance to Gardaí where the material is contained on a computer. Interestingly there is also provision, at Section 48 (6), for the admission of evidence obtained on foot of such an Order in proceedings by way of exception to the hearsay rule.

2.8 It is therefore clear that there is already legislation in place, albeit on a piecemeal basis, which provides that persons must in defined circumstances provide certain types of information to investigators of serious crime.

2.9 It is my view that, given the difficulties faced by investigators and the nature of the crimes under investigation, the Oireachtas should enact legislation imposing a general duty on persons, in defined circumstances, to provide material and other co-operation to investigators of fraud offences. The obligation should extend beyond the provision of documents and other material and include an obligation to answer questions put by investigators and to explain the contents of documents or other materials.

2.10 Measures of this kind were adopted in England and Wales under the Criminal Justice Act, 1987. Following the publication of the Fraud Trials Committee report under the Chairmanship of Lord Roskill, the United Kingdom set up the serious Fraud Office and enacted substantial legislative changes to the criminal trial process for serious fraud offences in the Criminal Justice Act, 1987.

2.11 The changes effected by Section 2 of the Criminal Justice Act, 1987 have been of particular assistance in the prosecution of serious fraud offences. This section confers

upon the Director of the Serious Fraud Office extensive powers to require persons to answer questions and provide documents in the course of an investigation into '*a serious fraud offence'*. Section 2 gives the Director of the Serious Fraud Office the power to:-

- Require a person to answer questions, or otherwise furnish information, with respect to any matter relevant to a serious or complex fraud;
- Require the production of documents, and to take copies of them and to demand explanations in relation to such documents; and
- To search for and seize such documents.

2.11 The international dimension of serious and complex fraud is given recognition by the fact that these powers can also be exercised in seeking to give effect to a request made under International Mutual Assistance provisions by other States. The Serious Fraud Office makes extensive use of its powers under Section 2 and reports suggest that the recipients of these notices include companies, liquidators, solicitors, banks and accountants. The approach adopted by the Serious Fraud Office is firstly to ask for voluntary co-operation and only if this is not forthcoming, to invoke the powers provided for under Section 2 of the Act.

2.12 The powers of the Serious Fraud Office under Section 2 extend to requiring the production of documents even after charges have been laid. In the case of ***R v. Director of SFO Ex Parte***[6] the Serious Fraud Office had served notices requiring the production of documents on Guinness PLC., after charges had been laid. The Court held that the charging of a suspect did not bring an end to the power to investigate and thus to require production of these documents.

2.13 There are of course a number of safeguards, similar to those set out for example in Section 52(4) of the Criminal Justice (Theft & Fraud Offences) Act, 2001, found in Section 2 of the English Criminal Justice Act, 1987. Section 2 (9) provides for legal professional privilege and Section 2 (10) deals with the issue of '*banking confidentiality'*. The issue of the admissibility of material obtained under these compulsory powers has been the subject of extensive consideration by the United Kingdom Courts, particularly since the adoption of the Human Rights Act, 1998 in that State. Following the decision of the European Court of Justice in ***Saunders,*** the UK Attorney General issued guidance to prosecutors to the effect that statements obtained under compulsory powers should not normally be adduced in evidence against their maker or put to him in cross-examination and this was given statutory effect in the Youth Justice and Criminal Evidence Act, 1999.

2.14 In any event Section 2 (8) of the Criminal Justice Act, 1987 had already shielded the recipient of a Section 2 Notice from having answers made in response thereto being used against him. Section 2 (8) provides that:-

> '*A statement by a person in response to a requirement imposed by virtue of this Section may only be used in evidence against him –*

[6] ***[1988] C.L.R. 837***

(a) *On a prosecution for an offence under Section 14* [for deliberately or recklessly making a false or misleading statement]; or

(b) on a prosecution for some other offence where in giving evidence he makes a statement inconsistent with it.'

2.15 Section 2 (13) creates a summary of offence of failing, without reasonable excuse, to comply with a requirement imposed under Section 2 of the Act. Section 2 (14) provides that a person who knowingly or recklessly makes a statement which he knows to be false or misleading in a material particular in response to a Notice under Section 2, is punishable on indictment or summarily.

2.16 It is my view that a broad ranging provision, which is drafted to take into account the comments of the Supreme Court in ***Re National Irish Bank*** and those of Kearns J in ***Dunnes Stores Ireland Company v. Ryan,***[7] would assist Prosecutors and investigators in breaking down any wall or silence which they might encounter when seeing to carry out a full and thorough investigation of corporate fraud. Any such provision would, particularly when it takes account of the above mentioned cases, be consistent with the provisions of the Constitution and the European Convention of Human Rights.

2.17 A provision similar to Section 2 would presumably greatly assist the investigation of such offences in this jurisdiction and would, for example, allay any concerns on the part of professional persons or employees of those being investigated for serious fraud offences that they might breach any duty of confidentiality to clients or employers if it was clear that they were under a legal duty to provide such co-operation.

3. PRE-TRIAL HEARING OR PREPARATORY HEARING

3.1 The idea of a pre-trial hearing to determine issues and to in effect '*knock heads together'* prior to a case going to trial is not new. In Chapter 6 of the ***Working Group on the Jurisdiction of the Courts – the Criminal Jurisdiction of the Courts 2003***, there was a recommendation for the introduction of a Preliminary Hearing in all cases on arraignment in the Circuit and Central Criminal Courts. To date no such arrangements have been introduced, whether by statute or under Rules of Court.

3.2 The pre-trial or preparatory hearing has the potential of radically changing the conduct of a complex trial. Although unfortunately not provided for in the Criminal Justice Bill, 2011 the pre trial or preparatory hearing appears to have been used not only in the neighbouring jurisdiction but also (albeit in different forms) in other common law jurisdictions.

3.3 Such a hearing can have the benefit of identifying the real issues in the case early on and reducing the time and resources unnecessarily devoted to side issues by both prosecutors and defendants. The adoption of such a system would represent a sea change in how both prosecutors and defendants do their business in the Irish Criminal Courts. The Defence side would have to adjust to the prospect of being deprived of the right to ambush the prosecution at will. The Prosecution would have to adjust to the need to precisely nail their colours to the mast early on in the case.

[7] ***[2002] 2 IR60***

3.4 The preparatory hearing should also encourage the Prosecution to adopt the approach suggested by Shane Murphy SC. The requirement to identify with precision the case which is being made against a Defendant early on in the process would undoubtedly lead to a more directional and focused approach to these cases. What appears to be particularly important, bearing in mind the experience particularly of the neighbouring jurisdiction and the comments of the Court of Appeal in the ***Blue Arrow*** case, is the avoidance of over complicating fraud trials by in particular over loading indictments. In order to successfully prosecute these cases, experience seems to indicate that it is desirable from early in the process to decide what is the criminality being pursued, what are the particular charges being laid and the overall strategy of the prosecutor. The dangers of vagueness and the over-complicating of cases or overloading of indictments cannot be stressed too highly.

3.5 Given the fundamentally radical departure that pre-trial or preparatory hearings would represent in our criminal justice system and particularly the desirability that directions at such hearings have the force of law, it is in my view preferable that such a procedure be put on a statutory footing.

3.6 As explained in the Working Group Report the concept of pre-trial hearings to determine issues of admissibility and obtain legal rulings from a trial judge in advance of the hearing of a case are a feature of many common law jurisdictions. In England and Wales, for example, practice rules for '*Plea and Directions Hearings'* were introduced in 1977 in the Central Criminal Court and were later adapted for the Crown Court both on a statutory and non-statutory form. Directions given at non-statutory hearings are non-binding whereas those given at statutory hearings are binding. In Australia, there are hearings of such a kind both at state and federal level. In its 1999 '*Working Group on Criminal Trial Procedure Report'* the standing committee of Attorneys General of Australia reviewed the various regimes in effect in the States and at national level.

3.7 In England and Wales preparatory or pre-trial hearings have been put on a statutory basis for serious fraud trials. Before the introduction of the 1987 Criminal Justice Act, there was an attempt by a nominated Trial Judge to resolve issues at a pre-trial review at which prosecuting and defence counsel canvassed matters affecting the conduct of the trial. The success of these hearings varied and depended on the co-operation of the parties and the skill of the Trial Judge in guiding the process. The 1987 Act[8], however, introduced a radical new departure in providing for a statutory *'preparatory hearing'* in serious fraud cases. The object of this procedure is to identify issues in dispute before the Trial '*proper'* begins (before the Jury is sworn) and can include the resolution of issues of law and issues as to the admissibility of evidence. Such hearings may be ordered by the Judge or may be requested by the prosecution or defence.

3.8 Section 7 (1) of the Criminal Justice Act, 1987 confers a discretion on the Trial Judge to order a preparatory hearing if it appears to him or her that the evidence on the Indictment reveals a case of fraud of such seriousness or complexity that substantial benefits are likely to accrue from such a hearing for the purpose of:-

[8] Section 7 of the Criminal Justice Act 1987 (as amended)

'(a) Identifying issues which are likely to be material to the determination and findings which are likely to be required during the trial,

(b) If there is to be a jury, assisting their comprehension of those issues and expediting the proceedings before them,

(c) Determining an application to which Section 45 of the Criminal Justice Act, 2003 applies, [i.e. an application for the Trial to be conducted without a jury]; *or*

(d) Considering questions as to the severance or joinder of charges'.

3.9 Once the preparatory hearing begins, the trial proper has begun and the accused is arraigned at such hearing. In the course of such a hearing, the Trial Judge may also order the preparation of a Case Statement by the Prosecution and also the service by the Defence thereafter of a Defence Statement.

3.11 Such a system should be introduced by primary legislation in order to set out clearly the parameters of the 'preparatory hearing' and to provide authority to the Court to impose sanction on parties who fail to comply with directions given at a *'preparatory hearing'*. Such legislation should also specifically provide that decisions made by the Trial Judge at the preparatory hearing are, save for certain exceptional circumstances or in the interests of justice, binding at the '*trial proper'*. In other words, the Trial Judge, nominated to deal with the case from the outset, should be in a position to swear a Jury to hear a serious fraud case confident in the knowledge that the rulings made by him or her at the preparatory hearing will be generally binding on the parties. There should also be provision that, upon the application of the Prosecution or Defence, a ruling made by any Judge at a preparatory hearing (if for example he or she cannot conduct the actual trial for good reason), should generally be binding at a future trial by another Judge. Such a statutory provision would seem necessary in light of the decision of the Supreme Court in the case of ***Lynch v. Moran,***[9] which held that issue estoppel had no part in Irish criminal law.

3.12 Bearing in mind the experience and practices of the in the Irish Criminal, the following are examples of issues which could be determined at the pre trial hearing:-

(i) Issues of Disclosure - whether disclosure by the Prosecution or the more vexed question of Disclosure from Third Parties;

(ii) Questions as to the admissibility of evidence at the Trial;

(iii) Applications for the admission of Hearsay evidence at the Trial, whether by the Prosecution or Defence [see further below];

(iv) Directions as to the exchange of experts reports;

(v) What evidence may be admitted under Section 21 of the Criminal Justice Act, 1984;

(vi) Admissions by either the Prosecution or Defence under Section 22 of the 1984 Act;

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[9] ***[2007] 3 IR 389***

(vii) A requirement that the Defence set out at such a hearing the extent to which it agrees with the Prosecution as to documents and other matters in respect of which the Prosecution has sought agreement and any reason for disagreement.

(viii) The service by the Prosecution of a Case Statement within a specified time [see further below];

(ix) The service by the Defence of a Defence Statement [see further below]; and

(x) The issuance of the equivalent of a *'Certificate of Readiness'* in Criminal cases

4. PROSECUTION STATEMENTS AND DEFENCE STATEMENTS

4.1 Prosecution and Defence Statements are a regular feature of serious fraud cases in England and Wales. In the course of a Preparatory Hearing a nominated Trial Judge can direct the prosecution to make such a Statement and to set out therein: -

- The principal facts of the prosecution case
- The witnesses who will address these facts
- Any exhibits relevant to these facts
- Any proposition of law on which the Prosecution proposes to rely and
- The consequences, in relation to any charge on the Indictment, that appear to the Prosecution to flow from the matters stated in the above.

4.2 The Judge may also order the Prosecution to amend this case statement following objections thereto from the Defence. Furthermore the Judge may order the Prosecution to give the Court and the Defence notice of various documents, the truth of whose contents ought in the Prosecution's view to be admitted and facts which in the Prosecution's view ought to be agreed.

4.3 The Judge at the preparatory hearing may order the Defence to set out in general terms the nature of their Defence and indicating the principal matters on which issue is taken with the Prosecution.

4.4 There is no requirement in Irish law at present for the Prosecution to set out its case in writing in a manner such as that provided for in the United Kingdom. There is also little if any incentive for the Defence to set out its Defence to any prosecution. Consistent with the traditional common law approach, not only does the onus of proof at all times rest on the Prosecution but the current system means that the Defence can in effect *'wait in the long grass'*.

4.5 In a number of other common law jurisdictions, and to a lesser extent in this Jurisdiction, there has been gradual change in this regard. For example, under Section 20 of the Criminal Justice Act, 1984 the Defendant is required within a defined period to serve a Notice of Alibi on the prosecution in advance of the trial. There also have been various statutory amendments requiring the service of experts' reports in advance

of a hearing[10] and indeed the practice of Judges at trial has invariably been to allow the Prosecution time, if required, to respond to any expert evidence adduced at trial.

4.6 If the Judge Orders the service of a Prosecution case Statement, he or she will generally make an Order that within a defined period of time thereafter, the Defence provide to the Court the following:-

'(i) Notice of any objections to the Prosecution case Statement;
(ii) Notice stating the extent to which the Defence agree with the Prosecution as to the documents and any Prosecution Notices to admit.

4.7 The obligations imposed on the Defence under Section 9 (4) (d) of the 1987 Act, as explained in the previous paragraph, cannot really be understood without reference to the general obligation which now is imposed on all Defendants in trials on indictment in England. Under Section 5 of the CPIA, Act, 1996 there is a requirement on the Defence to serve the Defence Statements as part of the disclosure process and indeed the proceedings as a whole. Under Section 5 (6), (as amended), a Defence statement is a written statement:-

'(a) Setting out the nature of the accused's Defence, including any particular Defences on which he intends to rely;

(b) Indicating the matters of fact in which he takes issue with the Prosecution;

(c) Setting out, in the case of each such matter, why he takes issue with the Prosecution; and

(d) Indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose'.

4.8 In the case of ***R v. Bryant,***[11] the Court of Appeal commented that a general denial of the counts in the Indictment was not the purpose of the Defence Statement, which in that case was described as being '*woefully inadequate'.*

4.9 Provision is made for the cross-service of Prosecution and Defence Statements in relation to fraud trials and it is specifically provided under Section 10 (4) of the 1987 Act that no part of a Defence Statement or Prosecution Statement may be disclosed without the consent of the Defendant. Similarly if the Prosecution departs from the case made in its Case Statement or fail to comply with an Order made by the Judge, the Defendant may with the leave of the Court make a comment on such failure to the Jury.

4.10 Under the English system the rules of Court provide for sanctions where parties fail to comply with directions made at preparatory hearings. Such sanctions include wasted costs orders and a more general open ended sanction which has yet to be the subject of Judicial determination in England and Wales[12]

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[10] Section 34 of the Criminal Procedure Act, 2010 – this requires the Defence to obtain leave of the Court to adduce expert evidence and this shall not usually be given unless notice of the evidence is served at least 10 days before trial

[11] *[2005] EWCA 2079*

[12] Rule 3.5(6)(c) of the Criminal Procedure Rules provide for the imposition of '*any other sanction as may be appropriate'* **for failure to comply with directions at a Preparatory Hearing.**

4.11 The introduction of a system such as that in the United Kingdom would again present a radical departure in this jurisdiction. To date the requirements on the Defence to disclose any part of their case are mainly confined to the provision of an alibi notice under Section 20 of the Criminal Justice Act, 1984 and the advance disclosure of expert reports under Section 34 of the Criminal Procedure Act, 2010.

4.12 Given the nature of fraud trials and the desirability of using a system of Preparatory Hearings to identify the real issues in dispute prior to the empanelling of a Jury, there is a strong case for a provision allowing a Trial Judge to direct both sides to serve such Statements. In order to ensure compliance with this requirement the Oireachtas should give consideration to allowing a Judge to impose sanctions on parties who fail to comply with such directions. Such sanctions could include wasted costs orders or perhaps result in the Judge being permitted to make comment to the Jury on any such failure.

5. AMENDMENTS OF RULE AGAINST DOCUMENTARY HEARSAY

5.1 It is inevitable that the majority of fraud cases will involve to a greater or lesser degree a paper trail. The Prosecution will often seek to prove the fraudulent transaction or criminal / fraudulent intent by referring the Court to what are in reality uncontroversial documents and frequently documents of a kind with which members of the Jury are familiar from their daily lives. Wholly unnecessary complexity is introduced to the criminal trial process by the application of the rule against hearsay to the proof of these documents. There is a real possibility of cases collapsing because of a failure to prove elementary and obvious matters set out in uncontroversial documents due to the application of the hearsay rule.

5.2 Significant but piecemeal exceptions to the Rule against Hearsay already exist in the Criminal Law from both Common Law and Statute. In addition to the common law exceptions to hearsay, which include provision for the admission of 'public documents', there has been significant legislative intervention so far as documentary evidence is concerned. The most important of such exceptions include the admission of Business Records under Part II of the Criminal Evidence Act, 1992 and the admission of '*Bankers Books'* under the Bankers Books Evidence Acts 1879 - 1989.

5.3 Other less well known, but more substantial reforms, can be found in individual Acts of the Oireachtas in the main dealing with regulatory offences[13] These reforms include provisions not only for the admission of documentary evidence but also often allow for presumptions to be made in relation to documents so admitted. Certain provisions allow for a presumption that a document that appear to have been made by particular individuals have been made by that individual and that a statement in such document was made by the person who purported to make such document.[14]

[13] ***See Sections 12 and 13 of the Competition Act, 2002, Section 21 of the Social Welfare and Pensions Act, 2009 and Section 110A of the Company Law Enforcement Act, 2003***

[14] **Both these presumptions appear for example in Section 12 (2) of the Competition Act, 2002**

5.4 Another provision where there has been a substantial inroad on the common law rule against Hearsay is Section 52(6)(a) of the Criminal Law (Theft and Fraud Offences) Act, 2001. This provision, which only extends to offences being prosecuted under that Act, is of particularly wide effect. As noted above this section allows a District Judge to compel any person to provide material to a Garda investigating any offence under the Act which carries a prison sentence of five years of more. It then goes on to provide at sub-section (6)(a) that:-

> *'(6)(a) Information contained in a document which was produced to a member of the Garda Siochana, 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* [and the sub-section then goes on to provide for the same exclusions as under Sections 5 to 9 of the Criminal Evidence Act, 1992]

5.5 The Rule against Hearsay has been recently reviewed by the Law Reform Commission and its application in Criminal cases is dealt with at Chapter 5 of its Consultation paper on the Rule. Perhaps surprisingly the Law Reform Commission provisionally recommended that the existing exceptions to the hearsay rule in criminal proceedings should be retained, that hearsay should (subject to such exceptions) continue to be excluded in criminal proceedings and that there should be no statutory introduction of a residual discretion to include hearsay evidence as was done for example in the United Kingdom in the Criminal Justice Act, 2003.[15]

5.6 Interestingly an earlier 1980 Working Paper of the Commission took a less restrictive view on this question. This working paper considered that any reform of the law in this regard should be designed to ensure that all evidence which is logically probative is admissible[16] and considered that the simple solution was to retain the present exclusionary rule but give the Court a discretion to admit otherwise inadmissible hearsay evidence and noted that this approach was to a certain extent adopted by the United States in the then *Federal Rules of Evidence (1975).* Since that date common law jurisdictions appear to have adopted a more flexible approach to these matters. In the United Kingdom the Criminal Justice Act, 2003 gives broad powers to admit hearsay evidence in criminal trials. Section 114 of the 2003 Act provides for the admission of hearsay evidence if '*it is in the interest of justice for it to be admissible'* (Section 114 (1) (d)). This provision is additional to other sections which allow for inter alia the admission of hearsay evidence where a witness is dead or unavailable to attend (section 116), which is contained in a business or other documents (section 117) or is multiple hearsay (section 121).

5.7 Another route to reform, adopted in Canada and New Zealand, has been via the development of the common law. Such an option allows the Courts to create new categories of hearsay exceptions where the judiciary deemed the same necessary. In Canada the mode of reform of the rule of hearsay has been through the widening at common law of judicial discretion to admit hearsay evidence based on a consideration of whether the evidence is cogent and reliable. As a result of a number of decisions of the Canadian Superior Courts new exceptions to the hearsay rule can be admitted if the requirements of '*reliability*' and '*necessity*' are met. The New Zealand Law

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15 ***Section 114 of the Criminal Justice Act, 2003***

16 ***Working Paper on the Rule against Hearsay (WP No. 9/1980) at 17***

Commission has recommended a somewhat similar approach. There is little evidence of willingness on the part of the Irish Judiciary to widen or extend the current common law exceptions to the hearsay rule. In any event, as pointed out by the Law Reform Commission here, the concepts of 'reliability' and 'necessity' are necessarily vague terms and lack the necessary clarity the Criminal Law demands.

5.8 Given the already substantial reforms to the rule against Hearsay, so far as documents are concerned, in discreet areas of the Irish Criminal Law and the practice and experience in other Common Law jurisdictions, it is my view that consideration should be given to a general inclusionary rule in relation to documentary evidence in general. Such a general inclusionary approach should be accompanied by a Judicial discretion to exclude such material. It seems to me that the cautious approach to reform adopted by the Law Reform Commission on this question is not warranted so far as documentary evidence is concerned. The concerns of the Commission do not appear to have been shared by Oireachtas when it in effect abolished the rule against Hearsay in relation to the category of documents provided for in, for example, Section 12 of the Competition Act, 2002 or when it enacted a provision such as Section 52 of the Criminal Justice (Theft and Fraud Offences) Act, 2001.

6. IMMUNITY AND WHISTLEBLOWERS

6.1 The concept of immunity from prosecution for those who confess to crime and agree to give evidence against an accomplice is as old as the Common Law itself. Prior to the modern era the so called practice of *'approvement'* [the practice where a person would confess his part in a crime and name his accomplices] was an important asset to those detecting crime. In previous times the system was results-orientated. If the accomplices of the approver were convicted then the approver was granted a pardon. If, however, the accomplices were acquitted, then the approver was executed.

6.2 Since the foundation of the State, there seems to have been a general reluctance or unease on the part of the prosecuting authorities here to grant immunity from prosecution. It does not however appear to be a practice viewed with the same distaste for example in the United States. Indeed it may be that immunity may well have to be offered to successfully prosecute serious fraud in many cases.

6.3 Perhaps historical reasons have no small part to play in the differing attitudes. The concept of the informer or traitor who turns *'Queen's evidence'* is one which is deeply imbedded with considerable distaste in the Irish psyche.

6.4 Set against this, however, is the successful (albeit controversial) use of such allegedly tainted evidence in high profile recent cases involving, for example, prosecution of those believed to have been involved in the murder of the journalist Veronica Guerin. The Director and the Gardai have of course had to learn to deal with a witness protection programme and the issues that result from the grant of immunity.

6.5 Furthermore the 'Cartel Immunity Programme', introduced in December 2001, outlines in a transparent way the policy and procedures in applying for immunity for criminal offences under the Competition Act, 2002. The Notice outlining the programme identifies difficulties which are common to the investigation of corporate crime

generally and sets out a transparent procedure for applying for and being granted immunity for prosecution for such offences by the Director.[17] In the preface to the Notice there is reference to the fact that cartel behaviour is almost inevitably harmful to customers, cartels are by their very nature conspiratorial, the participants are secretive and the cartels are notoriously difficult to detect and prosecute successfully. Each one of these comments applies to many white collar fraud crimes. The offering of immunity should therefore similarly be used, in the general public interest in the punishment of those primarily responsible for serious white collar crime, to assist in the gathering of evidence and prosecution of such crime.

6.6 In the United Kingdom the question of immunity was thrown into focus when it emerged that the Soviet spy, Sir Anthony Blunt, had repeatedly been granted immunity from prosecution by successive Attorneys General. Sir Michael Havers QC, the then Attorney General issued a statement in the House of Commons setting out the relevant criteria for the grant of such immunity.

6.7 Other jurisdictions do not appear to share the same reservations when it comes to these issues. Indeed it would appear to be common place in the United States and, perhaps to a lesser extent, in the United Kingdom that the successful prosecution of white collar fraudsters can only normally be brought about where there is a person lower in the an organisation who is prepared to open up and give evidence. If the prosecution in this jurisdiction is to follow such a course, and in my view this will have to be done in many instances if such offences are to be successfully prosecuted, then again this is something which should be provided for in legislation.

6.8 In the United Kingdom there have been recent legislative developments in relation to immunity. The Enterprise Act, 2002 sets out the immunity and leniency process exercised by the Office of Fair Trading when investigating cartel and competition offences. A useful general template may be found in the Serious Organised Crime and Police Act, 2005 which gives power to the Director of Public Prosecutions, the Serious Fraud Office and other prosecuting agencies in the UK to grant immunity or to agree to reductions in sentences.[18]

6.9 I would suggest that the Oireachtas provide a similar statutory basis for the exercise by the various Prosecution agencies in this State of discretion to grant immunity in serious criminal cases. In many serious fraud cases the best evidence against the main perpetrator of a fraud can be an insider who has himself played some part in the wrongdoing under investigation. There should be a transparent set of rules to guide all parties in the Criminal Justice process as to the use and consequences of the grant of immunity in these cases.

6.10 Once again it is in the United States that there is to be found the most far reaching legislative intervention in this regard. Under the ***Dodd-Frank Wall Street Reform and Consumer Protection Act***, there is provision requiring the Securities and Exchange Commission pay rewards for information that leads to enforcement sanctions of at least €1 million. Detailed regulations are to be drafted to provide the rules under which these 'bounty hunters' will be remunerated.

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[17] ***Competition Authority Website – Cartel Immunity Programme Notice 2001***
[18] ***Sections 71 and 72 of the Serious Organised Crime and Police Act, 2005***

7. THIRD PARTY DISCLOSURE

7.1 Access to important evidence held by third parties will clearly be vital to both the Prosecution and Defence in many cases involving serious fraud. As has been made clear by the Supreme Court on a number of occasions there is presently no such thing as third party disclosure or discovery for the purposes of a criminal case.[19]

7.2 There is a compelling and unanswerable case for the enactment of legislation providing for the granting by the Courts of third party discovery or disclosure in all criminal cases and particularly in relation to cases involving allegations of Fraud.

7.3 A number of attempts by other means to obtain relevant material from third parties have to date failed[20] and the only way of ensuring such material is available now appears to be by way of primary legislation.

8. CRIMINAL JUSTICE BILL 2011

8.1 In the last number of weeks the Minister for Justice, Alan Shatter, TD, has published a Bill designed to improve procedural matters and to strengthen Garda investigative powers. In the explanatory Memorandum to the Bill it is said that the intention is that such improvements will assist in reducing delays associated with the investigation and prosecution of complex crime and in particular white collar crime.

Changes to Section 4 Detention

8.2 At the same time it is proposed to introduce change to the regime for detention for the purposes of investigation under Section 4 of the Criminal Justice Act, 1984. This is said to be done for two purposes, firstly to refine the provisions for detention to give effect to entitlements under the European Convention of Human Rights and the Constitution in relation to access to legal advice whilst in Garda Custody and secondly to set out more clearly the circumstances in which a person detained under Section 4 may be questioned between midnight and 8:00 a.m.

Suspension of Detention pending Further Investigation

8.3 The proposed change which is perhaps most applicable to white collar investigations is that in Section 7 of the Bill, which for the first time allows the suspension of questioning under Section 4 of the 1984 Act and the release of a person pending the carrying out by Gardai of further enquiries. This is designed to allow the Gardai to follow up on information which has been obtained during questioning and, at a later stage, to put further questions following such follow up to the suspect.

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[19] People (DPP) v Sweeney [2001] 4 IR 102 and H(D) v Groarke [2002] 3 IR 522

[20] In F(J) v DPP Macken J said that the subpoena duces tecum procedure was not to be treated as a mechanism for such discovery
In HSE v White [2009] IEHC 242 (currently under appeal) Edwards J granted an order quashing a decision of a Circuit Judge directing the HSE to make certain material available to the DPP for onward transmission to the Defendant.

8.4 The Scheme envisaged in the proposed Section 4 (3A) to (3F) of the Act would permit the Gardaí to suspend detention of a person being detained in respect of a '*relevant offence'* where there are reasonable grounds for believing that this is necessary to permit further enquiries to be made for the further and proper investigation of the offence for which he or she is detained. A notice in writing will be given upon such suspension directing the suspect to return at a time and date specified. A new notice specifying another time and date may be issued by a Garda not below the rank of Inspector. Detention can only be suspended on a maximum of two occasions and the total time for which detention may be suspended must not exceed four months from the date of the first interview.

8.5 Upon the suspect's return, at the nominated date, his or her period of detention recommences from the time when it was suspended previously. There are various provisions in the Bill which provide for matters such as the form of the Notice in writing, the making of regulations to give effect to the statutory provisions and the interaction between a detention which is suspended and any other detention to which a person may be subjected in the period of suspension.

8.6 The amendment to Section 4 in the Bill also purposes amendments to Section 4 Sub-Section 6 of the Act which deals with the questioning of a detained person between midnight and 8:00 a.m. In broad terms, it is proposed that a detained person shall not be questioned during this period other than (i) where the suspect objects to the suspension of questioning or (ii) the member in charge authorises questioning on the grounds that to delay would involve a risk of one of a list of circumstances occurring which include injury to other persons, serious loss or damage to property and/or the destruction or interference with evidence.

8.7 There are also proposed provisions to create an offence of failing to return to a Garda station for the continuation of a period of suspended detention.

Access to lawyers whilst Detained

8.8 A new Section 5A of the 1984 Act seeks to put on a statutory basis the right of access of a suspect to his or her lawyer prior to Interview when detained under Section 4.

8.9 Section 5A of the Bill sets out the general rule that no questioning of a person detained under Section 4 may take place until such time as he or she has had access to legal advice (whether in person or by telephone). There are exceptions to this general rule including:-

(a) The waiver by the detained person of the right to consult a solicitor;

(b) Where a member in charge has authorised questioning on the grounds that to delay would involve a risk of one of a number of circumstances occurring including injury to other persons, serious loss or damage to property, interference with evidence and/or the alerting of accomplices

8.10 Provision is also made for the detention clock to stop pending a solicitor making him or herself available for a consultation but the period for which this clock may stop is restricted to a maximum of three hours or, where a person objects to a suspension of questioning between midnight and 8:00 a.m., to a maximum of six hours.

8.11 Amendments are also proposed to Sections 18, 19 and 19A of the 1984 Act and Section 2 of the Offences Against the State (Amendment) Act, 1998 providing that an adverse inference under those provisions cannot be drawn unless:-

> *'(b) the accused was informed before such failure or refusal occurred that he or she had the right to consult a solicitor and, other than where he or she waived that right, the accused was afforded an opportunity to so consult before such failure or refusal occurred'* [21]

8.12 Similar amendments, requiring notification to be given of a right to access a solicitor, is proposed in relation to Section 72A of the Criminal Justice Act, 2006[22] (drawing of inferences from failure to answer questions in relation to organised crime offences under Section 72) and Section 3 of the Criminal Justice (Forensic Evidence) Act, 1990[23] (drawing inferences from failure to provide samples), are also in the Bill.

Duty to Provide Documents and Information

8.13 The Bill also deals with issues surrounding the provision of documents and information to investigators. Section 15 provides that a District Judge may, on the application of a member of An Garda Síochána, make an Order in relation to a *'relevant offence'*, for the making available by a named person of documents of a particular description or for the provision by a person of particular information by answering questions or making a statement containing such information.[24]

8.14 In either case the District Judge must be satisfied, on information on oath from a Garda, that there are reasonable grounds for believing that the information or documents are relevant to the investigation of the offence concerned, there are reasonable grounds for believing that the document or information is relevant to the investigation of the offence concerned and that the document or information should be provided having regard to the benefit likely to accrue to the investigation and any other relevant circumstances.

8.15 The information which may be the subject of an order under Section 15(1)(b) and (3) is limited to information obtained by a person in the ordinary course of business. Such a restriction does not however apply to an order requiring the production of documents.

8.16 There are detailed ancillary provisions providing inter alia that: -

(i) Where documents are not in legible form an order under Section 15 includes a requirement to provide a password or otherwise enable the named Garda gain access to such documents[25];

(ii) A Section 15 order may, under Sub-Section 5, include a requirement that a person allow a Garda enter a place to obtain access to documents;

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[21] Proposed Amendment to Section 18 (3) at Section 9 (c) of Bill
[22] Section 11 of Bill
[23] Section 12 of Bill
[24] Section 15(2) (i) and (ii) and (3)(i) and (ii)
[25] Section 15(6)

(iii) A person who provides information on foot of questions put under a Section 15 Order is required to make a declaration of the truth of such answers; and

(iv) Allowing Gardaí to take away documents or copies of documents; and

8.17 The constitutional/convention requirements in relation to the right to silence are sought to be protected presumably by Section 15 (10) which provides that:-

> *'A statement or admission made by a person pursuant to an Order under this Section shall not be admissible as evidence in proceedings brought against the person for an offence (other than an offence under sub-section (15), (16), and (17).'*

8.18 There are various proposed provisions dealing with the certification of the authenticity of documents, the retention of documents pending criminal proceedings, and the return of documents. Section 15 (15) provides for an offence, punishable on summary conviction or indictment, of failing or refusing to comply with an Order from the District Judge to produce the said documents/information.

8.19 The proposed Section 16 of the Bill deals with the next question of privileged legal material. This is defined in Section 16 (1) as '*a document which, in the opinion of the Court concerned, a person is entitled to refuse to produce or to give access to it on the grounds of legal professional privilege'*.

8.20 Section 16 sets out a procedure for the determination by a District Court Judge of claims of legal professional privilege in relation to documents which are sought by investigating Gardai under these sections. Under Section 16 (2) and (3) a member of An Garda Siochana or the person from whom the document is sought, may seek a ruling from the District Judge as to whether the document is a legally privileged document. There is a provision of a kind new to Irish Law in Section 16(5) of the Bill which provides for the appointment of an independent lawyer to report to and assist a District Judge in relation to claims of privilege on certain documents. Section 16 (5) provides as follows:-

> *'… pending the making of a final determination of an application under sub-section (2) or (3), the Judge of the District Court may give such interim or interlocutory directions as the Judge considers appropriate including, without prejudice to the generality of the foregoing, in a case in which the volume of documents that are the subject of the application is substantial, directions as to the appointment of a person with suitable legal qualifications possessing the level of expertise, and the independence from any interest falling to be determined between the parties concerned, that the judge considers appropriate for the purposes of -*
>
> *(a) Examining the documents, and*
>
> *(b) Preparing a report for the Judge with a view to assisting or facilitating the Judge in the making by him or her of his or her determination as to whether the documents are privileged, legal material'*.

8.21 There is a further provision at Section 17 of the Bill for the creation of an offence relating to the falsification, concealment or construction of documents relevant to a Garda investigation into a relevant offence (other than an offence to which Section 51 of the Criminal Justice (Theft and Fraud Offences) Act 2001 applies.

8.22 Section 18 provides a welcome series of evidential presumptions to arise where documents are sought to be admitted in evidence in proceedings for a relevant offence. The proposed section provides for presumptions on the creation, ownership, receipt and attribution of documents. These are very much along the lines suggested in Paragraph above.

8.23 Section 19 is described as a new offence '*similar to the former misprision of felony offence'*, which relates to the failure to report information to the Gardaí. This proposed section provides that a person who has information which he or she knows or believes might be of material assistance in preventing the commission by another person of a relevant offence or in securing the apprehension, prosecution or conviction of another person for such an offence, and who fails without reasonable excuse to disclose such information as soon as practicable to the Garda Síochána, shall be guilty of an offence.

9. CONCLUSION

9.1 As can be seen from the above there have been many useful developments over the years which can assist in the proper and fair prosecution of fraud cases.

9.2 The Criminal Justice Bill 2001 contains provisions which go further in assisting in the investigation and prosecution of such offences and the proposed measures therein are to be welcomed.

9.3 In my view, however, more can and should be done by way of legislative intervention and particularly in order to streamline the trial process. The proposals set out above relating to (a) Preparatory or Pre-Trial Hearings, (ii) Prosecution and Defence Statements, (iii) Immunity and Whistleblowers and (iv) a general reform of the law on Documentary Hearsay, would go a long way to ensuring that the real issues in dispute in any criminal prosecution for fraud would be the subject of a Jury trial.

PATRICK MC GRATH
25th May 2011