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Prosecuting Corruption in Ireland

Introduction

There is a widespread perception in Ireland that corruption and white collar crime are not prosecuted. I want in the brief period that I have to try, first of all, to give you some information about the extent of prosecution of corruption in Ireland. Secondly, I propose to say a little about the problems of prosecuting corruption and fraud and to look at what can be done about these difficulties. Although I would like to deal with white-collar crime in general it is a huge area so in the time available I propose to talk mainly about prosecuting corruption.

The Legislative Framework

Before 2001 the anti-corruption laws in Ireland were very weak. Prior to that, the mere proof that a payment was made to a public official was not sufficient to establish the offence of bribery. It was necessary also to establish that the purpose of the payment was so that the official would do an act or refrain from doing an act in the course of his duty which conferred a benefit on the person making the payment. For this reason, the mere proof of a payment to a politician was insufficient to establish the offence of bribery since the politician would invariably state that the payment was made as a political donation because the donor admired the particular work of that politician, which, of course, in a sense was true.

The Prevention of Corruption (Amendment) Act, 2001, introduced a presumption of corruption. In the case of criminal proceedings against public officials, if it is proved that any gift, consideration or on advantage has been given to the official and that the person who gave the gift or whose behalf the gift was given had an interest in the discharge by the official of certain functions, the gift is deemed to have been given and received corruptly unless the contrary is proved. The section applies to the granting, refusal, withdrawal or revocation by the State of any licence, permit, certificate, authorization, or similar position. It also applies to the making of decisions relating to the acquisition or sale of property by the State and to any functions of the State under the Planning Acts.

While this section does not cover every function carried out by public officials, nonetheless it has hugely strengthened the position of the prosecutor in relation to bribery prosecutions.

A further additional strengthening of legislation has also taken place in the State in the form of the Ethics in Public Office legislation. Broadly speaking, this requires all office holders to make declarations of their property interests and any gifts received by them above a certain sum, and failure to make appropriate disclosure or the making of wrong disclosure is itself a criminal offence.

A continuing weakness of the regime to prevent corruption is that private donations to political parties are still not limited although they have to be declared above a certain amount. The presumption in the 2001 Act applies only to a gift made to an individual office holder, and therefore no presumption arises in respect of a donation made to a political party. While I am aware that there are strong views by those who do not believe that the financing of political parties should be a function of the state, once the possibility of private donations to political parties who in turn can make decisions which are of benefit to individuals is permitted to continue without limitation it seems to me that there will be a continuing possibility for a form of corruption to exist proof of which in legal proceedings would be extraordinarily difficult. The difficulty, of course, is where to draw the line between making a donation to a political party because one approves of its policies and activities, and at what point those activities cross the line in improperly conferring individual benefits on persons who make donations.

Some Statistics

Statistics provided to GRECO and published in their Evaluation Report on Ireland[1] show that in the years 2005 to 2008 17 prosecutions were directed under the Prevention of Corruption Acts. Twelve of these were prosecutions on indictment. Ten cases resulted in convictions on indictment, one person was acquitted, and one case could not proceed due to a serious illness on the part of a key witness. Sentences of imprisonment were handed out in four cases, typically in the 18 month to 30 month range. In the remainder there were suspended sentences usually between 6 to 12 months and in some cases a fine. The

[1] GRECO Eval 3 Rep(2009)4E

maximum fine imposed was €20,000. In four cases where I had consented to summary disposal on a plea of guilty such a plea was forthcoming and the cases were dealt with in the District Court. Two other less serious cases were disposed of summarily in the local District Court.

The GRECO Report provides a number of examples of the type of activity involved in these types of cases. One member of the Garda was sentenced to four-and-a-half years' imprisonment for receiving a bribe amounting to €18,000. One local government official was convicted and sentenced to one year's imprisonment, but the conviction was overturned and he was subsequently acquitted in a second case.

Another case involved a Chinese national who referred Chinese students who had come to Ireland to study English but did not meet the conditions for visa extension to a Garda working in the Garda Immigration Bureau. Both the Chinese national and the Garda were convicted in relation to bribery in relation to the false stamping of passports. Another case involved a Garda who received a gift in relation to the processing of work permits for foreign nationals. An official of the Department of Justice, Equality and Law Reform, was convicted in relation to receiving bribes in return for the issue of residency permits to foreign nationals. Another Garda was convicted for corruptly accepting a gift from a major criminal gang and was sentenced to four-and-a-half years. He served 18 months for the offence. A former Government Press Secretary, having been charged with 16 counts of corruption pleaded guilty to five and was sentenced to two years imprisonment with six months suspended and fined €30,000.

In addition there have been a number of other cases which while not involving corruption directly are perhaps relevant. A T.D. has been convicted under the Electoral Act 1997 for failing to disclose a political donation, a former minister of Government has been convicted for knowingly or willfully declaring false information in relation to his taxation affairs, a local councilor in breach of the ethics legislation as regards rezoning of lands pleaded guilty to seeking to influence a decision of the local council, and another official was convicted of fraud, attempted theft, deception and false accounting for the misappropriation of council funds, and given a one-year jail sentence and fined €75,000, although this conviction was subsequently overturned on appeal.

A number of cases are pending before the courts at present, including one where a councilor is accused of receiving bribes in connection with planning decisions and another where a senior official in a semi state body is accused of receiving bribes in connection with the making of grants.

Problems with Prosecuting Corruption Offences

I propose to say a little about some of the problems which are associated with the prosecution of corruption. Firstly, there is the problem that in many cases corruption is what is often wrongly referred to as a "victimless" crime. Of course, the crime is not victimless in the sense that society as a whole is a victim, and on occasion there may be an individual victim who is perhaps deprived of a benefit which he or she would have received had not the other person obtained the benefit as the result of a bribe. However, while the offences are not in fact victimless, typically the victims are not aware that in fact a crime has been committed and that they have been the victim of it. In most cases the only people with direct knowledge of the offence are the two people who commit it, the payer of the bribe and the person receiving the bribe.

It is for this reason that very often such crimes only come to light when there is a falling out between the two individuals concerned. It is not unknown, for example, for an offence to come to light when an estranged spouse effectively decides to spill the beans on the other partner who has been engaging in offences of corruption. Or there may be a falling out between business partners. The corrupt activities of the former Taoiseach, Charles Haughey, would probably not have come to light but for the disputes which took place within the Dunne family over control of the family's supermarket business.

For this reason, whistleblower legislation can be of great assistance in dealing with offences of corruption. At present there is no legislation in Ireland to protect whistleblowers from, for example, being victimized by their employers or being sued in damages. When the Freedom of Information legislation was being drafted some years ago I recall that the original draft contained whistleblower provisions but these were subsequently dropped. It was intended that they would be the subject of further legislation, but to date this has not happened. At present there is a Bill before the Oireachtas, the Prevention of Corruption (Amendment) Bill 2008, section 4 of which

proposes to insert a whistleblower section into the Prevention of Corruption (Amendment) Act 2001, providing protection against an action for damages or against dismissal in respect of communications of an opinion that an offence under the Prevention of Corruption Acts has been committed. This legislation, when enacted, will be a valuable addition to the anti-corruption legislation.

So far as concerns a whistleblower who has also engaged in criminality, the possibility exists of seeking an immunity from prosecution from me since in Ireland prosecution is a discretionary matter and even where an offence is committed I have the power to decline to prosecute on public interests grounds. However, one of the problems of offences of corruption is that in many cases it is impossible to say which of the two parties to the corrupt act are more culpable, and as a general rule it would not be regarded as desirable to confer immunity from prosecution on persons who were the imitators or the major players in a criminal enterprise. Of course, there may be exceptions, such as would be the case where an official made a practice of soliciting bribes from large numbers of persons, and in such a case it might be appropriate to offer immunity to somebody who paid such a bribe it having been sought on the initiative of the person who received it.

A second problem concerns the mass of material which often comes into being in connection with such cases. One of the side effects of modern technology has been to produce many records in real time which of necessity take a very long period to read or to view. It is easy to forget that any process of evaluation necessarily involves selection of material and analysis. The process of remembering necessarily also involves a process of selection and forgetting. I am reminded of a short story by the Argentinean writer Borges in which the protagonist could forget nothing that he had ever experienced in his lifetime. The effect of this was also that he could remember nothing since the only way he could trace the events of any particular day he had lived was by starting at midnight of that day and remember each successive second, a process which took him 24 hours exactly in respect of each day. One is reminded also of the map which was exactly the same size as the area being mapped. While such a map is of course the most accurate that can be imagined, it is also useless as a map.

Modern technology is imposing the same problems on the process of litigation, including criminal litigation and we have yet to find solutions. Frequently there is now a mass of

material which has been recorded in real time by CCTV, and this takes a great deal of time and patience to evaluate. In addition, all emails are preserved for a certain length of time as are all telephone records, and vast amounts of information are stored digitally on the hard drives of computers. Our legal system has yet to find mechanisms to cope with this flood of material, with the result that we have the absurdity that a tribunal which was established, as it has to be under the relevant legislation, to enquire into an "matter of urgent public importance" is still deliberating 13 years later. It seems almost as if our legal system has yet to come to grips with the idea that the human life span is not infinite.

A slightly different problem is that of complexity. Modern financial transactions and consequently the manner in which people commit fraud, have become much more complex and therefore difficult for the lay person to understand. Yet we still select juries at random – or, indeed, as I have suggested on other occasions, not entirely at random in that we tend to exclude a large proportion of the population who might actually understand such complexity by reason of their educational background or training, and then expect juries to be able to make a sensible finding in relation to such matters. In Ireland, trial by jury is constitutionally mandated. I served on an advisory committee on fraud 18 years ago which was chaired by Peter Maguire S.C. and we had occasion to look at this problem. At the time we looked at the idea of having expert assessors sit with juries, although personally I would be very doubtful that such a proposal could be accommodated without an amendment to the Constitution.

In the United Kingdom this problem has also been considered and led to a proposal for a Fraud (Trials without a Jury) Bill which was subsequently defeated in the House of Lords. The Bill was proposed for a number of reasons, including that if jurors were truly to be regarded as the defendant's peers, they should be experienced in the professional or commercial discipline in which the alleged offence occurred, that the volume and complexities of issues in fraud cases may be too difficult for jurors to understand or analyze so as to enable them to determine whether there has been dishonesty, that the length of trials can impose unreasonable intrusions on jurors' personal and working lives, that for this reason juries are even less representative of the community than normal since business persons who might understand the complexities involved tend to be excused because of the disruption to their working lives, that jury trials of such length are unduly expensive, and that trial by judges alone would be more open since there would be

publicly reasoned and appealable decisions rather than the "present inscrutable and largely unappealable verdict of the jury".[2]

A final point which members of the public often fail to understand is how evidence can be given before a tribunal which may disclose the existence of a fraud and no criminal prosecution subsequently ensues. Of course, the reason for this is very simple. Tribunals of enquiry have powers of compulsion, even though the normal rule is that no person may be required to inculpate himself or herself. The *quid pro quo* of the power to compel persons to give evidence before a tribunal is that that evidence cannot subsequently be used against that person to prosecute them for a criminal offence. Hence we have had the spectacle of persons before a tribunal admitting that they paid and received bribes, and yet there was no evidence which I could put before a jury in a criminal trial of the same two people since I would not be entitled to call them as witnesses against themselves.

Conclusion

Within the past ten years or so, as a result of significant legislative changes, there has been a higher rate of prosecution of corruption than was the case before that. There has also, I believe, been a significant public change in attitude to such offences. I think most members of the public now realize that there is a very high price to be paid for toleration of corrupt and shady practices and for the "cute hoor" culture. The introduction of a presumption in relation to payments in the 2001 Act was a significant strengthening of the law, as was the introduction of ethics in public office legislation. However, there are still significant weaknesses in the legislative scheme. I do not believe that so long as the private financing of political parties is allowed in an unlimited way it will be possible to eliminate political corruption. I also think that we need to give serious consideration to whether jury trials are appropriate in relation to offences of fraud. The current political and economic crisis may well provide the circumstances in which serious attention will be given to such issues, since I think most people now realize the consequences of turning a blind eye to corruption.

[2] M. Peck, *The Fraud (Trials without a Jury) Bill 2006-07*, Research Paper 06/57, House of Commons Library, 23 November 2006