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Prosecutors, Regulators, Trial by Jury and the Prosecutor's Discretion

PROSECUTORS, REGULATORS, TRIAL BY JURY AND THE PROSECUTOR'S DISCRETION

Introduction

In the last 2 – 3 years the importance of thorough and robust regulation in the financial sector has become apparent in a way few could have imagined. As the various regulators sift through the remnants of the financial system seeking to hold those responsible to account public debate has focused on the issue of regulation generally. The weaknesses and failures of regulation in various areas are obvious in hindsight as are many of the remedial steps that will, presumably, now be taken. What is, however, less apparent is the various structural and systemic issues in the prosecution system which, it is suggested, serve to render difficult regulatory prosecutions and dis-incentivise the taking of such cases by regulators.

The scope of this paper is to suggest a number of fundamental reforms to the manner in which such cases are prosecuted in order to bolster the regulatory function of the various bodies involved.

- Firstly it is suggested that regulatory prosecutors should be given a greater role in bringing prosecutions on indictment;

- Secondly, confining regulatory prosecutors to a limited number of criminal offences is illogical and causes significant practical problems;

- Thirdly, the over-reliance on Gardaí for the purpose of exercising powers of arrest and other ancillary statutory powers is an impediment to proper investigation;

- Finally, a more consistent approach needs to be taken to various exceptions to the hearsay rule in criminal prosecutions as set out in the various regulatory statutes;

The Regulator as Prosecutor

Central to the various issues addressed below is an understanding of the very different nature of the roles performed by a regulator who prosecutes on the one hand and that of a public prosecutor such as the DPP. Some of these distinctions are as follows:

- The function of a public prosecutor is to prosecute, within reason, all crimes brought to his attention where there is sufficient evidence to do so and no good reason not to[1]. The role of the regulator is considerably more selective. No regulator can hope to prosecute all or even most of the offences falling under his purview. Rather regulators prosecute on a selective basis, often informed by the existence of limited prosecutorial resources, with a view to making an impact on the sector to be regulated.

- Regulators may well feel entitled to ignore, or at least not prosecute, certain offences for reasons of expedience, convenience or resourcing. The DPP does not enjoy such a position.

- Most obviously the regulator performs a host of other functions in relation to the sector being regulated – most notably that of investigating the offences which are then the subject of prosecution. The DPP has no investigative role or function.

- The role of the DPP is limited to that of enforcing a set of pre-existing rules in relation to past behaviour. Regulators will be as interested, if not more so, in influencing future conduct.

- The role of the regulator frequently calls for a significant degree of expertise in a particular sector or industry. The expertise brought to bear by the office of the DPP is principally legal and forensic expertise of a somewhat more generic nature.

It is one of the suggestions of this paper that the present system of prosecution of regulatory offences by the DPP necessarily restricts the degree of regulation that can be brought to bear by a given regulator.

[1] See Kelly: The Irish Constitution (4th ed.) 5.4.22

In the DPP's Strategy Statement, 2007 – 2009 the following description was given of the nature of the relationship between regulators and the DPP:

> "In addition there are a number of specialised investigation agencies with power to investigate crime in specific sectors and to prosecute summarily. They include the Revenue Commissioners, the Competition Authority, the Office of the Director of Corporate Enforcement, and the Health & Safety Authority. Their relationship to the Director is similar to that of the Garda Síochána."

It is suggested that it may be worthwhile reassessing the nature of that relationship with a view to enforcing more robust regulation on a prosecutorial level.

Prosecutions on indictment – a role for regulators

The role of the DPP as the exclusive prosecutor on indictment derives from Article 30.3 of the Constitution which previously designated the Attorney General as the only person entitled to prosecute on indictment:

> "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

The functions of the Attorney General were transferred to the DPP by means of the Prosecution of Offences Act, 1974.

It would be a mistake to assume that the purpose of Article 30.3 was to restrict the role of prosecuting on indictment to the Attorney General on the basis that only one of the chief law officers of the State could discharge so solemn and grave a role. Rather it probably had more to do with seeking to restrict private prosecutions to courts of summary jurisdiction. Article 30.3 essentially replicates the terms of Section 9 of the Criminal Justice (Administration) Act, 1924 in constitutional form. Prior to the 1924 private prosecutions were permissible albeit not particularly common subsequent to the introduction of the Vexatious Indictments Act, 1869 which had been introduced to restrict a growing number of private prosecutions.

The point for present purposes is that Article 30.3 allows the Oireachtas to delegate legal personages other than the Attorney General (for which read DPP) to prosecute on indictment.

The designation of the DPP as the exclusive prosecutor on indictment has, it is suggested, had the unforeseen consequence of dis-incentivising the use of prosecution as a regulatory tool by prosecutors. Any regulator who institutes a necessarily summary prosecution will invariably do so in the hope that the District Court accepts jurisdiction. The consequences of a refusal of jurisdiction are often regarded as highly undesirable from a regulator's perspective.

Firstly the regulator effectively looses control of the prosecutorial process. This is significant in terms, firstly, of the onward progression of the prosecution, but more significantly in terms of the final disposal of same.

Many of the regulatory agencies that prosecute on a regular basis maintain a permanent in-house legal staff. When jurisdiction is refused and the case has to be reconstituted as a prosecution at the suit of the DPP either the Chief Prosecution Solicitor or the local State Solicitor will essentially take over carriage of the proceedings. Inevitably this will result in a significant degree of replication of function and delay – incidentally similar concerns in relation to the role of the Chief State Solicitor's Office informed the recommendations of the Prosecution System Study Group resulting in the setting up of the Chief Prosecution Solicitor.

In the course of the proceedings on indictment matters are further complicated by virtue of the fact that it is no longer the regulator that is calling the shots in relation to the prosecution. This may be the case notwithstanding the highly specialised and technical nature of the evidence in the case. Most critically the regulator will no longer have the final say in relation to what plea is acceptable or how the case should be disposed of ultimately.

As noted previously the role of a regulator as prosecutor is fundamentally different to that of the DPP and the considerations that will feed into the decisions to be made during the run of a case are also fundamentally different. In the context of federal regulatory prosecutions in the US it is not unusual for regulators to enter into Non-Prosecution Agreements or Deferred Prosecution Agreements with individuals and companies. Whilst

such an approach in this jurisdiction may well be regarded as a bridge too far it nonetheless serves to underline the importance of prosecution as one of the weapons in the armoury of a regulator who is seeking to influence the manner in which a particular industry or sector behaves.

In considering the issue of whether or not regulators should be allowed to prosecute on indictment it is worthwhile reflecting on a number of matters:

- Regulators are creatures of statute no different from the DPP. It is at best unclear why prosecution on indictment should be an executive function that is restricted to one body only.

- Regulators are already entrusted with a significant prosecutorial function in relation to summary prosecutions. It is worth bearing in mind that the maximum jurisdiction of the District Court in terms of custodial sanction stands at 24 months. Very few sentences in excess of that maximum have ever been handed down on indictment in relation to offences that are regulatory in character. Arguments against expanding the prosecutorial role of regulators on indictment predicated upon the likely increased penalties, therefore, would seem not to hold water. Indeed it is not immediately apparent as to whether there is any great distinction in practical terms between prosecuting summarily and on indictment.

- Unlike the DPP whose function is to respond to crime rather than prevent it the regulator is more likely to be held accountable for failings in relation to prosecutions – and perhaps rightly so. As such regulators should be given a role commensurate with that degree of accountability.

- Is there any identifiable benefit to having, in practical terms at least, two prosecutors in respect of the one prosecution? How does the involvement of the DPP assist the process?

Choice of charge

Inevitably regulators are confined to a fairly limited suite of offences set out in the relevant legislation. Anyone who prosecutes regulatory offences on a regular basis will be all too familiar with the various issues which arise with monotonous frequency in relation

to such offences. Invariably the section creating the offence will have been drafted without any consideration being given as to how such an offence might actually be prosecuted. The section will frequently specify any number of conditions precedent prior to liability which then become proofs for the prosecution. Most problematically such offences often seem to stipulate wholly unreal levels of criminal intent as having to be proven given the essentially regulatory nature of the offence.

A rather spectacular example is to be found in Sections 31 – 40 of the Companies Act, 1990 which makes it an offence of a director of a company to take certain loans from a company. The elements of the offence and the various exceptions to it are spread over 9 different sections and the section actually creating the offence seems to require that not only did the accused know what he was doing but knew that by doing so he contravened the law. As such ignorance of the law is actually a defence to such a charge.

Unlike criminal offences which are created by statute with a view to ease of prosecution the overwhelming majority of regulatory offences appear to be drafted with little reference to the possibility of prosecution. Rather the format of many statutes and regulations is simply to require that people act in a certain way and then somewhat blithely criminalise any default.

This leads to rather obvious problems in terms of the running of cases. More fundamentally, however, regulatory offences do not lend themselves particularly to circumstances where some element of dishonesty forms part of the regulatory offence. The existence or otherwise of such dishonesty on the evidence is generally not relevant to the actual prosecution of the charge on a definitional basis. As matters presently stand the regulatory prosecutor is not in a position to prefer additional charges of a more generic and purely criminal character which would potentially avoid many of the pitfalls of exclusively regulatory offences and in addition would allow for the agitation of elements of dishonesty and more traditional forms of criminal intent in the course of prosecutions.

Leaving aside the issue of redrafting much of the regulatory codes that seek to create specific offences it is unclear as to why a regulator should not be able to prefer a broader range of criminal charges where appropriate.

Reliance on Gardaí

The last number of years have seen a very significant bolstering of the investigative powers of Gardaí particularly in relation to questioning as provided for under Sections 18, 19 and 19A of the Criminal Justice Act, 1984. Many of these additional powers only arise subsequent to arrest. Necessarily this assumes that such powers can only be exercised in circumstances where the Gardaí are involved. It would seem to follow that the regulatory prosecutor can only hope to utilise such powers in circumstances where either the co-operation of the Gardaí has been secured or, in a relatively limited number of cases, where a Garda has been seconded to work directly with the regulator in question.

This has a number of practical consequences. Firstly in the vast majority of regulatory investigations these very significant powers will simply not be available to the regulator. Secondly, where powers of arrest are invoked and utilised it is inevitably the Gardaí who conduct interviews. Whilst the use of skilled interrogators is undoubtedly of significant assistance the fact that non-Gardaí take little or no part in such interviews imposes a significant limitation on the level of expertise that can be brought to bear in relation to such questioning.

It is suggested that there needs to be a re-assessment of the extent to which regulators are obliged to rely upon the Gardaí in the course of investigations for the purpose of exercising what must be regarded as basic investigative procedures.

Rule against hearsay in criminal cases

The recent consultation of the Law Reform Commission on Hearsay in Civil and Criminal Cases does not recommend any great degree of reform in relation to the manner in which the rule against hearsay operates in criminal cases. As such the approach which appears to be advocated in same would seem to be rather conservative. Whilst there is much to be said in favour of such an approach the fact remains that the hearsay rule probably represents the greatest single hurdle in the context of regulatory prosecution. Prosecutors will frequently encounter enormous difficulty in proving the simplest of transactions which are otherwise “evidenced” by extensive documentation.

In its earlier consultation paper on Documentary and Electronic Evidence the Law Reform Commission advocated a somewhat more radical approach in relation to purely documentary hearsay. Specifically it recommended that documentary evidence should be

rendered admissible in criminal proceedings where the court is satisfied as to relevance and necessity and moreover that subject to appropriate safeguards business records which are already capable of certification under the Criminal Evidence Act, 1992 should be presumed to be admissible in the context of criminal proceedings. Such a move would very significantly change the landscape so far as regulatory prosecutions are concerned.

At present the position in relation to different types of regulatory prosecution is hopelessly confused and inconsistent. Under the Companies Acts and the Competition Acts there are a number of useful evidential presumptions in relation to documentary evidence[2]. At their most basic level these presumptions allow a court to presume that the person who appears to have signed a document did in fact sign it. However, these presumptions only apply to prosecutions under each of the respective acts. Such a distinction is illogical and inconsistent. Either the presumptions should apply or they should not. It is quite possible at present (for the DPP at least) to mount one prosecution alleging offences under various different codes which each give rise to wholly separate evidential presumptions.

Conclusion

It is suggested that if the public wish to see regulators pursue prosecutions in a more robust fashion in the future that the impediments outlined above need to be remedied. Quite apart from the issue of resourcing regulators appropriately the legislative structure of the criminal justice system is presently geared almost exclusively towards the prosecution of non-regulatory crime and assumes that all prosecutors are bound by the considerations which bind public rather than regulatory prosecutors. It is, perhaps, unsurprising that regulatory prosecutions have in the past been modest in scope and effect.

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[2] See Section 110A of the Company Law Enforcement Act, 2001 and Sections 12 & 13 of the Competition Act, 2002