Neutral Citation Number: [2014] EWHC 3803 (QBD)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(SITTING AT NEWPORT CROWN COURT)
ON AN APPLICATION FOR A VOLUNTARY BILL OF INDICTMENT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 November 2014

Before:

LORD JUSTICE FULFORD
(Sitting as a judge of the Queen's Bench Division)

- -

Between:

Serious Fraud Office	**Applicant**
- and -	
Eric Evans	**Respondents**
David Alan Whiteley	
Frances Bodman	
Stephen Davies	
Richard Walters	
Leighton Humphreys	

- -

Michael Parroy QC
David Fosdick QC
Allison Clare
Ben Valentin
(instructed by **The Serious Fraud Office**) for the **Prosecution**

Patrick Harrington QC
John de Waal QC
Ben Douglas-Jones
(instructed by **Blackfords**) for **Eric Evans**

Phillip Hackett QC
David Hassell
(instructed by **Declan McSorley & Jon Lewis**) for **Alan Whiteley**

Michael Beloff QC
Gabriel Moss QC
Timothy Morshead QC
James Potts
(instructed by **Charles Russell Speechlys LLP**) for **Stephen Davies**

Nicholas Purnell QC
Jonathan Barnard
(instructed by **Hugh James**) for **Richard Walters**

John Charles Rees QC
Jonathan Elystan Rees
(instructed by **de Maids**) for **Leighton Humphreys**

Hearing dates: 14, 15, 16, 17, 20, 21 and 22 October 2014

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Lord Justice Fulford:

Introduction

1. This is the reserved judgment on an application by the Serious Fraud Office ("*SFO*") for a voluntary bill of indictment. The application follows the decision of Hickinbottom J on 18 February 2014 dismissing the single charge on which the prosecution had sought the trial of the six defendants (reflected, with slight amendments, in count 1 below). The substantive hearing of the dismissal application took place between 16 and 19 December, and there was a further hearing on 10 February 2014 – the latter was occasioned by a question from the judge following the end of the oral submissions on 19 December 2013 (set out below).

2. The proposed indictment in its current form contains two counts, as follows:

> *Count 1*
>
> *STATEMENT OF OFFENCE*
>
> *CONSPIRACY TO DEFRAUD contrary to Common Law.*
>
> *PARTICULARS OF OFFENCE*
>
> *ERIC EVANS, DAVID ALAN WHITELEY, FRANCES BODMAN, STEPHEN DAVIES, RICHARD WALTERS, LEIGHTON HUMPHREYS, between the 1st of January 2010 and the 31st of December 2010, conspired together to defraud Neath Port Talbot County Borough Council, Bridgend County Borough Council and Powys County Council ("the Mineral Planning Authorities") and the Coal Authority by deliberately and dishonestly prejudicing their ability effectively to enforce restoration obligations relating to open cast coal mining at sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales by:*
>
> > *i) establishing companies registered in the British Virgin Islands, in the ultimate beneficial ownership of Eric Evans and David Alan Whiteley; and*
> >
> > *ii) transferring the freehold title in the land containing and surrounding the opencast coal mining sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales from Celtic Energy Ltd to those companies registered in the British Virgin Islands;*
>
> *thereby intending that the financial liability to restore those open cast coal mining sites to open countryside and/or agricultural use would pass from Celtic Energy Ltd to those companies in the British Virgin Islands, thereby releasing some of the money set aside in Celtic Energy Ltd's annual accounts to restore those open cast coal mining sites, and allowing some of that money to benefit the Defendants personally.*
>
> *Count 2*
>
> *STATEMENT OF OFFENCE*
>
> *CONSPIRACY TO DEFRAUD contrary to Common Law.*

PARTICULARS OF OFFENCE

ERIC EVANS, DAVID ALAN WHITELEY, FRANCES BODMAN, STEPHEN DAVIES, RICHARD WALTERS, LEIGHTON HUMPHREYS, between the 1st of January 2010 and the 31st December 2010, conspired together to defraud Neath Port Talbot County Borough Council, Bridgend County Borough Council and Powys County Council ("the MPAs") and the Coal Authority by deliberately and dishonestly prejudicing their ability effectively to enforce restoration obligations relating to open cast mining at sites known as East Pit, Nant Helen (Nant Gyrlais), Selar and Margam (Park Slip West and Kenfig) situated in South Wales ("the sites") by dishonestly agreeing:

i) to establish and control shell companies registered in the British Virgin Islands ("the BVI companies"), and

ii) to cause one or more than one of the BVI companies to act against its/their financial interests by entering into a transaction at an undervalue, by which it/they acquired the freehold title of the sites from Celtic Energy Ltd ("Celtic"), and assumed liability to undertake substantial restoration works in respect of the sites and/or to indemnify Celtic in respect of any liabilities it might have in respect of the sites, without receiving adequate consideration in return and in the knowledge that Oak would be unable to meet those legal obligations, and

iii) to conceal from, and/or misrepresent to, the MPAs and other relevant parties the true nature of the transaction as set out at 1 and 2 intending thereby that:

a.the MPAs and/or Coal authority [sic] *and other relevant parties would accept that substantially all of the financial liabilities to restore the sites to open countryside and/or agricultural use had passed from Celtic to the BVI companies;*
b.the BVI companies would be unable to, and would not, meet any such liability;
c.the MPAs and/or the Coal Authority would be unable, during any investigation they conducted, to discover the true nature of the transactions as set out at 1 and 2 above and the MPAs would thereby be inhibited or deflected from carrying out their duty to consider how best to secure compliance with the relevant planning conditions;
d.the MPAs would be deterred from exercising their planning enforcement rights (including pursuant [sic] section 178 Town & Country Planning Act 1990) against the BVI companies;
e.provisions in Celtic's accounts in respect of the liability to restore the sites would be significantly reduced;
f.Celtic monies would be paid to the benefit of some or all of the conspirators personally.

3. Count 1 is identical to the draft relied on by the prosecution before Hickinbottom J in the prosecution's proposed indictment, whereas count 2 has been advanced for the first time as part of the present application. It is of note that count 1 differed slightly from the charge on which the accused had been sent from the Magistrates' Court. However, the judge decided that there was no material difference between the sent charge and that set out in the proposed indictment, and he dealt with the application on the basis of the latter version. At the outset of his judgment [3] Hickinbottom J

indicated that he was prepared to determine the application on the basis of these variations to the prosecution's case.

The Prosecution's Case: the core factual contentions

4. Celtic Energy Limited is a coal mining company based in Wales, and it produces over 1 million tons of coal each year by open cast mining. Richard Walters is the Managing Director of Celtic, as well as the sole beneficial owner of its parent company: the Celtic Mining Group Limited. Leighton Humphreys is Celtic's Finance Director. For the purposes of this decision it is sufficient to refer to these companies by the generic name "*Celtic*".

5. On 31 December 1994 following the reprivatisation of the coal industry, a number of sites in South Wales were transferred to Celtic for about £100 million. These sites included the four set out above in the Particulars of the Offences. East Pit and Selar are within the local authority boundary of Neath Port Talbot County Borough Council ("*NPT*"). Margam spans the boundary between NPT and Bridgend County Borough Council. Nant Helen is within Powys County Council.

6. The detail of the arrangements by which the coal was to be extracted and the land was to be restored thereafter is critical to the prosecution's application. Put shortly, although Celtic became the freehold owner of the four sites, the mining took place under various leases and licences that were issued by the Coal Authority (the freehold owner of the coal) and under an assortment of permissions granted by the relevant local authorities acting as the Mineral Planning Authorities ("*MPAs*").

7. £157 million has been suggested as the estimated cost of restoring the sites and, to an extent, this liability has been secured by monies that were required to be paid into escrow accounts for each of the four locations. However, by 2010 the gap between the amounts in the escrow accounts (albeit these were fully paid up) and the total required to restore the sites was substantial. For example, for East Pit, with estimated restoration costs of approximately £115 million, only £2 – 2.5 million had been deposited in the escrow account; for Margam, with restoration costs of approximately £57 million, only £5.5 million had been deposited.

8. It is argued that as the potential inability to meet the liability for the restoration costs started to become a source of concern, Celtic unsuccessfully investigated various potential solutions such as landfill and deep mining. It failed to secure an extension of the open cast mining at any of the sites. Indeed, mining at Margam ceased on 31 August 2008 and Celtic lost a challenge (by way of an application under section 288 of the Town and Country Planning Act 1990) to a decision that prevented the continued extraction of coal at that location.

9. By early 2010 the financial position of Celtic had become markedly uncertain. In the year ending in March 2010 it made a loss of £7.3 million on a turnover of £67.6

million; it had insufficient funds to effect restoration; and it had failed to gain approval for other uses for the sites. It was against this background of a worsening financial position that the prosecution allege that Celtic and its legal advisers resorted to a criminal device in order to avoid the obligation to restore the land to countryside and agricultural use as and when the mining at each site came to an end.

10. Celtic retained M & A Solicitors. David Whiteley was the senior partner. Eric Evans was the partner mainly responsible for looking after Celtic's affairs and Frances Bodman, an assistant solicitor, worked for Evans. Whiteley, Evans and Bodman produced a proposed solution to the problem entitled "*The Big Picture*", which the prosecution alleges was essentially the work or the brainchild of Evans. On the assumption that the restoration obligations, certainly in the main, went with the freeholds, Evans suggested that Celtic should retain control of the sites and the surviving coal mining activities (including the leases and licences) whilst it transferred the freeholds to a third party, along with the obligations to restore. This would operate to the personal advantage of those involved, because it would enable Celtic to release and distribute significant sums of money.

11. The SFO's case is that the fundamental underpinnings of this scheme were commercially unrealistic. Without a vast reverse premium from Celtic, no sensible buyer would take on the liabilities for the sites, particularly given Celtic's inability to find a profitable future use for them. It is alleged that, as a result, an elaborate scheme was constructed in order to give the appearance that the company which had bought the freeholds was an independent company, and it had bought the freeholds on normal, "arm's length" commercial terms. In order to create this fiction, Whiteley, Evans and Bodman proposed that a British Virgin Islands ("*BVI*") company, owned and controlled by Celtic and its legal advisors, should buy the freeholds. The BVI company would have no worth, save for any relatively slender funds contributed by the conspirators.

12. The prosecution maintains that it was critical to the success of the scheme that the outside world, and most particularly the MPAs and the Coal Authority, should view this arrangement as a conventional commercial sale to an unconnected entity. It is said that the self-evident advantage of using a BVI company is that the relevant laws of this Overseas Territory afford a high degree of confidentiality, privacy and secrecy, thereby rendering more difficult any attempts to investigate the true circumstances of the purchasing company.

13. A BVI company called Oak Regeneration Inc ("*Oak*") was incorporated in order to put this plan into effect. It had various subsidiaries. The registered agent and sole director and shareholder of Oak was a BVI service company called Fidelity Management Services Limited ("*Fidelity*"). By a Declaration of Trust dated 6 September 2010, Fidelity held the shares of Oak as nominee for Evans and Whiteley on a joint basis. The prosecution's case is that Walters and Humphreys ran Oak. Indeed, it is suggested that Whiteley, Evans and Bodman dealt with Oak only in their capacity as the lawyers acting for Celtic. It is of note that the only known draft contract was compiled by Evans and there is no suggestion that any amendments were sought on the part of Oak. The prosecution contends that all the proposed defendants

were aware of the significant steps that were being taken to hide the true nature of the relationship between Celtic and Oak and to enrich some or all of them.

14. Although there is £37 million in the escrow accounts, which is under the effective control of the MPAs, the prosecution allege that these arrangements were fraudulent: they were not at arm's length; they were not agreed in the normal course of business; and they were not on sustainable commercial terms. Oak became the owner of land that was only worth £10 million once restoration is effected; the cost of the restorative works will be approximately £100 million; and the reverse premium was, in the context of the sums involved, a paltry £1.2 million. Oak agreed to indemnify Celtic in respect of the costs of restoration, whether incurred before or after the date of the agreement. Oak received no consideration for the coal that Celtic intended to extract until the sites closed. As Mr Parroy Q.C. puts the matter in his skeleton argument:

> *42. In causing Oak to sign the agreement for sale on the terms set out above i.e. at a gross undervalue from Oak's perspective, [Evans and Whiteley] could not have been acting in the financial interests of Oak and were in breach of those fiduciary duties.*
>
> *43. A breach of a fiduciary duty owed to the company must prima facie amount to an abuse of that position. Causing a company to take on vast and unquantifiable restoration obligations for no value in order to secure a financial gain personally or for another must prima facie amount to an abuse of that position.*

15. A discrete part of the false history that was created relates to the suggestion that Celtic Environmental Development Limited ("*CED*") (owned by Walters and Humphreys) had been instrumental in introducing Celtic to Oak, when no introduction was necessary given Oak had been set up in order to purchase the freeholds. Bodman drafted a letter from Oak to Celtic dated 18 June 2010 which was designed to provide an explanation for the initial contact between the two companies, in which Oak expressed an interest in buying the sites. The draft was sent to Humphreys.

16. The SFO suggests that one of the difficulties faced by the conspirators was that they needed to perpetuate the fiction that Oak intended to restore the land it had bought because otherwise the entire arrangement would be exposed as a transaction which was not at arm's length. As a result, once the sale had taken place, Bodman wrote a document entitled a "*Strategy Paper Oak Regeneration*". This included the following:

> *If Oak sits back and does nothing this will simply bring forward the day when people (particularly the local authorities) begin to scrutinise the transaction. In the event that* [NPT] *try to communicate with Oak and receive no response they are more likely to seek external advice which simply increases the chances of a legal challenge sooner rather than later* […]

> *In order to establish the two companies as separate entities and avoid unnecessary confusion the directors of [Celtic] need to step back from any dealings with the land and not give the impression to the* [MPAs] *or anyone else that they are at liberty to make decisions in relation to the land (particularly Margam).*
>
> *If Celtic continues to deal with Margam as if the transaction had not happened this heightens the risk of the transaction being challenged as a sham. The opinion from* [Davies] *is on the basis of an arms-length transaction and this must be maintained.*

17. It is argued by the prosecution that Celtic's auditors needed reassurance as to whether the sale of the freeholds transferred the restoration obligations to the purchasers before they would agree to certify the accounts on a basis that recognised the reduction in the future restoration obligations. Without this step, monies could not be released for distribution.

18. In order to address this potential difficulty, the proposed defendant Stephen Davies Q.C. was asked to advise on the scheme. He provided two written Advices (a document entitled a "Note" on 24 June 2010 and an "Opinion" on 30 August 2010). Whether or not Davies's conclusions, or the route thereto, are correct in law, it has never been part of the prosecution's case that the first Advice was dishonestly motivated. In that first Advice Davies expressed a view that is said to have been wholly unhelpful to the plan in that he concluded "[w]*hilst the freehold titles in the Sites could be transferred pursuant to the Proposal, Celtic would remain liable under the Leases to fulfil all of its covenants, quite apart from the remediation requirements under the Town and Country Planning Act 1990* […]". Therefore, in this Note he advised that the underlying objective was unachievable.

19. However, Davies was asked to reconsider the issue and in his second opinion of 30 August 2010, in which he did not refer to his earlier advice, he concluded that following the transfer of the freeholds to Oak, Celtic would not be left with any substantive restoration obligations. It is alleged on the present application that the opinion was fraudulent, *inter alia*, because Davies failed to reveal the sale was not at arm's length. It is suggested that he knew that the objective was the fraud agreement alleged in counts 1 and 2, and that his reward was a fee of £250,000.

20. Shortly after Davies's advice had been provided, the freeholds of the sites were transferred for £1 each, with a reverse premium of £1.2 million. In due course Celtic's auditors agreed that a substantial reduction in the provision in the accounts was appropriate; indeed, Celtic's 2011 accounts showed a provision of £63.8 million, a reduction of £72.2 million.

21. The prosecution relies on the extent of the enrichment of the proposed defendants in the wake of the transfer of the restoration obligations. As set out above, Oak was the creation of Whiteley, Evans and Bodman and yet Celtic paid CED a £14.6 million "*consultancy fee*" purportedly for effecting a phantom introduction. CED awarded Walters and Humphreys a bonus of £6.9 million and £1.7 million respectively. Using the reverse premium, Oak transferred £650,000 to another BVI company called Sapling Regeneration Limited which was owned by Evans. Sapling made two loans of £160,000 to Evans and Bodman. Oak paid £450,000 to a further BVI company, Elder Regeneration Limited, owned by Whiteley who received £250,000.

22. In summary, therefore, it is alleged that the conspirators agreed dishonestly to use Oak, a BVI company, to unburden Celtic of the freeholds of the four mines and, more particularly, the £157 million obligation to restore the sites. Overall, they benefited personally by way of over £15 million from the release of the financial provision that had been set aside for the purpose of restoration and Celtic's financial position improved by £123 million.

23. It is highlighted that another member of M & A Solicitors recalled Evans in July 2010 giving a graphic explanation of the real underlying intentions of the alleged conspirators:

> *Eric said it took on average two years to obtain disclosure of the ownership of a BVI company and that as he had set up nine companies with their ownership hidden, then in theory, it would take eighteen years to establish the true owners and by which time he felt he would not be around to face the music. I recall him telling me that after some 18 months or so had elapsed he would simply put the BVI Company into liquidation and the liability for filling the holes would then fall back on the Local Authorities. I told him that the Local Authorities "were all clients of the firm" and he simply replied "fuck them".*

The Prosecution's Case: the legal analysis

24. The prosecution's case has been put in three distinctly different ways.

The first case

25. In the first iteration of the prosecution's case, Mr Ian Winter Q.C., leading counsel originally instructed for the SFO, argued that the transfer to Oak was unlawful and liable to be set aside. Additionally, contrary to the conclusions in Davies's second Advice, Mr Winter contended that the sale of the freehold of the sites to Oak only transferred the liability to restore the surface, and that the obligation to restore the mines and the void caused by mining remained with Celtic. It was alleged, therefore, that Davies's second opinion in which he advised that the substantive restoration

obligations had been transferred to Oak, was wrong in law and bogus. The advice was dishonestly provided because the auditors would not otherwise have agreed to a reduction of the provision in Celtic's accounts in respect of the future restoration obligations as representing a fair view of the company's overall financial position for accounting purposes. It was the prosecution's case that this dishonest opinion was effective, because after the sale of the freeholds, the auditors were presented with the opinion and, having been deceived by it, agreed that the provision could be significantly reduced. This enabled the conspirators to release and distribute significant sums.

26. As Hickinbottom J observed, "*deceit* [lay] *at the heart*" of this way of putting the case: "[…] *the provision in the Celtic accounts was released, not because of actual transfer of obligations away from Celtic, but because of Mr Davies' bogus legal opinion that they had been. It was all illusion, driven by that opinion*" [102]. In the Case Statement Mr Winter described Davies's second Advice as the document on which the success of the scheme depended: if the transfer of the obligations was, in the main, illusory, then Davies's Opinion was crucial to the criminality.

27. It is of some significant historical note that this description of the case by Mr Winter failed to match the particulars of the offence in the important sense that the particulars alleged that the conspirators intended that the financial liability to restore the sites **would pass** to the Oak. This was a substantial discrepancy, but it was clear that the case relied on by the prosecution was as described by Mr Winter.

The second case

28. In due course, Mr Winter's instructions passed to Mr Parroy, in circumstances which – given my conclusions on other issues – it is unnecessary for me to investigate. Following a hearing before Saunders J on 23 September 2013, Mr Parroy undertook to reconsider the Case Statement that he had inherited, and in his "*Review of the Crown's Case*" dated 9 October 2013 ("*the Review*") he indicated that, minor factual errors aside, it provided a proper and accurate reflection of the prosecution's case. Mr Parroy underlined that the second opinion of Davies remained at the heart of the prosecution's case, namely that its terms "[…] *were tailored to meet the requirements of the conspiracy*" (Review [6.5]). It was expressly suggested that Davies's opinion – that all of the restoration obligations had transferred to Oak – was plainly incorrect and unsustainable.

29. However, this approach was to change.

30. Following receipt of the prosecution's skeleton argument dated 9 December 2013 in advance of the dismissal hearing, it emerged that the SFO was altering the way it put the case. It involved the argument that significant restoration obligations (including, at least, the surface down to the first seam of coal) had passed to Oak. It was suggested that in consequence the rights of the MPAs and the Coal Authority to recover the costs of restoring the sites were prejudiced "*commercially and practically*" by the conspirators' dishonest transfer of these obligations, should they choose to exercise their statutory power to carry out the restoration works and thereafter seek to recover the costs. The prosecution's new case was that prior to the transfer, if the authorities needed to do the restoration works themselves, they had recourse against Celtic (an on-shore company with substantial assets) in order to recover the costs of restoring the sites. Following the transfer, they only had recourse against Oak, an off-shore

company with negligible assets. Therefore, Mr Parroy now relied on an entirely different form of prejudice:

> *The prejudice to the MPAs [...] by the transfer to Oak is not, as suggested […] the way in which the restoration reserves are treated in the Celtic accounts but rather the difference between attempting to enforce against an on-shore company with substantial liquid funds and other assets and against an off-shore company with neither.*

31. Hickinbottom J was of the view, and I agree, that this represented a very substantial change to the prosecution case, which was now directed at the consequences of the successful transference of the restoration obligations to Oak rather than at those that were retained. This meant that one of the main areas addressed by the defence – the question of ownership of various parts of the site following the transfer of the freeholds – had become essentially irrelevant. The accused had consistently maintained that at least some of the principal obligations had been transferred whilst the prosecution had originally contended that, in substance, this had not happened.

The third case

32. Therefore, as described in detail above, the SFO's case before Hickinbottom J was founded to a very significant extent on the suggestion that the authorities had suffered some substantial financial prejudice, namely they would be unlikely to recover their costs against Oak if they exercised their statutory power to do the restoration works themselves. The judge observed that a conspiracy to defraud does not necessarily involve an unlawful **object** (it can involve an agreement to obtain a lawful object by unlawful means) and the prosecution accepted that the relevant restoration liabilities were lawfully transferred to Oak. Moreover, the only **means** set out in the particulars of charge – the establishment of Oak in the beneficial ownership of the conspirators and the transfer of the freehold title in the sites to Oak – were not seemingly unlawful. As a result, after the legal submissions had closed, the judge raised the question with counsel (by way of email) as to whether, if he was unpersuaded that unlawful means had been used in this case, it was the SFO's case that a conspiracy to defraud can comprise an agreement to achieve a lawful result by lawful means. It is instructive to set out the relevant parts of the email sent by the judge's clerk:

> *In its Case Statement and Review, the prosecution case was based on the obligations to restore that were **not** transferred to the BVI company, and the allegedly bogus opinion of Mr Davies designed to give the illusion that they were transferred which prompted the reduction in the provision in Celtic and the consequent "distribution" to the conspirators […] However, in its response to those applications – and, particular, at the December hearing – the Crown indicated that it did not intend to pursue the case on that basis. Mr Parroy QC made it clear that it is now intended to pursue a case based only on the obligations to restore that **were** transferred to the BVI company, and the prejudice to the MPAs and the Coal Authority caused thereby in terms of their ability to enforce those obligations. The Defendants submit that neither the end nor the means they employed, in setting up the BVI company and transferring the freeholds to it, were criminal or otherwise unlawful. The Judge wishes to have your further assistance on one issue relevant particularly to this intended case, namely whether, as a matter of law, a common law conspiracy to defraud*

encompasses circumstances in which the ends are neither criminal nor otherwise unlawful; and, if so, the scope and limits of that legal proposition […]

33. I emphasise that in due course the judge noted in his judgment that the prosecution conceded that the means set out in the particulars of charge – the establishment of Oak in the beneficial ownership of the conspirators and the transfer of the freehold title in the sites to Oak – were both lawful [166]. Put bluntly, the conspirators had the right to establish Oak, and Celtic had the right to sell the freeholds to Oak.

34. In his skeleton argument of 6 February 2014 and in his submissions before the judge at the reconvened hearing on 10 February 2014 (following the judge's question) Mr Parroy submitted that *R v Hollinshead* [1985] AC 975 established that it is possible to commit the offence of conspiracy to defraud by lawful means, when there is a lawful object. The judge was unpersuaded by this contention – he concluded that such an offence is not recognised by the common law [160] and [166] – and this argument has not been resurrected as part of the prosecution's case during this application.

35. Critically, at the reconvened hearing – notwithstanding the concession that the means set out in the particulars of charge – *viz.* the establishment of Oak in the beneficial ownership of the conspirators, and the transfer of the freehold title in the sites to Oak – were both perfectly lawful, Mr Parroy submitted that those steps necessarily involved the conspirators committing offences under sections 1, 2, 3 and 4 of the Fraud Act 2006, and obtaining secret profits at the expense of Celtic, the details of which were set out in Mr Parroy's skeleton argument (paragraph 26 and following). The victims of the conduct, which it was alleged amounted to statutory offences and involved obtaining secret profits, were Oak and Celtic. It was not alleged that the victim was either an MPA or the Coal Authority. Accordingly, what was now suggested was a conspiracy to defraud various public authorities, in which the "illegality" relied on was conduct amounting to statutory offences under the Fraud Act perpetrated against two private companies, both owned and controlled by the conspirators. This is now reflected in the Legal Submissions in Support of an Application to Prefer a Voluntary Bill of Indictment: *"16. It is the applicant's case that the evidence reveals a conspiracy to prejudice the rights and obligations of the MPAs and/or Coal Authority by unlawful means, including a) The commission of a criminal offence (principally an offence contrary to section 4 of the Fraud Act 2006 but including other criminal offences)* […]". The judge observed that he had not expected this (late) development in the prosecution's case [164].

36. Hickinbottom J, in his response to this development, indicated that he approached the case on the basis that it was essential that the accused were each aware of the case that they had to meet:

126. […] the case statement and similar documents are important in a prosecution for conspiracy to defraud, to enable the defendants to know precisely the case they face and to have a proper opportunity to meet it; and also to prevent the

prosecution case drifting around in this nebulous offence, for example to counter defences that are made.

127. However, important as the case statement is, in these applications we are concerned primarily with the charge and its particulars. Mr Parroy has made no application to amend those, nor has he suggested that the Crown might in the future wish to do so. He submits that those particulars are still good, and the "new case" is entirely consistent with them. Indeed, he might have said – but for obvious reasons he refrained from doing so – that the new case was more consistent with the particulars of charge than the old.

128. In those circumstances, although the Case Statement would of course need amending if the case were to proceed, I propose dealing with the applications on the basis of the case that the Crown now wishes to pursue. […]

37. As to the content of the charge, the judge observed:

167. […] *Of one thing I am sure; if a case of conspiracy to defraud an individual is, in terms of means, based entirely upon conduct that amounts to statutory offences by those defendants against others – or, for that matter, the taking of secret profits at the expense of others – then that needs to be made plain in the particulars of charge to enable the defendants properly to prepare their case, and to enable the jury to consider whether that specific criminal conduct has been made out. They are not in the particulars of charge here, and there is no application to amend to include them.* […]

38. The judge concluded:

168. That is sufficient to determine these applications, by dismissing the charge as it is brought. […]

39. As part of this application for a voluntary bill, in addition to the Fraud Act offences there has been added a secondary basis (considered below) involving unlawfulness based upon section 418 Companies Act 2006 and section 423 Insolvency Act 1986. Under the secondary basis, the SFO additionally advanced a variant based on the idea that the conspirators' deceit interfered with – not with their enforcement powers per se (as alleged in count 1) – but with the MPA's alleged public law duty to investigate whether or how to enforce their enforcement powers, and caused them prejudice in

this regard. However, the reasons for my decision set out below make it unnecessary to elaborate on this secondary basis.

The Application for a Voluntary Bill

40. Against that background, the prosecution advances two bases for this application, as follows:

> *10. This court should approach the [application for a voluntary bill] by firstly assessing whether on the case presented by the SFO before the original Judge, he erred in law (the principal basis).*
>
> […]
>
> *15. Only if such an error of law is not made out need the court go on to consider whether on the basis of those additional matters now put forward by the SFO, it would be in the interests of justice to allow the (application for a voluntary bill) (the secondary basis).*

The principal basis

41. The SFO's principal basis contains the following main elements (skeleton [11]):

> *i) there was an indictable conspiracy effected by means of the sale at an undervalue […] which involved the commission of a criminal offence and*
>
> *ii) this caused prejudice to the enforcement rights of the MPAs pursuant to section 172 and 178 of the TCPA by deliberately emasculating those rights*
>
> *iii) this basis was presented to the court in advance of the ruling on dismissal*
>
> *iv) in rejecting this basis, the Judge erred in law.*

42. In the *Legal Submissions in Support of an Application to Prefer a Voluntary Bill of Indictment* [4] and [14] it is set out starkly that the basis for the application is that the ruling of Hickinbottom J contains or is founded upon errors of law, namely i) the categorisation, definition and limits of conspiracy to defraud, and particularly the judge erred in law by unduly restricting the ambit of conspiracy to defraud in non-economic loss cases to those involving operative deceit on the victim; ii) the detail which any charge must contain, namely the charge must contain the same level of

detail as a trial indictment; and iii) the existence of a suggested power to amend any charge post its sending under section 51 of the Crime and Disorder Act 1998.

43. It is suggested that the judge accepted at paragraph 128 of his judgment that he would deal with the dismissal applications on the basis that is now pursued by the prosecution, namely that the means employed by the conspirators were unlawful, principally on the basis of a section 4 Fraud Act 2006 offence in respect of Oak. This is a fundamental contention that I must resolve on this application.

44. That section is in the following terms:

> *4. Fraud by abuse of position*
>
> *(1) A person is in breach of this section if he—*
>
> *(a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,*
>
> *(b) dishonestly abuses that position, and*
>
> *(c) intends, by means of the abuse of that position—*
>
> *(i) to make a gain for himself or another, or*
>
> *(ii)to cause loss to another or to expose another to a risk of loss.*
>
> *(2) A person may be regarded as having abused his position even though his conduct consisted of an omission rather than an act.*

45. It is contended that Oak is a separate legal entity and that Whiteley and Evans owed fiduciary duties to the company. By causing Oak to sign the agreement for sale at a gross undervalue (as far as Oak was concerned), they were not acting in the best financial interests of Oak and thereby breached their fiduciary duty. Therefore, Evans and Whiteley acted dishonestly towards a company over which they had control. In a general sense, it is argued that sole shareholders can act dishonestly and illegally towards their own company, and that informed consent on the part of the company is dependent on the transaction in question having been bona fide and honest. It is suggested that dishonesty in this context is a matter for the jury. Applying that approach to the present case, given a director and sole shareholder caused a shell company to take on massive liabilities which brought no substantive value to the company but instead personally benefitted the director, it is argued that a jury could safely regard that action as dishonest. The director benefited from the separate legal

personality of the limited liability company because it protected him from personal responsibility for company liabilities. The company lost and the director gained.

46. It also suggested that "*the other offences within the case presented to the Judge included Fraud by Abuse of Position and Fraud by Failing Disclose Information/False Representation by those controlling* [Celtic] *(section 2 – 3 Fraud Act 2006)*" (skeleton [52]). The basis of this part of the allegation is that Walters and Humphreys were directors of Celtic and as such had statutory duties under the Companies Act 2006, including to avoid conflicts of interest and to declare any interests that were relevant. It is suggested that as directors they additionally owed common law fiduciary duties to the company, and in particular that as directors they were expected to safeguard, or not act against, the financial interests of Celtic. The solicitors and counsel involved in the case occupied similar positions at common law.

47. The SFO argues that in pursuing an agreement which resulted in the extraction of sums of money from Celtic, all the proposed defendants abused their positions in order to secure an advantage (a gain) for themselves or for another person. It is emphasised that although the sale of the freehold placed Celtic in a significantly better position financially (approximately £123 million), there was no necessity or legal obligation to pay out £15 million from the company subsequent to the transfer of the restoration obligations. Furthermore, the relevant company minutes are said to have been significantly misleading, in that they failed to reveal that this was a related-party transaction and not a normal commercial deal. Indeed, they concealed the fact that Celtic was wholly controlling the sale to Oak and that it was the antithesis of an arm's length transaction.

48. The prosecution submits that the case presented to Hickinbottom J "*revealed a dishonest agreement to prejudice the rights and obligation of the MPAs by unlawful means (a criminal offence) and that this in law amounts to a conspiracy to defraud even if a) there was no agreement to deceive the MPAs and b) the unlawful means did not operate upon the MPAs*" (skeleton [59]).

49. Against that background, the principal criticism of the judge is described as follows:

> *The applicant submits that the Judge erred in law by effectively ruling that the agreement in the case could only amount to a conspiracy to defraud if it was committed in one of two ways, namely by*
>
> *i) Agreeing dishonestly to prejudice another's proprietary right or interests ["First Limb"]*
>
> *or*

> *ii) Agreeing to deceive a person with intent to cause him as a result of that deceit to act contrary to his duty ["Second Limb"]* [skeleton 60]

50. It is argued that the jurisprudence reveals that in order to prove a conspiracy to defraud, the prosecution merely has to establish a dishonest agreement by which it is intended to cause prejudice to the rights or obligations of another by unlawful means. Indeed, the conspiracy can be to commit a lawful act by unlawful means. Therefore, it is suggested this offence is not limited to the two alternatives described above. The judge, it is said, erroneously excluded the possibility of an offence that is simply based on a dishonest agreement to prejudice the rights and obligations of the MPAs by means of a criminal offence, without the additional element of the need to prove that the conspirators agreed to deceive the MPAs with intent to cause them to act contrary to their duty as a result of the deceit.

51. There are two additional criticisms of the judge that need to be summarised.

52. First, it is suggested that the judge erred when he accepted the "*conceptual possibility*" of the prosecution's contentions, but then dismissed the charge on the basis that it had not been made plain in the particulars of charge:

> *167. I pause to mark that, whilst I do not say that it is conceptually impossible, a charge of conspiracy to defraud various public authorities and only them, reliant for its illegality only on conduct amounting to statutory offences against two private companies, both apparently owned and controlled by the conspirators, would be a strange creature. The Defendants do not accept that they were guilty of any statutory offences against anyone. They have not of course been charged with any. Of one thing I am sure; if a case of conspiracy to defraud an individual is, in terms of means, based entirely upon conduct that amounts to statutory offences by those defendants against others – or, for that matter, the taking of secret profits at the expense of others – then that needs to be made plain in the particulars of charge to enable the defendants properly to prepare their case, and to enable the jury to consider whether that specific criminal conduct has been made out. They are not in the particulars of charge here, and there is no application to amend to include them.*

53. It is suggested that the judge allowed the prosecution to advance the case under section 4 Fraud Act and then dismissed it because there had been no application to amend the charge. It is argued that a charge does not require the same level of detail as the particulars in an indictment. Furthermore, it is pointed out that the prosecution could not have applied to amend the charge at any stage after the case was sent under section 51 Crime and Disorder Act 1998, and including during the dismissal hearing.

54. Second, it is contended that the prejudice advanced before the judge was the ability of the MPAs to make effective use of their powers under section 172 and 178 of the Town and Country Planning Act against an impecunious BVI company. It is argued that the judge erred in describing this as not amounting to prejudice to public law Town and Country Planning Act rights but instead as constituting an allegation of economic loss:

> *137. […] As Mr Parroy put it, the right of the authorities which was to be prejudiced by the conspirators' dishonest agreement was their right to recover the costs of restoring the sites, if they exercise their statutory power to do the restoration works themselves and seek to recover the costs thereof. If they do take that course, recovery against Oak (an off-shore company with limited assets) will be "commercially and practically" more difficult and, he submits with force, probably impossible. In other words, the concern is about the contingent financial liability owed to the authorities in respect of the costs of restoration if the authorities perform those works themselves. The fact that the victims happen to be public bodies is merely coincident.*

55. Mr Parroy submits in his skeleton argument that those errors of law (the principal basis) justify the grant of a voluntary bill of indictment on the principal basis:

> *137. If there were the errors of law [set out] above on the case as presented to the Judge, the use of this exceptional procedure would be warranted.*
>
> and
>
> *141. This court will determine whether in all the circumstances the preferment of a (Voluntary Bill) is in the interests of justice. If there have been the errors of law as contended for above by the SFO, it would be prima facie in the interests of justice to put that right.*

The secondary basis

56. By the secondary basis, the SFO submits that the court should grant a voluntary bill on two main additional grounds that are now advanced. It is accepted they were not canvassed before the judge. These are, first, *unlawfulness based upon section 418 Companies Act 2006.* It is argued that the directors of Celtic were under a statutory duty to reveal in the accounts (that were available to the public) that the sale to Oak was a related party transaction. If this piece of information had been included, the MPAs would have had notice of the true nature of the transaction. Whenever the statement by directors in their report is false as regards the relevant audit information, any director who knew it was false, or was reckless as to whether it was false, and

failed to take reasonable steps to prevent the report from being approved, commits a criminal offence. The Report of the Directors of Celtic and the Financial Statement for the year ending 31 March 2011 contained a declaration that there had not been a breach of section 418 Companies Act 2006 and that there were no transactions requiring disclosure in the current or the future year. It is the prosecution's case that an offence contrary to section 418 was committed following the conspirators' agreement to hide the true nature of the related party transaction.

57. Second, it is argued that there was *unlawfulness based upon section 423 Insolvency Act 1986.* The SFO suggests that the transaction between Oak and Celtic is susceptible to challenge on the basis that it was a transaction that defrauded creditors (it was a transaction at significant undervalue with the purpose of the putting assets beyond the reach of, or prejudicing the interest of, a person with an actual or a potential claim). The SFO contends that the MPAs are to be viewed as potential "*victims*" of these transactions, provided it can be established that they were capable of being prejudiced by them. A substantial purpose of the transaction was to prejudice Oak, who the prosecution argue is the "*debtor*" within the meaning of section 423(5), because it would never have the financial means to perform the restoration works. As a result, the interests of the MPAs were prejudiced because they might wish to bring an action requiring the freeholder to make good the sites. Therefore, the MPAs, using section 423, could challenge the transfer of the freeholds and the restoration obligations, and the court would be able to reverse the transaction in its entirety, thereby requiring Celtic to pay Oak any sums that the court directs.

58. Mr Parroy accepts that if it becomes necessary for the court to consider the additional bases (*e.g.* the section 418 Companies Act 2006 and the section 423 Insolvency Act 1986 issues), it will be right, when assessing the interests of justice limb of the test, to reflect the fact that the these arguments played no part in the prosecution's case before Hickinbottom J. It is accepted that in this context the court will wish to have regard to the wider history. However, it is suggested that if these new arguments on the part of the prosecution had been advanced at the dismissal hearing they would undoubtedly have failed before Hickinbottom J, given the erroneous effect of his ruling was that a charge must contain the same level of detail as a trial indictment.

59. Finally, it is argued that if the prosecution's case, as presently formulated, is sustainable it would be in the interests of justice to allow the case to proceed and in this regard it is suggested that there is no authority which supports the proposition that a failure at a previous stage in the proceedings to advance a correct proposition of law is a bar to granting a voluntary bill of indictment.

Discussion

60. On this application I have been authorised by the Lord Chief Justice to sit as a judge of the Queen's Bench Division.

61. To the extent relevant, I have reflected the submissions of the respondents in this part of the judgment. Although I have had the benefit of arguments from many members of the bar, given the basis on which I have determined this application I fear that I have not addressed the greater part of their submissions in this decision. However, I pay tribute to the skill and economy with which – without exception – they were delivered and the assistance they provided to the court.

62. The central decision that falls to be made is whether the prosecution is entitled to proceed against these proposed accused by inviting a High Court judge to grant a voluntary bill of indictment. In reaching my decision, I have focussed principally on whether the prosecution's suggested justification for using this procedure satisfies the criteria for granting a voluntary bill.

The prosecution's justification

63. I have already extensively described the SFO's submissions in support of this route to a prosecution. In summary, it is argued that I should first assess whether Hickinbottom J erred in law as regards the case presented by the SFO (the principal basis). It is only if I am against the prosecution on this principal basis that I am invited to consider the additional matters now put forward by the SFO and whether it would be in the interests of justice to grant a voluntary bill of indictment, notwithstanding the fact that they were not raised with Hickinbottom J (the secondary basis). I return to these two suggested bases below.

The circumstances in which a court can issue a voluntary bill of indictment

64. Section 2(2)(b) of the Administration of Justice (Miscellaneous Provisions) Act 1933 ("AJA") 1933 provides that:

> *Subject as hereinafter provided no bill of indictment charging any person with an indictable offence shall be preferred unless either—*
>
> *(a) [...]*
>
> *(b) the bill is preferred by the direction of the Criminal Division of the Court of Appeal or by the direction or with the consent of a judge of the High Court*

65. It is important to have in mind that Parliament has not provided an appeal against the dismissal of a charge under sections 58-61 of the Criminal Justice Act 2003 (see *R v Thompson and Hanson* [2006] EWCA Crim 2849; [2007] 1 WLR 1123, paragraphs 32-38 and 58). Indeed, no further proceedings may be brought on a dismissed charge save by preferment of a voluntary bill of indictment. The Crime and Disorder Act 1998 at schedule 3 paragraph 2(6)(a) provides:

> **Applications for dismissal**
>
> *2 […]*

(6) If the charge, or any of the charges, against the applicant is dismissed –

(a) no further proceedings may be brought on the dismissed charge or charges except by means of the preferment of a voluntary bill of indictment […]

66. Furthermore, the decision to dismiss the charge is not susceptible to judicial review (see section 29(1) of the Senior Courts Act 1981 and *R (Snelgrove) v Woolwich Crown Court* [2004] EWHC 2172 (Admin); [2005] 1 Cr App R 18, paragraphs 42-47) because it is a matter relating to trial on indictment.

67. The main purpose of the AJA was to abolish grand juries, which had hitherto been the main means by which indictments were issued. The role of the law officers in this regard was also removed (see *R v Raymond* [1981] QB 910, 914F-915C and *R v Clarke* [2008] UKHL 8, paragraphs 3-4). The AJA perpetuated the power of a High Court judge under the Vexatious Indictments Act 1859 to grant leave to prefer a voluntary bill of indictment (see *R v Raymond* supra page 915 E). As set out above, this procedure is now only available to the Court of Appeal Criminal Division and a judge of the Queen's Bench Division.

68. Although the AJA did not define the circumstances in which it is appropriate for a High Court judge to prefer a voluntary bill of indictment, it is clearly established that it is a power to be used only "exceptionally".

69. Indeed, paragraph 14B.4 of the *Criminal Practice Directions* [2014] EWCA 1569 sets out that:

The preferment of a voluntary bill is an exceptional procedure. Consent should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it.

70. In *R v Raymond* Watkins LJ referred to the exceptional decision by a judge to grant leave to prefer a voluntary bill in the context of considering whether the "*vital decision*" was one that should be taken by the justices (page 917E).

71. In *Brooks v DPP* [1994] 1 AC 568, the Privy Council addressed similar procedural arrangements that existed in Jamaica (including the opportunity for High Court judges to grant a voluntary bill of indictment), and Lord Woolf giving the judgment of the board observed:

"*[…] In coming to his decision the D.P.P. or the judge should treat the decision of the resident magistrate with the greatest respect and regard their jurisdiction*

as one to be exercised with great circumspection. There have to be exceptional circumstances to warrant prosecuting a defendant after it has been found in committal proceedings that there is no case to answer: see the judgment of Ackner LJ in Reg v. Horsham Justices, Ex parte Reeves (Note) (1980) 75 Cr App R 236." (page 581 H)

72. The authorities provide clear guidance as to three particular situations when this exceptional procedure is available following a successful application to dismiss a case that has been sent to the Crown Court. I would wish to stress that this is not an exhaustive list because there no doubt are other exceptional situations that will justify granting a voluntary bill.

The first situation: new evidence

73. First, when significant new evidence, previously unavailable to the prosecution, becomes available which along with other evidence provides a sustainable basis for a conviction. In *R v Gurpinar* [2002] EWHC 628 at page 4, Stanley Burnton J decided that there had been no misconduct or abuse of the process on the part of the prosecution in that case such as to mean a voluntary bill of indictment should not be granted. Against that background he indicated:

> *Where evidence has become available to the prosecution that was not available when a charge was dismissed under paragraph 2 of Schedule 3 to the 1998 Act and the totality of the evidence is sufficient for a jury properly to convict, leave to prefer a voluntary bill may be given. In such a case, if the application to prefer is heard on notice, the proposed defendant is not denied the opportunity to seek dismissal of the new charge on the ground of the insufficiency of the prosecution evidence. He has the opportunity on application for leave to prefer the bill.*

74. In *R v Goldstone* [2008] EWHC 976 (QB) at paragraph 59(5), after an extremely helpful analysis of the relevant authorities, Irwin J observed:

> *59. Following all that my conclusions on the law are as follows:*
>
> *(1) The power of a High Court Judge to prefer a Bill of Indictment is a common law power preserved by statute, not granted by statute.*
>
> *(2) Although judicial review is not available in respect of dismissal by a Judge of charges following transfer or sending, the approach consistently recommended in authority where such a remedy is available, or was thought to be available, was*

itself highly restrictive. That approach applied both to where a Voluntary Bill of Indictment was sought as an alternative to committal and perhaps even more so where a Voluntary Bill was sought following a refusal to commit or a dismissal by a magistrate after consideration of the evidence.

(3) By section 58 of the Criminal Justice Act 2003, Parliament introduced limited interlocutory appeals at the behest of the Prosecution. Parliament did not grant any right of interlocutory appeal where there had been a dismissal of charges following transfer. The decision by Parliament must be taken to be intentional.

(4) At the same time in the 1998 Act, Parliament preserved the Voluntary Bill explicitly where charges had been dismissed. The fact of preservation, with no express limit or qualification in the statute, cannot of itself widen the circumstances when the power should be exercised. The limits on that exercise, and the absence of an interlocutory appeal on this point, are consistent with the historical position whereby the Prosecution could not on occasion obtain redress for the wrongful failure of a Prosecution.

(5) All the authorities suggest that, following dismissal, a Voluntary Bill of Indictment should be preferred only in an exceptional case, without defining what is an exceptional case. Obvious mistake of law, a serious procedural error, ***or significant fresh evidence where the evidence taken as a whole represents a satisfactory body of evidence for trial may, if they arise****, be exceptional cases. An alleged failure to take a reasonable view of the evidence by magistrates or by a Judge, although such can be characterised as "unlawful" because irrational, has not usually been held to be an exceptional case.*

(6) One reason why that outcome is to be maintained is the rarity, devoutly to be wished, of the situation where a truly unreasonable view has in fact been taken by a Judge dismissing charges. Another reason why that outcome is to be maintained is that given by Bell J in the Snaresbrook case: the difficulty arising when one single Judge is sitting on appeal on another, both being potentially judges of the same judicial rank, although sitting in different courts. Another reason is the practical point touched on by Pitchers J in Davenport. The consequence of accepting that an application for a Voluntary Bill of Indictment may be used for a general review of major cases, on the basis that an irrational decision had been reached below, is a prospect of extensive, time-consuming and costly

> *hearings, to be followed by a trial if successful.* (emphasis added)

The second situation: a basic and substantive error of law

75. The second situation is when the judge made a basic and substantive error of law. In *R v McGuinness* [2007] EWHC 1772 (QB) Griffith Williams J expressly indicated that this might provide a sufficient justification for granting a voluntary bill of indictment. Having noted the example given by Pitchers J in *R v Davenport* [2005] EWHC 2828 (QB) of a judge having not been informed of a crucial authority or statutory provision, he observed at paragraph 6 "[…] *I would add, where the judge has clearly made a mistake of law* […] *In such circumstances, it is clearly in the interests of justice that the error is put right"*.

76. As set out above, Irwin J in *R v Goldstone* indicated that an "*[o]bvious mistake of law*" can potentially constitute an exceptional case (paragraph 59(5)). He rejected the prosecution's submission that the test of exceptionality would be fulfilled if the dismissal had been "*Wednesbury unreasonable*" as regards the judge's assessment of the relevant facts, indicating instead that, *inter alia*, "*a basic error as to the law governing the charges"* is necessary:

> *62. The attack on the decision of the learned Judge below does not involve a suggestion of* ***a basic error of law****, does not involve the suggestion that there is significant fresh evidence now available, does not involve the suggestion of any perversity on his part, and does not contain any suggestion of procedural irregularity. The attack is on the reasoning of the Judge. It is that it was Wednesbury unreasonable and nothing more. Given the analysis of the law which I have reached, it follows that, even if correct, that [sic] nature of that attack takes it outside the ambit of a proper application for a Voluntary Bill of Indictment.* (emphasis added)

77. Nicol J in R. v Arfan [2012] EWHC 2450 set out at paragraph 23 that:

> *Where the 'normal procedure' has involved a successful application to dismiss a case sent to the Crown Court, the authorities underline the caution which should be exercised before a High Court Judge grants leave to prefer a voluntary bill – see R v Christine Davenport & Ors [2005] EWHC 2828 (QB) Pitchers J. at [21] [23] and R v McGuiness [2007] FWHC 1772 QB Griffith Williams J at [6]. Without attempting to give an exhaustive list, there may be circumstances which would justify the granting of leave if the Judge who had dismissed the charge had taken the decision without regard to a relevant statutory provision or judicial authority, or had otherwise erred in law, or if the Crown had new evidence which made a significant difference to its case, or if the decision to dismiss lacked a rational foundation.*

78. Nicol J went on to add, reflecting the Criminal Practice Direction "[…] *However, the defence are correct to say that the application will only succeed if the Crown can show that the circumstances are exceptional*" [25]. I add that the error of law will usually need to relate to a substantive, rather than a peripheral, issue.

The third situation: a serious procedural irregularity

79. The third situation is when there has been a serious procedural irregularity. As set out above, the possibility was clearly identified in *R v Goldstone* at paragraph 59(5) and 62.

The circumstances in which a court should decline to issue a voluntary bill of indictment

80. The jurisprudence also provides assistance as to when this procedure should not be used.

81. It is inappropriate to grant a voluntary bill of indictment when the prosecution is simply unhappy with the decision of the judge to dismiss the charges. In *Davenport* Pitchers J declined to consider in detail whether the SFO had made good the defects in its case by obtaining further evidence, and he observed:

> *21. No application for a Voluntary Bill is, in form, an appeal from a decision of another court. However, at least when a High Court Judge is considering an application following a refusal of justices to commit for trial the decision of the lower court is being considered by a judge of a higher court. There may then be scope for taking a broader view of the circumstances in which it is right in effect to overturn the decision of the lower court. That is not this case and I express no further view on the point.*

> *22. That cannot be said where an application for a Voluntary Bill is made after dismissal of transferred charges. It happens that the decision in this case was taken by a Circuit Judge but it could quite well have been by another High Court Judge. In those circumstances it must in my judgment be wrong in principle for the prosecution to be able to get round a decision that they do not like by inviting another judge to take a different view of the same material that was before the judge who dismissed the charges. In R v The Crown Court at Snaresbrook, ex parte the Director of the Serious Fraud Office […], the Divisional Court pointed out that Bell J had refused to grant a Voluntary Bill on the basis that the application was in effect an appeal from one single judge to another single judge whose judgment appeared to be clearly and carefully reasoned. He said it was not obviously wrong or unreasonable."*

82. Similarly in *R v Muse* [2007] EWHC 2924; [2007] All ER (D) 216 Openshaw J ruled that it had to be wrong in principle for the prosecution to be able to get round a decision that it did not like by inviting another judge to take a different view of the same material that had been before the judge who had dismissed the charges. However, the judge suggested there was no inflexible rule that a voluntary bill of indictment could never issue to correct a mistaken decision of the Crown Prosecution Service ("*CPS"*) or to reflect a change of mind by the prosecuting authority, albeit the power to do so should be used sparingly, in truly exceptional cases. In that particular case the prosecution changed its position on whether to rely on the evidence of certain members of a gang to which the victim belonged and Openshaw J observed that the public interest plainly required that if, on a proper analysis, there was sufficient evidence to justify putting the defendants on trial, then the case should proceed, particularly when grave injuries have been inflicted as a result of gang violence. The original decision by the CPS not to use the evidence of certain witnesses had been wrong and it was in the interests of justice for a trial to take place.

83. Perhaps with greater relevance as regards the present case, it is inappropriate to use the voluntary bill procedure when the prosecution has initially failed to put its case on a coherent basis. In *R v Horsham Justices, ex parte Reeves* (1982) 75 Cr.App.R. 236, the Divisional Court was faced with a proposed prosecution in which after committal proceedings lasting three days, the justices found that the defendant had no case to answer. The prosecution then sought to prefer fresh charges against the defendant based on the original charges, albeit by way of simplified and shortened facts. The Divisional Court granted an order of prohibition directed against a fresh bench of justices from continuing the second committal proceedings on the ground that to do so would be vexatious and oppressive, such as to amount to an abuse of the process. Ackner LJ, in delivering the lead judgment, posed the question at page 240:

> *Should the prosecution be entitled, as they seek, to treat the first committal proceedings, for all practical purposes as a dummy run, and, having concluded that they over-complicated them, bring virtually the same proceedings but in a form in which they could have been brought if proper thought had been given by the prosecution to them, in the first place?*

84. The court's response was that if an application had been made for a voluntary bill of indictment, it would in all probability have been met with a "*dusty answer*" because the prosecution materials contained a high proportion of irrelevant material or material that was of no probative value. Ackner LJ went on to observe:

> *To allow prohibition in this case should bring home to the prosecution the desirability of following the advice which the Appellate Courts have given again and again. The prosecution must direct its energies to the simplification of cases they desire to present. All too often juries, and to a lesser extent magistrates, are treated like computers into whom superfluous and ill-digested material is fed in the over-optimistic hope that somehow or another they will produce the right result.*

Conclusions as to when a voluntary bill of indictment can be preferred

85. The conclusions to be drawn from the statutory provisions, the Criminal Practice Directions and the jurisprudence can be shortly described. Granting a voluntary bill of indictment is an exceptional course, and it will only be issued following a successful application to dismiss if i) the court has made a basic and substantive error of law that is clear or obvious; or ii) new evidence has become available that the prosecution could not put before the court at the time of the dismissal hearing which (along with any existing evidence) provides the prosecution with a sustainable factual basis for the charge; or iii) there was a serious procedural irregularity. As I have already indicated, this is not an exhaustive list because there will be other exceptional situations when it may be appropriate to grant a voluntary bill, for instance if the charges against the accused were dismissed on the basis of a technicality, particularly if it was one that the prosecution reasonably failed to anticipate.

86. Although in *Muse* Openshaw J was prepared to grant a voluntary bill in a further situation, namely following a change of mind by the CPS or in order to correct a prosecutorial mistake, as he observed the power to grant a voluntary bill in such circumstances will be sparingly used. In my view whether or not a voluntary bill is granted under this heading will depend on the nature and the extent of the prosecution's changed position, the reasons that have led to the new approach and the implications for the proceedings as a whole. Therefore, the court will need to consider carefully the prosecution's suggested justification against the background of the relevant procedural history. Furthermore, it is to be emphasised although the accused will always be prejudiced by the prosecution's application to revive dismissed criminal proceedings, his position will necessarily require careful consideration.

87. I do not consider that a voluntary bill of indictment should be granted following a change of mind or to rectify a mistake by the CPS if the prosecution, deliberately or otherwise, has repeatedly reformulated its case in the course of more than one set of proceedings in an attempt to identify a sustainable basis in law for the charges. Although the observations by Ackner LJ in *ex parte Reeves* were made in the course of a case with markedly different facts, the prosecution should not be permitted to use the voluntary bill procedure as a means of enabling it to hold a "*dummy run*", and instead it should direct its energies at the outset to ensuring that it has identified the proper legal underpinnings of the charges. Adapting the words of Ackner LJ, the judges must not be treated like "*computers*" into which "*ill-digested material is fed in the over-optimistic hope that somehow or another they will produce the right result".*

88. In the context of the present case, I am of the view that the test of exceptionality, still less the criterion of the interests of justice, are unlikely to be satisfied if the prosecution seeks – without sustainable justification – to reformulate the legal basis of the charges by way of an application to prefer a voluntary bill of indictment when the case should have been presented on the new legal foundations at the time the case was sent for trial and during the dismissal application. That outcome becomes more certain if the prosecution has repeatedly made fundamental changes to its case in circumstances that have operated to the real prejudice of the accused.

Did Hickinbottom J err in law?

89. I am unpersuaded by the prosecution's submission that Hickinbottom J made any relevant errors of law when he identified his principal reasons for dismissing the charges. As I have described above, the judge concluded – and the prosecution now accept – that a conspiracy to defraud must incorporate some unlawfulness, either in its object or in its means. It cannot comprise an agreement to achieve a lawful object by lawful means. It was only in February 2014, after the hearing of the dismissal application had concluded, that Mr Parroy, in response to the judge's question, for the first time suggested that the conspiracy involved unlawful means, in the sense that the accused had committed Fraud Act offences and obtained secret profits at the expense of Celtic (the victims being Oak and Celtic as opposed to the MPAs or the Coal Authority). Mr Parroy erroneously contends that the judge proceeded on the basis of this new legal basis for the prosecution's case. In his skeleton argument in support of the present application it is suggested:

> *37. The case presented to the Judge alleged that the means employed were unlawful, principally on the basis of a section 4 Fraud Act [FA] 2006 offence in respect of Oak.*
>
> […]
>
> *52. The other offences within the case presented to the Judge included Fraud by Abuse of Position and Fraud by Failing to Disclose Information/False Representation by those controlling CE (section 2-3 FA 2006).*
>
> […]
>
> *59. The applicants submit that the case presented to the original Judge revealed a dishonest agreement to prejudice the rights and obligations of the MPAs by unlawful means (a criminal offence) and that this in law amounts to a conspiracy to defraud even if there was no agreement to deceive the MPAs and the unlawful means did not operate upon the MPAs.*

90. This was not the case presented to the judge, save at the last moment in the skeleton argument of 6 February 2014 and in Mr Parroy's oral submissions on 10 February 2014, and the judge declined to rule on it. Indeed, the judge set out in terms:

> *166. However, I do not have to rule on that* (viz. the third basis). *I have to rule on the legal integrity of the particulars of charge as relied upon by the Crown. There has been no application to change the particulars. Mr Parroy accepts – rightly – that the objects of the conspiracy were lawful. He accepts – again, rightly – that the only means relied upon in the particulars were also lawful. I have concluded that a*

> *conspiracy to defraud in which both the object and the means are lawful is unknown to the common law.*

91. The judge did not, as suggested by Mr Parroy, allow the prosecution to advance the case under section 4 Fraud Act only then to dismiss it on the basis that there had been no application to amend the charge as sent from the Magistrates' Court (which it is accepted is impossible). This suggestion is to misunderstand the true basis of the judge's decision, namely that the legal particulars need to be made plain:

> *167.* […] *Of one thing I am sure; if a case of conspiracy to defraud an individual is, in terms of means, based entirely upon conduct that amounts to statutory offences by those defendants against others – or, for that matter, the taking of secret profits at the expense of others – then that needs to be made plain in the particulars of charge to enable the defendants properly to prepare their case, and to enable the jury to consider whether that specific criminal conduct has been made out. They are not in the particulars of charge here, and there is no application to amend to include them.* […]

92. The judge had been prepared to allow the prosecution to vary its case by way of amendment to the draft trial indictment, and there is no sustainable reason to suppose that he was considering an alternative possibility at this stage, namely an amendment to the charge as sent by the Magistrates' Court. The judge's approach was clear. At the outset of the judgment, having set out the particulars of the offence as contained in the draft indictment, which the judge expressly observed differed from the particulars upon which the defendants were originally charged, he went on to state:

> *3.* […] *These differ, slightly, from the particulars upon which the Defendants were originally charged and sent to this court: for example, dates of the conspiracy have been added, as have the words "… and dishonestly…" and the final phrase, "… and allowing some of that money to benefit the Defendants personally". The particulars of the charge are required to set out clearly and unambiguously the case the Defendants have to meet (see R v K [2004] EWCA Crim 2685; and R v Goldshield Group plc [2008] UKHL 17; [2009] 1 WLR 458 at [18]); and in an application to dismiss the charge such as this, they are of especial importance. However, there is no material difference between the original particulars upon which the Defendants were charged, and those upon which the Crown now wishes to proceed. If this prosecution were to go ahead, I would allow it to proceed on the basis of particulars drafted by Mr Michael Parroy QC for the Crown; and those are therefore the relevant particulars for the purposes of these applications.*

93. The essence of the judge's decision was that the accused were entitled to know the case that they were expected to meet. At the reconvened hearing on 10 February 2014, after the dismissal submissions had closed, the prosecution revealed a fundamentally changed case. The judge decided that the proposed defendants had not had any proper opportunity to meet this case, which, as he observed, was not based on a further

proposed change to the particulars of the charge. That was the substantive reason for refusing to consider the SFO's third basis, and it is a decision with which I entirely agree. I fear the SFO in this case failed at the outset to identify the proper legal underpinnings of the charges, and instead it varied its case in law against the accused as the arguments unfolded and in response to the restrained but penetrating enquiries on the part of Hickinbottom J.

The interests of justice

94. The prosecution now seeks to persuade this court to permit it to bring the case on the proposed principal and secondary bases. Given my conclusion that the prosecution has failed to establish a relevant error of law on the part of Hickinbottom J, the sole outstanding question is whether it is in the interests of justice to allow the prosecution to proceed on this new formulation of its case. The changes to the prosecution's approach to the legal elements of the charge or charges has evolved over a substantial period of time, and that process included the request on 23 September 2013 by Saunders J to Mr Parroy to review Mr Winter's Case Statement. As set out above, Mr Parroy responded that, minor factual errors aside, it provided a proper and accurate reflection of the prosecution's case. Mr Davies's second Advice remained at the heart of the prosecution's case and it was expressly suggested that his opinion – that all of the restoration obligations had transferred to Oak – was plainly incorrect and unsustainable. The subsequent variations have been set out in full above and do not require repetition.

95. This has not involved a simple and understandable change of heart by the prosecution. Instead, it reveals, as Hickinbottom J mildly expressed the position, that the SFO has not approached this case with "*particular analytical precision*" [130]. I am unpersuaded that it would be in the interests of justice to permit the prosecution to use this exceptional procedure to reformulate the legal basis of the charge or charges when the case should have been presented on the current proposed legal foundations at the time the case was sent for trial. I am reinforced in that conclusion by the repeated shifts in the prosecution's stance in this regard, which have operated to the real prejudice of the accused. One of the consequences of seeking a voluntary bill of indictment is that nearly a year after the submissions on the dismissal application concluded, the court is being asked to decide whether the prosecution can conduct a trial against the accused on a wholly new legal basis. I return to the approach of Ackner LJ in *ex parte Reeves*. The effect of granting a bill of indictment on this occasion would be to allow the prosecution to treat the original proceedings *"for all practical purposes as a dummy run",* and, having realised they had – on more than one occasion – chosen the wrong legal basis, to permit the SFO "*to bring virtually the same proceedings but in a form in which they could have been brought if proper thought had been given by the prosecution to them in the first place".* This would constitute a misuse of this exceptional procedure: the trial process should not be used, deliberately or otherwise, to explore in repeat proceedings – from a range of profoundly different options – the most sustainable legal basis for prosecuting alleged criminals.

Conclusion

96. It follows I refuse the application for a voluntary bill of indictment. However, I stress this decision should not be taken as any kind of comment on my part as regards the suggested criminality of the proposed defendants. Whether or not any of them committed a criminal offence is a question that falls wholly outside the remit of this application.

Costs

97. I remit any consequential issues as to costs to Hickinbottom J who is seized of various applications in this regard arising out of the original dismissal proceedings. Similar principles are likely to apply to this application and it is convenient for the entirety of this issue to be dealt with by a single judge.

Press Reporting

98. I lift the order I made under section 4(2) Contempt of Court Act 1981.